



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr J Ahwere-Bafo**

**v**

**Royal Holloway Bedford New  
College**

**Heard at:** Reading

**On: 24-31 October, 1  
November 2022**

**Before:** Employment Judge Gumbiti-Zimuto  
Members: Mrs C Baggs and Mrs A Gibson

## **Appearances**

**For the Claimant:** Mr R Robinson, Consultant

**For the Respondent:** Mr T Kempster, Counsel

## **REASONS**

*[Reasons for judgment dated 1 November 2022 provided at the request of the claimant.]*

1. We have concluded that the claims are not well founded and should be dismissed and our reasons for that are as follows.
2. The claimant commenced employment with the respondent in September 2007 as a teaching fellow in finance. At the point of his dismissal, he was employed as a lecturer teaching focused and accounting.
3. In 2013/2014 academic year, the claimant applied for promotion. The claimant was unsuccessful, and he received feedback from Professor Jeffrey Unerman who at the time was Head of Department of the School of Management, he told the claimant that the claimant's colleagues felt he deserved promotion; however, it was felt that the claimant did not have enough on the leadership criteria for promotion. The claimant was given some more detailed feedback by another panel and Professor Brendan McSweeney, he said that:

“The school committee met discussing your cv decided that your cv does not yet present a strong enough case for us to put you forward to the college for promotion to senior lecturer, teaching focus level. Specifically, the committee noted that your performance is good but there is no considerable increase in the level of activities or achievements since the transfer to lecturer teaching focused.”

4. That year the claimant had been nominated for a faculty teaching prize. That to us seems to indicate that the claimant's performance was good and that there were no concerns about his performance at that time.

5. The claimant completed an employee engagement survey in October 2014. The claimant understood the purpose of this survey was to ascertain the general mood of staff who worked for the respondent. The survey was circulated electronically to every employee at the respondent. It was carried out by a contractor, Capita. The claimant's evidence did not explain exactly what the responses he gave were. However, the claimant says that he would have been identifiable from his completion of the survey. The respondent says that the survey was anonymous and was carried out by a third party.
6. The claimant says that there was a two-step verification process and that made it possible for the respondent to identify individuals who had completed the survey. The claimant says that it was clear that he had been identified because at a school board meeting Professor Unerman told those who were present that there were four individuals who had given red flag responses in the survey. The claimant says that from what Professor Unerman said at a lunch given during an open day it was clear that he was one of them. When Professor Unerman spoke about the organisation of data he gestured in the direction of the claimant and the claimant says that this was to indicate that the claimant was one of the individuals who had made a red flag response. The evidence given by the claimant does not make it clear why we should draw this conclusion. The claimant does not say that Professor Unerman specifically identified him, nor has he explained what it was that he said in the survey responses.
7. The claimant says that from that point onwards the respondent began to find fault with his work.
8. The claimant says that he was wrongly blamed for an unauthorised cancellation of some workshop sessions. He refers to being blamed for cancelling workshop sessions without authorisation on course MN2405 when he says, "in reality this had been an administrative error". The claimant says he was accused of being a poor co-ordinator in relation to the academic work on campus.
9. The claimant applied for promotion in 2015/2016. He was again unsuccessful and received some feedback from Professor Unerman. In the feedback the claimant says that he was told that he was unsuccessful because he had made too many mistakes.
10. In October 2015, an online petition was started by students. The claimant says that it was directed at the claimant's teaching and that the School of Management leadership encouraged the students to sign the petition. The claimant says it was against him and it was in exchange for favourable grades. The claimant attaches significance to the use of the words "the management" in the petition.
11. In 2016 Professor Unerman ordered that there should be a remarking of some second year undergraduate essays. This was done because of alleged complaints by some students.

12. In the summer of 2016 Professor Unerman raised a complaint to Professor Katie Normington, Vice Principle (staffing) about the claimant. He prepared a report about the claimant which was entitled "Summary with the timelines of concerns with John Ahwere-Bafo's academic integrity or competence". The claimant takes issue with that document, particularly the reference to academic integrity.
13. The claimant complains that his university college union representative, Professor Jefferson Frank was given a version of the document which had been prepared by Professor Unerman. That document was given by Professor Normington and when she did that she told them not to share it with the claimant. We have been provided with an account by Professor Normington as to why she said that and her explanation given for it.
14. The claimant says that although Professor Normington dismissed all the allegations against him during the course of the investigation that she carried out, she added two new allegations: (1) repeating exam questions and (2) not using rubric for marking. The claimant says that Professor Normington knew that the respondent did not have any policies in relation to either of these two matters which justified making charges.
15. In about December 2016 Professor Normington produced her report which recommended that the allegations against the claimant should be considered under the capability policy rather than being proceeded with as a disciplinary matter. The claimant was invited to a Stage 2 capability proceedings.
16. In the summer of 2016 the claimant was signed off work with work related stress. The claimant subsequently was signed off sick with stress on other occasions before his employment came to an end in 2020.
17. While off sick the claimant's responsibility for one of the course was removed from him and on his return at the start of the academic year in 2016 he discovered that he was no longer director of the BSc Accounting, Finance and Economics (AFE) degree programme. The claimant was informed that that BSc AFE programme was coming to an end and the university was cutting the course once the students already on the course had completed the course. The claimant, however, notes that the course did continue for a number of years with Dr Matthew Li as the course director. The effect was to remove from the claimant management responsibilities.
18. The claimant applied for promotion in 2017. He was not successful and, on that occasion, he says it was "*largely due to the ongoing capability process and the failure to address the issues I raised in the employee engagement*".
19. The claimant filed a grievance on 30 January 2017. The grievance made complaints against Professor Unerman. The grievance was expressed to be under the Equality Act 2010.
20. On 17 February 2017 the claimant met with Professor Agyemang for a Stage 2 meeting on a capability procedure. An action plan was agreed with a number of interim review dates set.

21. The claimant's grievance was considered by Professor Sagat who, having carried out the investigation, did not uphold it. During this time the claimant's stress levels increased and he had to take time off work due to stress.
22. One of the things that the claimant complains about is that throughout this period he was working closely with a colleague, Dr Jeremy Morales, on course MN245. The claimant says that Dr Morales was the senior lecturer and therefore was senior to the claimant. The claimant seeks to compare the way that he was treated with Dr Morales in that at no point was Dr Morales disciplined or blamed for any of the lapses which were alleged against the claimant. The respondent explains this by saying that the claimant was the person who was responsible for matters that were the subject of concern and not Dr Morales.
23. The claimant failed to complete exam marking in MN2405 by the required date. Professor Agyemang informed the claimant that in light of this failure an investigation would have to be conducted by Professor Felix Driver. This was in about June 2017. The allegation was that the claimant had failed to mark coursework on MN2405 by the deadline of 23 May 2017. Marking was a feature of the claimant's capability process. Professor Driver met with Professor Agyemang, Marie Gallagher, who was an administrator, and the claimant to gather information that was required for the investigation.
24. Professor Driver concluded his report on 11 July 2017 and found that there was evidence that the marks for the course had not been returned as they should have been by the claimant and that there was a breach of the claimant's obligations. Professor Driver did not consider that this constituted a disciplinary offence. He concluded that there was evidence of problems in performance, recurrent stress-related illness and an ongoing capability process, and that the non-return of the marks was an infringement of one of the targets set under the capability process. Professor Driver recommended that the matter move to the next stage of the capability procedure, which would be stage 3.
25. On 19 June 2017 the claimant's grievance investigation by Professor Spagot was concluded. There were recommendations made that there was no grounds for a formal hearing stage to be commenced but that there should be informal consultation with the claimant to chart a constructive way forward.
26. In the summer of 2017 the claimant asked to undertake an MSc in Finance supported by the college through financial support and time taken away from work. Professor Agyemang was not in favour of this and explained to the claimant why, her reasoning revolved around the fact that doing an MA was a downward step, or a backward step, as the claimant already had a PhD.
27. The claimant says that throughout the entire process leading up to his resignation in 2020, there were endemic and systematic mistakes made by white colleagues who continued to ignore the use of rubrics in their assessment marking and made similar mistakes to those that the claimant made. Yet none of those colleagues were subjected to any of the humiliation and capability process that the claimant put under. The problem that we have

in this case is that there was no detail provided from which we could make an analysis or comparison with the treatment to the claimant.

28. Professor Unerman made a grievance against the claimant and his union representative, Professor Frank. That was subsequently the subject of investigation.
29. In September 2017 the claimant was informed that he was being called to a Stage 3 capability hearing. This was as a result of the report which had been prepared by Professor Driver. The capability hearing took place on 30 November 2017. The panel concluded that the development plan should continue and that there should be a further review under the Stage 2 procedure.
30. In January 2018 a further Stage 2 review meeting was arranged for April 2018 and during the meeting Professor Agyemang discussed the target which the claimant had not met and set out new timeframes for completion of revised targets.
31. In May 2018 the claimant raised issues about his workload. The claimant also around that time made allegations of bullying against colleagues. His complaint of bullying related to marking turnaround times. The claimant was due to return exam scripts for course MN2405 by 25 May 2018, he in fact returned them on the 30 May. As a result, Dr Julinda Nuri emailed the claimant about the marking of MN2405. The claimant considered that his interaction with Dr Nuri was bullying.
32. There was moderation of exam scripts marked by the claimant that found differences of plus or minus 5. As a result, the external examiner decided that it was appropriate to re-mark all the scripts which had been marked by the claimant.
33. On 6 June the claimant raised extensive concerns about being asked to re-mark scripts. As a result of the points that the claimant had raised, Professor Agyemang reported the matters that the claimant raised to HR who appointed Ms Elaine Turton to carry out an investigation under the Dignity at Work Policy.
34. On 3 July 2018 the claimant was invited to attend to give evidence to an external HR consultant. This was in relation to investigations into the allegations which had been made against Professor Frank. What the claimant the external consultant was that he was being victimised as a result of having completed the employee engagement survey and that the college were actively victimising him by finding undue fault with his work.
35. In August 2018 the claimant again raised issues about excessive workload. Dr Nuri was the person who was acting as convener at that time and she considered that the claimant did not have an excessive workload but that it was a heavy workload.

36. A Stage 2 capability review meeting took place between the claimant and Professor Agyemang in about September 2018. Professor Agyemang did not consider that the claimant had met the targets in relation to marking and exam setting which had been set. Professor Agyemang's view was that the claimant should in fact proceed to the next stage of the capability procedure however, it was agreed that the claimant's Dignity at Work investigation should be allowed to take place first as that may have an impact on matters.
37. By January 2019 there were again issues relating to the marking of exam scripts. Dr Nuri was involved with this and she suggested an approach to deal with the issues that had arisen which concerned an exam question that contained an error. The claimant did not agree with the approach that Dr Nuri suggested.
38. In January 2019 Dr Nuri spoke with Ms Turton as part of the Dignity At Work investigation. Professor Agyemang and others also spoke to Ms Turton as part of the Dignity At Work investigation. That investigation was completed in March 2019 and the conclusion was that there was no case to answer in respect of the claimant's allegations of bullying and harassment made against other colleagues.
39. On 1 August 2019 Dr Nuri became the claimant's line manager and took over responsibility for the claimant's capability process. There was a handover between Professor Agyemang and Dr Nuri during which details of the claimant's capability process were shared with Dr Nuri for the first time.
40. In October 2019 the claimant met with Dr Nuri to discuss his performance development review. Dr Nuri considered that the capability process involving the claimant had been going on for a long time and as it had been agreed that the claimant was going to be teaching in a new course the change in line management and the allocation of the new course was something which she considered offered the opportunity for a fresh start.
41. In about November 2019, the claimant discussed with Dr Nuri his wish to have a sabbatical. The claimant wanted a year but Dr Nuri informed the claimant that she could only support one term. The claimant was advised to revise his request for a sabbatical to one term, he did not do that, so Dr Nuri submitted his original request with her comments on the request. The committee was willing to support the claimant's sabbatical for one term only, but the claimant needed to produce a revised proposal by 16 December 2019 but did not do that. When the pandemic hit in March 2020 a moratorium was placed on all sabbaticals in any event.
42. In December 2019 there were a number of complaints from students about the claimant's marking.
43. In January 2020 there were issues about marking for three courses. The claimant was not able to meet the deadline for marking despite the deadline being extended. Dr Nuri became involved, she asked the claimant for a timeframe for marking and asked another colleague to undertake the claimant's marking for one of the courses to free up the claimant to complete

other marking. The claimant did not agree with her approach because he wanted to complete the marking himself. This was at a time when the claimant was also complaining that he had an undue amount of marking to do.

44. By the end of January 2020 Dr Li informed Dr Nuri that the claimant had still not completed his marking and that there were marking deadlines for two of the courses which had been missed and a marking deadline of 4 February was in danger of being missed. Dr Li was saying that he was waiting for papers to be marked by the claimant so that he could carry out his moderation of the papers.
45. On 4 February 2020 Dr Nuri wrote to the claimant asking whether he had completed the marking, and if he had not requesting that he pass the scripts on to Dr Li to undertake marking. The claimant's response was to ask for additional time to complete the marking. Dr Nuri confirmed that Dr Li had been instructed to mark the scripts but the claimant continued to refuse to hand over the scripts.
46. Things came to a head on 5 February 2020 when Dr Nuri went into the claimant's office. She knocked on the door, apologised for interrupting the discussion the claimant was having with the student. Dr Nuri spoke to the claimant in a firm manner. Dr Nuri denies that she barged into the claimant's office or that her manner humiliated the claimant. Dr Nuri asked the claimant to bring scripts to her office. The claimant says that Dr Nuri was angry with him about the marking and ordered him to immediately bring the scripts and to meet with her in her office in five minutes. This the claimant says was done in front of a student and was humiliating for him.
47. The claimant accepts that he had not returned the scripts but states that when he had done so previously, i.e. returned scripts without marking them, he was recommended for Stage 3 capability procedure by Professor Driver. He felt uncomfortable about returning the scripts marked.
48. Later on 5 February the claimant attended Dr Nuri's office with the scripts. The door was open. Dr Li was also present. The reason Dr Li was present was because he wanted to be able to discuss the situation with the claimant so that the claimant knew the stress that he, Dr Li, had faced with his own workload through the claimant's refusal to hand over the scripts. The claimant says that during this meeting his capability process was mentioned by Dr Nuri. Dr Nuri says that at no point was the claimant's capability process discussed or mentioned. Dr Nuri in her evidence says that she believes the claimant had in fact in any event informed Dr Li about the capability process, but it was not something that was discussed at this meeting. Subsequently Dr Li completed the marking by 7 February. Dr Nuri, after reflecting over the weekend, sent the claimant an email setting out her expectations from the claimant.
49. Dr Nuri also reflected on the situation with the claimant and her view was that the claimant was not performing at the appropriate level for a teaching focused lecturer. She consulted HR and after consulting HR asked the

claimant to attend a meeting to discuss the outstanding capability procedure. During the meeting that took place the claimant was told that the capability process would be brought to an end and that the claimant would be given a fresh start. The claimant was told what Dr Nuri's expectations of the claimant were at that meeting and following the meeting she sent the claimant a number of emails explaining what she expected. That meeting took place on 28 February.

50. Around this time the claimant says that he too took time to consider his position and he felt that it was not possible to resolve the impasse that he had arrived at with his employer and for the good of his mental well being and general health he decided to leave his employment, so he resigned with notice.
51. The claimant says that there was an endemic and systematic racial unconscious bias and conscious biases within the respondent. The claimant says that no black academic was ever promoted except for Dr Gloria Agyemang and he asserts that many black colleagues who left the respondent's employment were now professors, associate professors and readers elsewhere and he claims that the respondent breached the implied term of the employment contract which shows that there should be trust and mutual confidence between the parties and that the breach was the repudiatory breach of contract which occurred over a long period of time and he says that there was a cumulative breach of contract and he relies on the last straw principle.
52. Section 13 Equality Act 2010 provides that an employer must not discriminate against an employee by dismissing him or subjecting him to any other detriment. An employer discriminates against an employee if because of his race he treats the employee less favourably than he treats or would treat others. Race includes colour, nationality ethnic or national origins. Where the employee seeks to compare his treatment with that of another employee there must be no material difference between the circumstances relating to each case.
53. Section 26 EA provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether conduct has the effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B, the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect must be taken into account.
54. Section 27 EA provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. Each of the following is a protected act; bringing proceedings under this Act, giving evidence or information in connection with proceedings under this Act, doing any other thing for the purposes of or in connection with this Act, making an allegation (whether or not express) that A or another person has contravened this Act. Giving false



evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith. We were also referred to the case of Thompson v London Central Bus Company Ltd [2015] UKEAT/0108

55. If there are facts from which the employment tribunal could decide, in the absence of any other explanation that the employer contravened the provision concerned the employment tribunal must hold that the contravention occurred. However, this does not apply if the employer shows that it did not contravene the provision.
56. Guidance on proving discrimination is provided in the case of Igen Limited v Wong [2005] IRLR 258:

(1) It is for the claimant who complains of [race] discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by [the relevant provisions] is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of [race] discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in [section 136 EA]. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts .... This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of [race], then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of [race], since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [race] was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

57. Section 95 (1) of the Employment Rights Act 1996 (ERA) provides that "an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employers conduct."

58. In Waltham Forest v Omilaju the following propositions of law were set out by the Employment Appeal Tribunal

1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761.

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship (emphasis added).

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:

"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."..."

59. We have also been provided the cases of Williams v Governing Body of Alderman Davies Church in Wales [2018] UKEAT/0108 and Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.
60. Counsel for both parties produced written submissions which they spoke to. This was a case where the claimant produced a statement in support of his case. We have taken that statement into account. The claimant did not specifically adopt his ET1 as part of his evidence in chief, however we have taken it into account in reaching our decisions.
61. The claimant's case was drafted in an economical way and did not contain evidence about all aspects of the case. In particular, there was a failure on the part of the claimant to articulate how we should analyse the position of various comparators in this case. It was not set out in the statement and in the course of the evidence that was called from the respondent's witnesses, there was very little questioning of the respondent's witnesses about the position of the comparator. So it makes it difficult for us to be able to reach conclusions that there has been less favourable treatment of the claimant on the one hand and where there has been a different treatment of the claimant and others, an inability for us to be able to analyse what the explanation or reason for that difference is.
62. The claimant makes a number of complaints set out in summary form in the list of issues which we have been provided with. We begin by considering the matters that are set out in section 4 of the list of issues at points A to J. The first matter concerns the cancellation of a workshop. The list of issues says that either Professor Unerman or Professor Agyemang sent the claimant an email on 6 October 2015 which wrongly blamed the claimant for an unauthorised cancellation of some workshops. I think we can deal with this relatively shortly, although there was a considerable amount of evidence given about it.
63. The claimant was the person who had cancelled the workshop. The claimant accepted that he did it. He accepted that he did it in correspondence with Professor Unerman. There was clearly a reason why he did it. The reason was that he thought that there was an extra workshop because there were only 19 scheduled and there was a 20<sup>th</sup> workshop. This mismatch created a problem because students had signed up for the 20<sup>th</sup> workshop. And

eventually the situation was resolved with the additional workshop being put on but to the extent that the claimant complains that he was wrongly blamed for unauthorised cancellation of some workshop sessions, our conclusion is the claimant is wrong about that. One, he was not wrongly blamed, he was the one who was responsible for cancelling the workshop. Two, he was not blamed. Professor Unerman made it clear in his correspondence with the claimant that what he was seeking to do was find out what happened because there was a situation where students ostensibly signed up for a workshop were not going to be able to undertake it.

64. We see no basis for finding in relation to that incident any matter which is either a breach of contract or is the sort of conduct which could sensibly result in the claimant concluding that it is part of a course of conduct which forms or results in a breach of contract.
65. At B the claimant says that Professor Unerman took the decision that the claimant did not meet the criteria for promotion and in 2015/2016 promotional round in the Performance Appraisal Review should be used for identifying training and development gaps and that the claimant was not eligible for promotion due to various events that had taken place. The claimant contends that the University College Union had objected to the use of Performance Appraisal Review as the basis of promotion.
66. The claimant applied for promotion in 2013/2014. He also applied for promotion in 2015/2016 and he applied for promotion in 2017.
67. The recommendation in respect of his latter application for promotion was considered at a meeting on 21 January and there was recognition of engagement with good quality teaching. However, there is insufficient evidence of leadership at the appropriate level across four criteria to support the promotion to senior lecturer. The claimant was informed of that in an email from Professor Unerman telling him that he was unsuccessful on that occasion. The claimant was told the reasons why.
68. The claimant says in his witness statement as follows:

“In 2015/2016 I applied for promotion. The process of applying meant filling in a form which I submitted to the head of department. In the feedback I was told by Professor Geoffrey Unerman that I was unsuccessful because I had made too many ‘mistakes . I found this to be unfair because these mistakes were not actually my responsibility. At this time I was responsible for coordinating two courses at Singapore where the college has a campus. This meant that I was under a lot of pressure at that time. This was not taken into consideration by the respondent. I subsequently applied for promotion in 2017 and wasn’t successful largely due to ongoing capability process and failure to address the issues I raised in the employee engagement.”
69. The claimant says that the feedback from Professor Unerman was that he was unsuccessful because he had made too many mistakes. That is not actually what is set out in the email sent to the claimant by Professor Unerman. The claimant also received some feedback from Professor Nodes and that is not what he said either.

70. The claimant says that it was Professor Unerman who took the decision that the claimant did not meet the criteria for promotion. The decision was in fact taken by a committee. The claimant's evidence was that feedback was given by Professor Unerman is not supported by the contemporaneous evidence which suggests that other than an email from Professor Unerman the claimant was given feedback by Professor Nodes. The claimant does not complain about feedback that he got from Professor Nodes who confirmed that he met with the claimant to give him feedback on his application to the extent that the claimant complains about the use of performance appraisal review as part of the promotion process there was no evidence or explanation as to why this could amount to something that amounts to a breach of contract.
71. At C of section 4 the claimant says that Professor Unerman conducted an academic investigation into the marking of MN2405 course groups which did not conform to normal procedures. The claimant contended at the time that this investigation was an act of victimisation and was intended to lead to disciplinary action.
72. The Tribunal had not been informed by the claimant or by the respondent of what the normal procedures were if such a thing existed. However, Professor Unerman explains clearly how his investigation came about and that explanation can be found at page 220 of the trial bundle. We note that Professor Normington says in her witness statement that:

“I am aware that Dr Ahwere-Bafo asserts that Professor Unerman's investigation did not conform to normal procedures. I didn't have any concerns that Professor Unerman had conducted an inappropriate investigation. I would expect student concerns to be investigated when they are raised and Professor Unerman was appropriately placed to do so as head of school on reviewing documentation. I consider that the issues being raised were far reaching and I considered it appropriate to narrow this down to the core allegations.”

73. Professor Unerman had prepared a report which in part reads as follows:

“MN245 is an autumn term compulsory taken by approximately 390 students... students had to submit an essay electronically... This essay was marked using the Turnitin electronic platform . The deadline for completion of the marking, moderation of the marking, and the return of the marked essays to the students was 18 January 2016.

Following student complaints at the beginning of February that marked essays had not been handed back to them, the Head of School intervened with the course coordinators to remind them how important it was that the marking was done to a high quality and returned to students in time. The marked essays were then returned to the students on 8 February 2016.

Soon after this, students began to raise concerns that several essays with widely diverging marks had identical feedback comments. As feedback comments from markers should be related to the qualities of the essay on which they have been provided, the students could not understand how essays with the same feedback comments (indicating similar qualities in the essays) could have been given such widely divergent marks. The Head of School decided to undertake a brief review

of the marked essays to see if these concerns raised by students appeared to have any substance. He looked at the marked essays on MN2405 on Turnitin from the lowest marked (40%) upwards until he ran out of time. By that point he had looked at all 78 essays with marks from 40% up to 57% and had reviewed the marker feedback comments on these essays. Out of these 78 essays, 38 (with marks ranging from 40% to 57%) had identical feedback comments of: *The essay could have benefited from a good structure and analytical discussion of the usefulness of the traditional budget through its evolution to more progressive systems like the flexible budget, ABB, ZBB and Kaizen budgeting and evaluation of the extended use of modern budgets in the capital market.*

On then investigating who had marked these essays, he found they had all been marked by the same marker.”

74. That marker was the claimant. The passage explains how Professor Unerman came to carry out his investigation into MN2405.
75. It seems to the Tribunal that this was a matter that properly needed investigating and in the absence of a specific procedure that should have been followed we can see no error on the part of Professor Unerman, there does not appear to be any breach of any procedure in doing so. The fact that there is no “normal procedure” in our view does not suggest that there was anything improper carried out by Professor Unerman taking the steps that he did at this time.
76. The claimant contended that the investigation was an act of victimisation and intended to lead to disciplinary action. We have not understood the reference to victimisation here as being a reference to victimisation as defined in section 27 EA but rather as a statement in its colloquial form that the claimant was being treated unfairly or being picked on. Considering whether or not this was victimisation in that colloquial form we reject that. The claimant was not being targeted. The way that the marking came about was clearly explained by Professor Unerman.
77. The next issue of complaint is that Professor Normington asked Professor Frank not to allow the claimant to see a report dated 19 May 2016 which was the summary with timelines document which had been prepared by Professor Unerman. How this comes about is explained in the witness statement of Professor Normington at paragraph 19. We note that Professor Frank deals with it in paragraph 6 of his witness statement. What he says is that:

“Professor Kate Normington, the Vice Principal, sent me a document entitled Summary of Concerns on condition I not show it to Dr Ahwere-Bafo.. This report was from Professor Unerman. I note that I consistently found Professor Normington to be reasonable ion my discussions with her.”

78. Considering the explanation which is provided by Professor Normington for what she agreed was a statement that she made, first of all we accept her evidence that she was not banning Professor Frank from giving the document to the claimant once she had given it to him she appeared to recognise that she could not sensibly prevent him from showing it to the claimant. But what

she was saying was that the document contained more information on it than was going to inform any investigation that she was going to undertake. She was aware that the claimant had been under stress and did not think him being shown the document was a good idea. Do we accept what she said? We do. The alleged behaviour of Professor Normington would have been unreasonable if she was trying to stop the claimant from knowing the allegations against him. We note that Professor Frank stated that in the discussions that he had with Professor Normington she was reasonable.

79. We also had the opportunity of seeing and hearing Professor Normington for ourselves and we found her to be a clear, concise, convincing in her evidence. We think that she was able to display integrity in the way that she dealt with issues relating to the claimant and we illustrate that by the fact that initially on consideration of the report prepared by Professor Unerman. She thought his methodology was flawed and said so clearly and in writing. However, subsequently, it was clear that she was wrong about that because she had misunderstood the approach that he had taken. On realising that she was wrong she readily accepts the error. We consider that demonstrates a degree of integrity in a way that she dealt with matters arising from this case and we feel able to accept the evidence that she gave.
80. The claimant complains that the respondent proceeded to a Stage 2 capability process against him based upon two charges identified by Professor Normington which were outside the universities policies and procedures. The claimant asserts that there were other colleagues who did not use the rubric were not subjected to capability hearing, the claimant relies on Dr Evangelos Giouvriss who convened two courses on Strategic Finance in 2020.
81. Professor Normington's report conclusion says as follows:

“In conclusion I consider that convening of a module so as to set marking schemes which do not refer to current schemes have large sequences of numbers missing and differ when being taught on and off campus together with the setting of a repeated exam question which privileged students who have seen the model answer on VLE constitute a risk to the quality of teaching standards of the college and thus our reputation moreover in interview Dr Ahwere-Bafo showed very little understanding of marking schemes or how to reflect these when marking a piece of work. It is for these reasons that I have concluded that there is sufficient evidence to warrant a formal hearing being called under the capability policy and procedures as outlined at 3.13.”

82. That 3.13 is a reference to the respondent's capability procedure which provides that:

“The manager must have attempted to manage under performance informally before entering a formal capability procedure unless the situation is serious enough to pose significant risk to individuals or the college to warrant moving directly to the formal stage.”

83. We consider that it is clear what the concerns were of Professor Normington. In the criticism that he makes of her we consider the claimant was to some extent misconceived because the claimant was not being criticised for not using the rubric, that was not what led to the claimant being subjected to the capability procedure on the recommendation of Professor Normington.
84. We conclude that there was nothing wrong with the conclusions that Professor Normington came to. They may not have been correct in the sense that somebody else might have come to a different conclusion but it was not unreasonable for her to reach the conclusions that she did and in recommending the use of the capability procedure it was not disproportionate. In all circumstances we think that she was acting well within what one would expect her to do having reached the conclusions that she apparently did in respect of her investigation.
85. In section G of the list of issues the claimant says either Professor Unerman, Professor Agyemang or Marie Gallagher encouraged the students to sign an online petition against the claimant in exchange for favourable grades. The claimant asserts that this accusation was not investigated by the respondent.
86. There was a petition lodged on 26 October. The petition includes the words "I have spoken with management and suggested creating a petition so that if we do run into problems regarding our final grade we have something we can refer back to as to why we may not have done so well." The petition was clearly in reference to the claimant as it refers to John and a course which we understand that the claimant was teaching.
87. It also appears from looking at the documents that Professor Unerman spoke to the students responsible for the petition. There is no evidence that the petition came about because of the contact between Professor Unerman and the students. The evidence appears to show that the petition was in October 2015 and Professor Unerman's contact with the students was in February 2016. It appears that the petition came before the contact with the students rather than the other way around. If there was contact between the students and management, as the petition says there is, there is no evidence about who this was. The use of the word "management" is an odd word to use by a student in reference to a Professor. If it was either Professor Unerman or Professor Agyemang who encouraged them to start a petition. In this case the reference to "management" may be shorthand reference to School of Business and Management which, if that is the sense in which it was being used it could conceivably include Professor Unerman, Agyemang, or a member of the administrative staff but it does not help in identifying persons responsible for giving the advice.
88. Finally, it seems to us that the purpose of the petition was not to criticise any persons specifically. It was not specifically to criticise the claimant. What the petition says is;

"that from discussing lectures among fellow students I have come to realise that managerial accounting is next to impossible to follow for a number of reasons including John who as lovely as he seems is next to impossible to understand along



with the heavily loaded lecture slide that inevitably just get copy and pasted into our own notes in a hope that we can understand them at a later date. I have spoken with management who suggested creating a petition so that if we do run into problems regarding our final grade we have something we can refer back to as to why we may not have done so well. By signing you are covering your back so that your not solely liable should you fail.”

89. The reason/purpose of this petition is clear and blatant it seems to us that it is a petition written by students for a purpose which is explicitly stated. There is not any evidence that Professor Unerman or Professor Agyemang spoke with the students beforehand. The reference to the word “Management” may or may not mean that Marie Gallagher may have spoken to the student, it simply is not clear. In any event, the purpose of which the petition was made is clear and blatant; it was not so much directed at the claimant it was in order to cover “your back” so that the student would not be “solely liable” should they “fail”.
90. The next matter which the claimant complains about concerns events which occurred on 5 February 2020. The list of issues makes reference to 26 February 2020; however, we have come to the conclusion that date is wrong. The incident must have been on 5 February 2020, firstly because that is the date that is provided by Dr Nuri but, secondly, because the engagement all concerned the provision of marking of exam scripts which had to be marked and the evidence showed that completion of the marking of those exam scripts was on 7 February so the date could not have been 26 February when the exam scripts were handed over by the claimant.
91. What the claimant says is that Professor Nuri entered his office on 26 February 2020 demanding a meeting in the presence of a student. The tribunal are satisfied that something along those lines clearly happened. We are also of the view that it was reasonable for Dr Nuri to ask the claimant to meet with her. We are also satisfied that it may well have been the case that Dr Nuri was annoyed because what had led up to this was the way that the claimant had responded with inaction in respect of her various requests for the production of the exam scripts. The claimant says that he was humiliated by Dr Nuri in front of his colleague Dr Li and that Dr Nuri ignored his confidentiality in relation to the capability proceedings by addressing this topic with Dr Li present. There is a difference in the accounts given by Dr Nuri and the claimant about this encounter. If Dr Nuri had proceeded to discuss the claimant’s capability proceedings in the presence of Dr Li, we consider that would be an unacceptable way of behaving. However, Dr Nuri denies that that was what took place. There is a conflict in the evidence between the claimant and Dr Nuri. We also note that it is said by Dr Nuri that she believed that the claimant had in any event discussed the capability proceedings with Dr Li but it was not with her present or during the course of this meeting that it took place.
92. Bearing in mind that the claimant has not been able to recollect the correct date of the incident, we are, on balance, of the view that Dr Nuri is unlikely to have used the 5 February meeting in her office as an opportunity to discuss capability issues with the claimant. That conclusion in our view is

strengthened by the fact that what happened next was that she wrote to the claimant explaining what her expectations were and subsequently, on 28 February, she held a meeting with the claimant, and this is referenced in J of the list of issues.

93. At that meeting Dr Nuri told the claimant that he was being given a fresh start and the capability proceedings were going to be brought to an end. Her reason for doing that is clearly explained in her witness statement at paragraphs 41 to 46. The claimant was told what her expectations were of him and what would happen if he failed to meet those expectations: she made it clear that matters would be considered under the disciplinary proceedings potentially. The claimant was unhappy with this, he considered that to be bullying behaviour and he resigned.
94. In respect of the events of 5 February and 28 February, we are unable to conclude that there was any unreasonable action on the part of Dr Nuri and that her decisions are rational, proportionate and she has given a clear explanation for the action that she took which was not discriminatory on the grounds of race or harassing related to the race or her acting in a way which amounted to victimisation.
95. We have gone on to consider whether or not the claimant was discriminated on the grounds of race and alternatively harassed or alternatively victimised and have concluded that none of those things happened. We have no basis for concluding that the claimant was constructively dismissed. In respect of the incident on 5 February where the conduct of Dr Nuri is criticised by the claimant, we considered the incident in context. The context is that Dr Nuri is likely to have been frustrated. The claimant was clearly under stress and anxious about the capability proceedings. Dr Li was in the background, the innocent victim of problems relating to the claimant marking of scripts. Having heard all the evidence, from Dr Nuri and also from the claimant, in our view there was no breach of contract in relation to what happened on that occasion. The claimant was not constructively dismissed when he resigned his employment with the respondent. The claimant's claim for unfair dismissal is not well founded and is dismissed.
96. The claimant has made a complaint of direct race discrimination. The claimant's direct discrimination claim is articulated in the list of issues at section 8. It falls into two parts.
97. What the claimant says is that by the time he resigned from the employment of the respondent he should have been promoted and he says that the respondent used excuses based on allegations against him by the unauthorised cancellation of workshop sessions to deny him the opportunity of advancement of his career. The claimant claims that he was not promoted during his 13 years of tenure with the respondent and that was direct discrimination.
98. In his witness statement the claimant says that he was not appointed in 2013. In his witness statement he sets out the feedback he received and says that this was probably his best shot at promotion. The claimant applied in 2015

and was informed that he had made too many mistakes. He does not explain in his evidence what the mistakes were supposed to be. In 2017 the claimant says that he was unsuccessful largely due to the ongoing capability process. In cross examination he said that “the capability process meant that I had no administrative role therefore I could never be promoted.”

99. The claimant has relied on a number of comparators but he accepted in his evidence that they were not on a capability process that he was when they applied for promotion. In any event, we heard little about the comparators other than that they were successful.
100. The claimant, in his own evidence, has given an explanation which is not because of race for why he was not promoted. He appears to be saying that the reasons given were not justified. In 2013 his case was not strong enough; in 2015 he had made too many mistakes; in 2017 there was no leadership.
101. There is no evidence that these reasons were not genuine reasons when put forward by the persons providing the feedback. There is nothing to suggest that the claimant’s race played a part at that point. There is little evidence that the comparators and certainly no evidence allowing us to make a meaningful comparison with the claimant beyond the fact that he was unsuccessful where the comparators were successful. We cannot form a view as to whether the comparators are not materially different as required by section 23 EA.
102. In 2020 the claimant applied for sabbatical leave to write some book chapters. He says that he was refused when he made this application. The excuse given was that there was no sabbatical that year. Previously, Dr Sigrun Wagner, who is a comparator, and also other academics, had been granted sabbaticals to enable them to complete book chapters and conduct research which puts them in a favourable position to be able to be promoted to Heads of Departments and Senior Lecturers. Sabbaticals had been available to academic and senior administrators. The fact that this was afforded white colleagues and not the claimant in 13 years of tenure is claimed by the claimant as detrimental treatment.
103. There is a problem with the way that the claimant puts his case on sabbatical and that problem is this; he is partly right in the sense that the sabbatical, as he requested it, was not capable of being granted, he wanted too long. There was an agreement to provide or to allow the claimant to have a sabbatical but restricted to a term. The evidence that we heard was that could be accommodated taking into account the claimant’s timetable and the resources available to the department, whereas the longer period that the claimant wanted could not. It is also the case that there was a moratorium college wide on sabbaticals from April 2020 during the period of lockdown.
104. We are unable to reach a conclusion that the claimant’s race played any part in any of the decisions relating to the sabbatical. The claimant was told that he was being supported in respect of a sabbatical for a limited period of time. The explanation for the limiting of the support for the sabbatical was clearly explained and appeared to be in accordance with what had happened in other

cases. There is no evidence of less favourable treatment of the claimant in that regard.

105. The claimant's complaints of direct discrimination on the grounds of race, as articulated in the list of issues, is not well founded and is dismissed.
106. The claimant makes a complaint of harassment. His complaint of harassment appears to have a number of limbs. The first is the length of time that the capability process was carried out. The fact that the claimant was unwell and that the capability process was making him unwell. The contrast between the way that the claimant was dealt with and the way that Dr Morales was dealt with; the deteriorating relationship with Dr Nuri and the lack of justification for the capability process.
107. All those things we understood to be the aspects of the claimant's complaint of harassment when he says that he complains about the manner in which the capability proceedings were carried out.
108. The length of time that the process lasted is something that was explained by the respondent's witnesses.
109. The Improvement criteria is important in determining whether or not a performance improvement plan is rational or not. In the claimant's case there was a concern about marking and setting exam scripts. These things are annual events so it is not as though the claimant can demonstrate them every working day of the year. They occurred at specific points in time. As a result of that, the length of the improvement period is necessarily long. Professor Agyemang appears to have deliberately designed the capability proceedings to take place over a period of time. There is no indication that she had taken into account the claimant's race in determining that. Dr Nuri, on taking over the management of the claimant's capability procedures, determined that it had been going on for a long time and that this offered an opportunity for a fresh start. So what she did was she brought it to an end.
110. We do not see in the length of the process of capability, any unreasonable conduct on the part of the respondent that requires explanation. It also needs to be borne in mind that the process is stressful to the claimant; it calls for a critical look being taken at the work that he is doing and the capability process can escalate to the point where it is possible that the claimant could be in jeopardy of losing his employment. That is something that is likely to be stressful. In this case, unfortunately the stress was such that it made the claimant unwell and he had to take time off work. This too contributed to the length of the capability process. The fact that the claimant was unwell, in our view, does not mean that the capability process became unreasonable. In any event, it does not appear to be a case where any complaint is made arising from the fact that the claimant became unwell at any particular point in time.
111. The claimant complains that he was harassed because when you compare the way that he was treated with the way that Dr Morales was treated, there

was not the same critical view taken of what Dr Morales did. There is no evidence of a reason for Dr Morales to be the subject of any criticism.

112. The comparison of Dr Morales and the claimant does not work because the claimant was the one who was responsible for the aspect that was subject to criticism and not Dr Morales.
113. There was indeed a tension in the relationship between Dr Nuri and the claimant. The claimant speaks of a number of issues arising. Those issues appear to have arisen as a result of concern about the claimant's performance. Dr Nuri was the claimant's line manager or was a person responsible for courses that the claimant was teaching. She was required to fulfil her duties in a way and that may require her taking issue with something the claimant has done or not done. It is unfortunate that there was a deteriorating relationship, but we see no basis for saying that the claimant's race was any part of it. Dr Nuri raised issues with the claimant which arose directly from his performance.
114. Finally, the claimant says that there was no justification for the capability process. It is clear that the number of academic colleagues of the claimant took a different view. We are unable to say on the information that we have that view was irrational or improper. It may well be that it was wrong but we cannot say that it was irrational or improper so as to evidence any suggestion that the capability process was unreasonable.
115. The claimant complains that he was humiliated by Dr Nuri on 26 February. There was not anything that happened on 26 February. As we have already said that date should be 5 February. In any event, as we have previously stated, we consider that behaviour was not unreasonable on that occasion when looked at in context. Section 26 of the EA requires us to consider subsection 4 and to have regard to the circumstances in considering whether or not it is capable of being harassment. In our view the matters that the claimant has set out, considering our findings of fact, the behaviour of Dr Nuri on 5 February did not amount to harassment.
116. Finally, victimisation. The claimant complains that inviting him to meet the external HR consultant was victimisation. We do not think that it was. There was no detriment here. The claimant was simply asked to attend an investigation meeting relating to Professor Frank. He did so; he provided his information and it was no doubt taken into account. We do not consider that an employee would consider that they were disadvantaged in the workplace by being requested by their employer to participate in an investigation of an allegation in circumstances where the evidence that they could give was pertinent and important in relation to the allegations under consideration.
117. So, for all those reasons, the Tribunal's view is that this is a case where the claimant's employment came to an end following a difficult period of a few years after what had been a largely successful career, but in resigning his employment, the claimant was not constructively dismissed.

118. So, for all of those reasons, the claimant's complaints are not well founded and are dismissed.

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Employment Judge Gumbiti-Zimuto

Date: 20 February 2023

Sent to the parties on: 21 February 2023

For the Tribunal Office