Case No: 1601704/2021

EMPLOYMENT TRIBUNALS

Claimant:	Ms D Sundar
Respondent:	Cardiff University
Heard at:	Cardiff and by video
On:	8, 9, 10, 14, 15, 16, 17, 20, 21 March 2023 5 April 2023
Before:	Employment Judge S Moore Mrs A Burge Mrs J Beard
Representation	
Claimant:	In person
Respondent:	Mr D Mitchell, Counsel

RESERVED JUDGMENT

1. The claimant's claims for unfair dismissal contrary to S98 and S103 (A) Employment Rights Act 1996 fail and are dismissed.

2. The claimant's claim that she was subjected to detriments on the grounds of having made protected disclosures contrary to S47B Employment Rights Act 1996 fails and is dismissed.

3. The claimant's claim for breach of contract fails and is dismissed.

4. The claimant's claims for direct marriage and race discrimination contrary to S13 Equality Act 2010 fail and are dismissed.

5. The claimant is not a disabled person within the meaning of S6 Equality Act 2010. The claim of failure to make reasonable adjustments contrary to S20/21 Equality Act 2010 fails and is dismissed.

6. The claimant's claim of victimisation contrary to S27 Equality Act 2010 fails and is dismissed.

REASONS

Background and Introduction

1. The ET1 was presented on 28 October 2021. Early conciliation commenced on 26 October 2021 with the early conciliation certificate issued on 28 October 2021. The claimant initially brought claims of unfair dismissal, automatic unfair dismissal/detrimental treatment for having made protected disclosures, race, disability and marriage discrimination and unpaid wages.

2. A preliminary hearing for case management took place before Employment Judge Howden Evans on the 16 February 2022. The claimant was directed to provide further and better particulars by 24 May 2022. These were drafted by Mr McMillan, Counsel, who represented the claimant at the subsequent preliminary hearing on 7 June 2022 before Judge Frazer. Also before Judge Frazer at that hearing was an amendment application by the claimant to add further acts of alleged less favourable treatment for her race discrimination claim and two further allegations of victimisation. Judge Frazer permitted the amendments albeit the time issues were reserved for the final hearing.

3. A further preliminary hearing took place before Judge Brace on 5 September 2022. At this hearing the claimant was represented by solicitor Mr Magara. The claimant had made a further application to amend her claim on 8 August 2022 in order to bring a further victimisation claim concerning action taken by her professional regulatory body after her dismissal. The detriment was unclear to Judge Brace and the claimant was provided with a further opportunity to set out in writing the detriment. Judge Brace also determined that the claimant had identified in her ET1 she was disabled by reason of insomnia, migraine and depression but that neither disability by reason of PTSD and/or anxiety had been referred to in her original pleaded claim. Judge Brace determined that this required permission of the tribunal to amend. Judge Brace set out in draft an indication of the typical issues that arise in each of the complaints brought by the claimant and directed that the claimant complete a first draft of the list of issues by 19 September 2022 based on the template in Judge Brace's order. The parties were set to agree a final list of issues by 10 October 2022.

4. A further preliminary hearing took place on 24 November 2022 before Judge Povey. By this stage, the claimant's amendment application consisted as follows:

- to add two further detriments to her victimisation claim arising from post dismissal involvement of her professional regulatory body;
- to add disabilities of PTSD and depression to her disability discrimination claim;
- to add 18 further alleged detriment to various existing claims.

5. The amendments in respect of the victimisation detriment claims and disability claims were permitted by Judge Povey however the 18 further alleged detriments were refused. Judge Povey issued varied orders in respect of disclosure. A list of documents was due to be sent by 13 January 2023, copies requested by 20 January 2023 and sent by 27 January 2023.

The respondent was directed to file an amended response to address the permitted amendments to the claim. No order was made regarding a final list of issues.

Disclosure

6. We set out the following as it is relevant to the Tribunal's refusal to permit the claimant to reply on a supplementary bundle at the final hearing.

7. On 6 December 2022 the claimant provided to the respondent a list of documents but not the actual documents themselves.

8. On 13 January 2023 the respondent sent the claimant a disclosure bundle. They requested the claimant's disclosure by return and were advised by the direct access Counsel (Ms Mallick) that she had been instructed the claimant had already provided disclosure. This proved not to be the case as acknowledged by Ms Mallick on 20 January 2023 where she advised the claimant would "aim for the following Monday" to send her disclosure.

9. The respondent provided further disclosure upon requests from Ms Mallick and a final disclosure bundle was sent to the claimant on 20 January 2023.

10. On 26 January 2023 the claimant provided two case bundles to the respondent. The respondent was unable to access these and informed the claimant as such later that day. They were sent again on 27 January 2023 and the claimant was informed (on 27 January) that the respondent could not access them. It was suggested they were sent via Dropbox or as an attachment to the email.

11. On 30 January 2023 the claimant resent her documents. It is unclear in what format they were sent but on 15 February 2023 the respondent informed the claimant they were still unable to access documents sent by Google Drive.

12. The final index and bundle were sent to the claimant on 15 February 2023. On 16 February 2023 the claimant sent a bundle (not a list of documents) via Dropbox. This was the first time the respondent had seen the claimant's disclosure and it consisted of approximately 3000 pages.

13. The final preliminary hearing before the final hearing of this claim took place before Judge Ryan on 24 February 2023. The claimant was represented by Dr Ahmad, Counsel at this hearing. The purpose of that hearing had intended to be a catch up with the parties to ensure they were ready for the final hearing. Judge Ryan recorded that there had been several attempts to agree a final list of issues and that it remained outstanding. Judge Ryan recorded after much discussion a final list of issues was agreed as set out in appendix 2 to the order and that if the claimant wish to advance any other claims or matters than set out in that list of issues, she would have to apply at the final hearing for further amendment to her claim.

14. It is also necessary to set out what Judge Ryan recorded regarding the hearing bundle. At that stage, the respondent had served a hearing bundle following disclosure on the 15 February 2023 of just over 2500 pages. The

claimant had served on the respondent two further bundles of 670 pages and 1373 pages respectively. Judge Ryan told the parties that that situation was unworkable and that every effort must be made to provide the Tribunal with a single agreed bundle of documents that were relevant and necessary.

15. The claimant was ordered to identify to the respondent, documents from her bundles that were not included in the respondent's served bundle of 15th February 2023 that were both relevant and necessary for the determination of the issues in the case by no later than 4pm on 1st March 2023. The claimant was required to identify documents by reference, where applicable, to the page numbering of the respondent's bundle served on 15th February 2023. If the respondent agreed that they were admissible the claimant was required to produce a copy of a supplementary bundle for the respondent, together with 3 paper copies and an e-bundle for the Tribunal. If the respondent disputed admissibility of such documents then the claimant had to make an application to the Tribunal on the first day of the final hearing for the documents to be permitted and if so, ready to hand up sufficient copies for the Tribunal and witness table.

16. This order was accompanied by strike out warning that if the claimant failed to comply with that order her claim may be dismissed without further hearing for breach of an order, failure to actively pursue her claim is actively and for prejudicing a fair trial.

17. On 1 March 2023 the claimant sent 2 separate bundles totaling over 1000 pages to the respondent. This did not comply with Judge Ryan's order as the claimant had not identified which of the documents she wanted to rely upon that had not been included in the respondent documents of 15 February 2023. According to the respondent, large portions of the bundles the claimant sent were already included in the respondent's bundle of 15 February 2023. The latter point appears to have been accepted by the claimant as on 3 March 2023 the claimant sent a revised additional bundle ("the claimant's supplementary bundle") totaling 398 documents the claimant maintained were missing from the respondent's 15 February 2023 bundle.

18. The respondent submitted that this was not in a chronological order, included commentary labelling at the top of a large number of pages which were an attempt to incorporate new claims not in the list of issues, contained duplications of documents and without prejudice correspondence. This bundle had also been sent to the Tribunal via Dropbox. The claimant was informed by Judge Harfield on 3 March 2023 that the Tribunal could not access Dropbox and a link would be sent for the claimant to upload the bundle via the document upload centre.

<u>Applications and decisions arising during the final hearing</u>

19. The first day of the final hearing, 8 March 2023 had been designated a reading day. Most of the day was taken up with dealing with applications that had been made by the claimant as well as an application by the respondent to strike out the claims. Decisions were given orally and the claimant made a request for written reasons. We set out these and the decision and reasons below.

Admissibility of the claimant's supplementary bundle

20. The background to this application is set out above under the heading "Disclosure". This 398 page bundle was not before the Tribunal as it had not been uploaded by the claimant in compliance with Judge Harfield's direction. The claimant told the Tribunal this was because she had not been sent a link to the document upload centre and had been informed (contrary to what Judge Harfield had directed) that the respondent had to upload the claimant's bundle.

21. The Tribunal determined the bundle should not be admitted as the claimant had failed to comply with Judge Ryan's order set out above. She had failed to identify documents in the manner prescribed instead serving a large number of documents in an unstructured and unreferenced manner. This was precisely what Judge Ryan had sought to avoid with the terms of the order. The order had been carefully explained by Judge Ryan to the claimant and her representative as he was mindful it was only a short time before the hearing and the written record of his order may take some time to be sent. It was accompanied by a strike out warning to the claimant.

22. The Tribunal concluded that if the bundle were to be admitted a fair trial would not be possible meaning the hearing would have to be postponed. The respondent would need time to consider the documents in the claimant's supplementary bundle to review the documents, take instructions and possibly draft supplementary witness statements. The claimant had the benefit of having prepared her witness statement with full disclosure from the respondent. The respondent had not. Given the claimant's previous failures to comply with Judge Ryan's orders we did not consider this was a proportionate step to take. Balancing the prejudice to both parties, we did not consider a strike out of the claim was a proportionate step to take notwithstanding the failure to comply with the order. The proportionate step in our judgment was to not strike out the claim but proceed with the hearing without admission of the claimant's supplementary bundle.

Application by the claimant to admit amended witness statement

23. On 7 March 2023 the claimant made an application to amend her witness statement and introduce further documents by adding them to an amended witness statement. Witness statements had already been exchanged and the amended witness statement differed from the version that had been exchanged with additional paragraphs inserted and references to the claimant's supplementary 398 page bundle that she sought to rely on.

24. The Tribunal concluded that the claimant should not be permitted to admit a new witness statement prepared after exchange whereby the claimant had the advantage of having read the respondent's witness statements and seek to then amend her statement. This was not in the interests of justice and would be prejudicial to the respondent. Further, the Tribunal had already given their decision to exclude the 398 bundle which meant the documents referenced in the amended statement could not be admitted.

25. The claimant was directed to submit to the Tribunal the witness statement dated 1 March 2023 that had been exchanged with the respondent to the Tribunal and this would stand as her evidence in chief. The only amendments that would be permitted was the claimant had to insert page numbers of the bundle where documents were referenced.

Application by the claimant to admit expert evidence

26. One of the claimant's witness statements was not a witness statement at all but a Psychology Assessment Report by a Dr Pearce, Chartered Clinical Psychologist. The report was dated 20 February 2023 and noted on the front that the basis for instruction was an expert instruction on behalf the claimant. The report was set out as one would expect an expert medical report to be. This report was evidently not a witness statement about issues relevant to the claims but an expert report and the claimant did not have permission to admit expert medical evidence.

27. The Tribunal determined that the claimant would not be permitted to rely on this expert medical report. There had been no application to admit medical evidence, the content of the report was not relevant to the issues before the tribunal (the hearing being liability only) and there was prejudice to the respondent given that the respondent had not had the opportunity to take part in a joint instruction or instruct their own expert

Application by the claimant to admit audio recordings and transcripts

28. The claimant indicated in correspondence that she intended to rely on video or audio evidence. The claimant was directed by Judge Harfield on 3 March 2023 that she would need to make an application to rely on such evidence and arrangements as to how that evidence will be played given that the claimant was taking part in the hearing by video.

29. The claimant was not able to assist the Tribunal with how either listening to the audio or reading the transcripts were relevant to the issues in her claim. The audio appears to have been a recording of supervision sessions that the claimant had with her line manager Ms K Jones ("KJ").

30. The transcripts of the recordings have been produced by the claimant and are not agreed. They were first disclosed to the respondent on 3 March 2023 which was after the date for disclosure in the earlier orders and Judge Ryan's extended order. They have not been reviewed by the respondent at the time of the discussion around the application. There had not been a previous reference to audio recordings at any of the previous preliminary hearings and as such had not been provided for in the timetabling of the hearing.

31. The Tribunal concluded that the audio recordings and the transcripts should not be admitted as part of the evidence in hearing as they had not been disclosed in accordance with previous tribunal orders and to admit them would require an adjournment to enable the respondent to review the transcripts, take instructions and if necessary prepare further witness evidence. This would inevitably have resulted in the postponement of the final hearing. Given that we did not know why the content would be relevant

to the issues in the claim this was not proportionate and would prejudice the respondent. For these reasons the application was refused.

Application by respondent to strike out the claimant's claims

32. By letter of 7 March 2023 the respondent made an application for a strike out of the claimant's claims in their entirety on the basis that she had conducted the litigation in a manner which is scandalous, unreasonable vexatious and failure to comply with various orders. The history of the litigation, according to the respondent was set out in the application and referenced Judge Ryan's strike out warning as well as the failures by the claimant to comply with Judge Ryan's order concerning the disclosure of documents and also the claimant's witness statement which had failed to include page reference numbers. The respondent also relied on the claimant's attempt to submit an amended statement following exchange as well as references to without prejudice correspondence in both the claimant supplementary bundle and her amended witness statement. The respondent submitted that claimant had a wilful disregard for Judge Ryan's order which had proven to be a considerable distraction for the respondent in its preparation for trial and hampered their ability to properly defend the claim.

33. The tribunal refused the application to strike out the claim on the basis that we considered a fair trial was still possible even though the claimant had failed to comply with Judge Ryan's order. This was because the claimant had not been permitted to admit new documents nor was she permitted to rely on an amended witness statement. As such, the respondent was facing the hearing with a bundle they had prepared and witness statements as exchanged simultaneously. There undoubtedly had been inconvenience and increased costs to the respondent but there was no demonstrable prejudice in continuing with the hearing. The balance of prejudice weighed in favour of the claimant meaning strike out was not proportionate or necessary.

Application by claimant to amend her claim

34. At 3pm on 8 March 2023 after the above decisions were communicated the claimant informed the Tribunal and the respondent that she wanted to make an application to amend her claim. This was in reference to an additional act of less favourable treatment for the direct race discrimination claim. Judge Ryan had referenced this in his order. The claimant had understood from the order that she did not need to make the application until the first day of the hearing hence her explanation of the timing.

35. Judge Moore explained the principles we would apply (citing **Selkent Bus Co Ltd v Moore 1996 ICR 836 EAT**) to the claimant. These were as follows:

36. In deciding whether to exercise discretion to grant leave for amendment of an originating application, a tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Relevant circumstances include:

(a) The nature of the amendment, i.e. whether the amendment sought is a minor matter such as the correction of clerical and typing errors, the addition of factual details to existing allegations or the addition or substitution of other labels for facts already pleaded to, or, on the other hand, whether it is a substantial alteration making entirely new factual allegations which change the basis of the existing claim.

(b) The applicability of statutory time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions.

(c) The timing and manner of the application. Although the tribunal rules do not lay down any time limit for the making of amendments, and an application should not be refused solely because there has been a delay in making it, it is relevant to consider why the application was not made earlier. An application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then and not earlier, particularly where the new facts alleged must have been within the knowledge of the applicant at the time the originating application was presented.

37. We also had regard to:

a. **Abercrombie and others v Range Master Limited [2013] EWCA Civ 1148** which provides that when considering applications to amend which arguably raises new causes of action the focus should not be on questions of classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old; the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted and;

b. **Vaughan v Modality Partnership [2021] IRLR 97.** In deciding whether to exercise the discretion to allow an amendment, the Tribunal has to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Such relevant circumstances include consideration of the nature of the amendment, the applicable time limits and the timing and manner of the application. The real practical consequences of allowing refusing amendment should underlie the entire balancing exercise.

<u>The amendment</u>

38. The claimant wished to advance a new act of less favourable treatment namely that she had been offered less favourable terms at the commencement of her employment than her comparator Ms Spencer. This was about events and decisions made in May 2018. The claimant submitted this claim had been included in her ET1 and further and better particulars. In the alternative she had told her Counsel that she had been offered an unfavourable contract and relied on Counsel to have advanced that claim. The claimant asserted that she had only discovered that Ms Spencer's offer

letter was discriminatory compared to her offer letter in January 2023 when she received disclosure regarding Ms Spencer's role.

39. The application was opposed by the respondent. Mr Mitchell submitted that this was a new claim was not a relabeling exercise as her existing race discrimination claim did not reference the differences in contract allegedly between the claimant and Ms Spencer. The claim is significantly out of time. In terms of the manner of the application, there have been repeated attempts by the tribunal to formulate the claimant's claim into a list of issues. There was no written application, at the last hearing the claimant had been represented by counsel. The prejudice to the respondent was significant, they have not dealt with differences between the contracts and would need to amend their witness statements. If granted, it was likely to mean that the hearing would be lost or go part heard.

Decision

40. The application by the claimant to amend her claim was refused for the following reasons.

Nature of the amendment

41. The Tribunal considered the claimant ET1 and grounds of complaint. Whilst the claimant had stated that she was treated less favourably compared to Ms Spencer who was recruited around the same time, the less favourable treatment pleaded was that Ms Spencer was given leadership roles. The Tribunal also considered the claimant's further and better particulars. Whilst there was less favourable treatment set out in regard to Ms Spencer, the differences in contract were not mentioned (see paragraphs 45 and 46). We therefore concluded that whilst a race discrimination claim was already advanced, the amendment sought to add new facts and as such was a new claim.

Time limits

42. In relation to time limits, the claimant was offered two part-time contracts, one fixed term and the other open-ended on 2 May 2018. Ms Spencer was offered her role around 1 April 2018. We were relying on an oral amendment application where the claimant was asserting that the discriminatory act took place at the time she was offered the role or at the time Ms Spencer was offered her role. This must have been around March / April 2018 in regard to any alleged discriminatory decisions in the differing terms. The application to amend was being made on 8 March 2023 and as such is some 4 years out of time. In regard to the explanation as to why the claim had not been brought in time, we considered that the claimant's explanations did not amount to circumstances in which we consider it just and equitable to extend time in accordance with s23 Equality Act 2010. These are closely bound with the timing and manner of the application.

43. The claimant had stated she only knew about the alleged difference in terms (that she was given two contracts one fixed term and one open ended whereas Ms Spencer was given one full time, open ended contract) when she received disclosure on 27 January 2023. However this cannot have

been the case as the claimant had worked with Ms Spencer since 2018 and must have known at the very least Ms Spencer was full time and the claimant was part time. Further, the documents in the bundle demonstrated the claimant had been complaining about differences in contracts as early as her grievance brought in August 2019.

44. The claimant submitted she had relied upon counsel and had told them that she considered this to be less favourable treatment previously. There was no evidence of this before us and having regard to the extensive efforts by the tribunal, the respondent and the claimant's previous representatives to agree a list of issues we were not persuaded that this was indeed the case. Even if it had been the case, this did not explain why given the claimant was in possession of information regarding the contracts as of 27 January 2023, and was represented by counsel at a subsequent preliminary hearing, that the application was only being made on the first day of the final hearing.

45. We also had regards to the merit of the amendment sought. We considered that the claim was likely to have no reasonable prospect of success. There was no evidence before us, other than the claimant and her comparator being offered different contracts that the reason for the treatment was because of the claimant's race.

46. We considered that the balance of prejudice if we allowed the application lay heavily with the respondent in having to defend a claim 4 years out of time, with possibly little merit. The respondent would have to make enquiries and investigations as to who made the decisions on both contracts in 2018 and why. We agreed with Mr Mitchell that if the amendment was permitted, it would have derailed the final hearing. The respondent had 11 witnesses ready to give evidence, many holding senior roles within the universities.

<u>Application by claimant for postponement of hearing</u>

47. On 9 March 2023, the tribunal were expecting to start the evidence in the claim as had been agreed the day before. At 10:34 AM, the claimant made an application to postpone the hearing in its entirety. The basis of the application was that the case was not trial ready and it was unlikely a fair hearing would be achieved citing inequality of arms between the claimant and the respondent. The claimant submitted a postponement would enable the parties to properly prepare a single hearing bundle with properly referenced witness statements. The claimant complained she could not adequately cross-examine the respondent witnesses on key documents that have been excluded from the respondent's bundle.

48. This application was opposed by the respondent.

49. This application was refused as it was evident that the claimant was seeking to circumvent the decisions the Tribunal had made the day before regarding admissibility of the claimant's supplementary bundle and amended witness statements.

50. The claimant had been given multiple opportunities to comply with Tribunal directions. She had been represented throughout by solicitors or counsel.

To postpone on this basis would effectively give the claimant a whole new opportunity to prepare her claim.

Claimant's witness statement

51. Upon reading of the claimant's witness statement (and it is worth noting the same can be said for the amended statement that was not admitted) the Tribunal noted that it did not deal at all with a number of the claimant's claims. For example there was no mention whatsoever of the events the claimant relied upon for her direct discrimination claim due to her marital status. The claimant did not address why her disclosures were qualifying disclosures or in the public interest nor why she maintained the detriments were on the grounds of having made these disclosures.

52. This was raised with the claimant. In response the claimant submitted the Tribunal should also rely on her ET1 and further and better particulars as her evidence for her claims.

53. Mr Mitchell sought direction from the Tribunal as to how to approach this issue. The Tribunal directed that notwithstanding the omissions, Mr Mitchell should put the respondent's case to the claimant in cross examination. The reason for this approach was the overriding objective. The Tribunal often sees witness statements from litigants in person that do not address all of the facts and legal issues in the claims. The Tribunal concluded that the claimant's case was understood and prepared for by the respondent given their detailed witness statements and clarified in Judge Ryan's list of issues. The omissions in the witness statements should be considered when making findings of fact and reaching conclusions.

List of issues

54. There had been extensive case management and effort to try and agree list of issues in the claim. We need not go into the detailed background history other than what is set out above in paragraphs 3 and 4 above and as follows.

55. There had been attempts to agree a final list of issues in December 2022 and January 2023. On 13 January 2023 the direct access barrister emailed a draft list of issues that was based on a draft provided by the respondent. The email stated it had been "worked on with instruction". On 18 January 2023 the respondent's representative sent a revised draft list of issues to the direct access barrister. On 24 January 2023 the direct access barrister confirmed that the list of issues was agreed (apart form insertion of some brackets at 4.1.1.1 and 4.1.1.2, stating "this has been confirmed upon discussions / instructions with the claimant"). The respondent sent the draft list of issues incorporating the requested brackets back to the direct access barrister on 25 January 2023.

56. The respondent's representative then sent the list of issues directly to the claimant on 26 January 2023 as it would appear the direct access barrister was no longer instructed. On 31 January 2023 the claimant sent back an amended list of issues. The amendments were substantial. The claimant had sought to add new allegations / claims of direct disability discrimination,

failure to provide written particulars of employment, holiday pay and disability discriminatory dismissal. The claimant also sought to add qualifying disclosures, detriments, amend the race discrimination claim and comparators, amend the PCP, protected acts and detriments. This was understandably not accepted by the respondent who had understood from the direct access barrister that the list of issues had been agreed.

57. At the preliminary hearing before Judge Ryan he recorded that after much discussion the final list was agreed as set out in Appendix 2 to the order. That appendix is attached to this Judgment. The order records that the list of issues was based on the respondent's understanding of what had been agreed previously and, following discussion at that hearing Judge Ryan amended it only to show agreements reached (and these were underlined). The claimant was represented by counsel at this hearing.

58. On 8 March 2023 the claimant emailed the Tribunal with an attached list of issues that she purported to be the list of issues that had been agreed on 24 February 2023 by Judge Ryan. This was in fact the claimant's list of issues that she had sent to the respondent on 31 January 2023 but was refuted as it attempted to make multiple new claims and allegations. During the hearing the claimant submitted that the list of issues annexed to Judge Ryan's order was incorrect and that Judge Ryan had deliberately produced a different list of issues to that had been agreed by her barrister at the hearing on 24 February 2023. No evidence or supporting information was provided to support this allegation which we found to be scandalous and unsubstantiated. The order and appended list of issues had been sent to the parties on 27 February 2023 and there was no explanation as to why challenges to the list of issues were being raised at this late stage.

59. The Tribunal informed the parties that the claims and issues to be determined at the hearing were as set out in the list of issues produced by Judge Ryan.

The hearing

60. The Tribunal sat on the above dates. The Tribunal sat as a hybrid with Judge Moore present in the hearing room and the non legal members joining remotely. The claimant had previously applied for and been given permission to attend the hearing by video. Mr Mitchell, Counsel for the Respondent and all of the Respondents witnesses appeared in person. On some days some of the witnesses observed the hearing by video when their attendance was not required in person.

Witnesses

61. The Tribunal heard from the following witnesses.

a. Claimant (by video) and Dr Allen in person. With respect to Dr Allen, none of his evidence was relevant to the issues in the claim other than a section in which he related hearsay evidence as to what he had been told about the claimant about events in October 2019. The Claimant also produced letters from Wendy Mayfield who was the claimant's counsellor since 23 November 2022 and gave no evidence relevant to the liability issues other than

hearsay evidence about the impact on the claimant and Kevin Dale who was the claimant's UCU representative. As Mr Dale was not called to give evidence and be questioned we have not attached any weight to his evidence which was in any event of limited relevance.

b. On behalf of the Respondent the Respondent called the following witnesses in order of their appearance:

- Karen Jones, Claimant's Second Line Manager
- Graeme Paul Taylor, Professional Head of Physiotherapy
- Dr Dawn Pickering, Claimant's First Line Manager
- Professor David Whittaker, Dean and Head of School and Healthcare Science
- Kathryn Davies, Business Partner and HR
- Professor Ian Weeks, Chair of the Grievance Panel
- Helen Mullens, Head of HR Operations
- Professor Nicola Innes, Chair of the Probation Panel, and
- Professor Khaliq, Chair of Probationary Appeal Panel

62. The bundle produced by the Respondents stood as the trial bundle. In addition, the Claimant applied to admit additional documents related to her disability and there was no objection by the Respondent and therefore these were added to the bundle. There was an issue with the electronic version of the bundle, some of the pages were corrupted and these were resolved with new copies being provided. In addition the Respondents representatives couriered a hard copy of the bundle to the Claimant.

Claimant's conduct at the hearing

63. The Employment Tribunal hears many cases where a party is a litigant in person. In such cases parties often require direction from the Judge to assist the parties and the Tribunal ensure the hearing is conducted in accordance with the overriding objective.

64. In addition to the multiple, unmerited applications made by the claimant during the hearing we record the following issues concerning the claimant's conduct of the hearing.

65. During cross examination of the claimant, the claimant repeatedly would not answer the question she had been asked, instead making long speeches about other subject matters. In almost every answer the claimant spoke so quickly the Tribunal was unable to take a note of her evidence and had to be asked to slow down and repeat the evidence. This happens often and it is not normally be necessary to record such an instance in a judgment. The Tribunal is well placed and experienced in understanding it can be a unsettling and nervous experience. However an unusual aspect of this case was despite repeated warnings, the claimant continued to conduct herself in this manner throughout the proceedings.

66. This issue continued and worsened during the claimant's cross examination of the respondent's witnesses. In the main, instead of questions being put the claimant made long and repeated statements which meant there was either no question for the witness to answer or the witness and the Tribunal

were unable to understand what point was being put to the witness. During the questioning of Professor Khaliq, after repeated attempts to ask the claimant to ask a focused question and numerous long statements the Tribunal determined that the cross examination of the witness had become chaotic and a break would be required to see if it could become more focused.

67. The claimant also focused on events that were not relevant to her claims and failed to ask about the key matters in her claims. The claimant raised an incident that had taken place with Ms U Jones ("UJ"), that did not form part of her claim. The claimant raised this matter in cross examination of Ms K Jones ("KJ") on five occasions and had to be repeatedly asked to move on from this issue. It was also put to a number of the other witnesses.

68. The claimant also incorrectly paraphrased evidence that had been given by witnesses and put it back to the witness or to other witnesses. The claimant had to be frequently assisted by the Tribunal clarifying their note of the evidence that had been given as opposed to what the claimant was relaying.

Findings of Fact

69. We make the following findings of fact on the balance of probabilities.

Disability

70. The impairments relied upon by the Claimant in respect of her disability discrimination claim were migraines, insomnia, depression, PTSD and/or anxiety. We considered the following evidence in relation to the findings of fact that we make below;

a) The Claimant's impact statement dated 20 July 2022;
b) The contents of the disability bundle that ran to 28 pages;
c) The additional documents provided by the Claimant on 17 March 2023. It was established that a number of these documents were actually already in the disability bundle but a number of additional items were not namely three medical reports, a number of FIT notes and a Consultant Report; we took these into account. We also had regard to the Occupational Health Report in the main bundle dated 4 June 2020.

71. The Tribunal had made the standard Orders made in this region for the Claimant to provide an impact statement and copies of GP and other medical records that were relevant to the disability at the time the events the claim was about. The Claimant did not provide her GP records. The Claimant was off sick from 27 March 2020. A FIT note in the bundle dated 3 April 2020 recorded that she was not fit for work due to headache and stress and this would be up to the period of 10 April 2020. On 6 April 2020 the Claimant received a prescription, an eye prescription from Specsavers due to diplopia. A further FIT note dated 21 April 2020 stated the Claimant was unfit for work due to reaction to Amitriptyline causing diplopia, headache and eye pain caused by a change in eye prescription persisting despite correction requiring optometrist assessment. The Claimant was assessed as unfit for work from 11 April 2020 to 20 April 2020. This was essentially repeated in a further FIT note where the Claimant was said to

have been assessed on 20 April 2020 signing her as unfit until 27 April 2020. On 24 April 2020 the Claimant was assessed with double vision and unfit for work for 2 weeks by the University Hospital of Wales. On 27 April 2020 there was a letter from a Consultant Neurologist to the Claimant concerning a consultation that had taken place on 24 April 2020 attaching a management plan. This stated as follows,

"Shakila is usually fit and well. She has a 3 month history of headache, which initially was intermittent and attributed to her increased workload and stress levels. In February 2020 the headache became associated with pain behind the right eye. A few weeks later in March, the headache became troublesome and started requiring analgesics which she now takes on an almost daily basis. In April 2020 she started to experience diplopia on right lateral gaze.

Currently she locates the headache to behind the right eye and over to the right nasal bridge and over the right forehead. This is a sharp throbbing pain made worse with concentration for example if sitting in front of a laptop. There are no migrainous features, such as light aversion or nausea. The headache is not constant, it will go away for a few days and then come back and persist for several hours at a time. The diplopia on right lateral gaze has been continuous for about two weeks and she describes it as one image next to the other."

72. The letter concluded that it was unclear exactly what was going on with the nature of the headaches being possibly tension or migrainous and likely with an element of medication overuse. A plan was set out for further treatment.

73. On 6 May 2020 there was a further FIT note from the University Hospital of Wales stating the Claimant was not fit for work due to double vision (sixth nerve palsy) for one week. In relation to the additional documents submitted by the Claimant on 17 March we find as follows;

74. There were 3 pages of medical history from her GP centre. In summary these confirmed as follows. The Claimant had had headaches since January 2020, the page before us was a summary page listing a problem of headaches and then history, examination and comment with a telephone consultation on 3 April 2020. This also described the claimant initially starting to get headaches in January 2020 detailing increased stress at work and several late nights marking assignments. The second page of medical notes from her GP referred to a second consultation on 7 April 2020 regarding ongoing dizziness and double vision. The Claimant attributed that this was definitely a result of the Amitriptyline with headache and eye pain being resolved due to a change in prescription. There were other entries on 6 April 2020 with a telephone consultation taking place referencing headaches. The third page of medical notes referenced a further consultation on 9 April 2020 concerning ongoing drowsiness and double vision. A further consultation by telephone took place on 14 April 2020 with double vision recorded as ongoing, it also recorded the Claimant was not happy with the sick note saying "ear infection" as the ear symptoms had resolved and she wanted a detailed description of the problems on the sick note for work. It then records that the Claimant had been seen in the Neurology clinic and had had a diagnosis of sixth nerve palsy in her right

eye with a CT scan being normal but alluded to atrophy of right lateral rectus muscle. With regards to the consultant report of 27 April 2020, it should be noted that this was already in the disability bundle.

75. In relation to the Claimant's impact statement the relevant evidence in relation to the disability impairments is as follows.

76. The Claimant started to suffer from headaches from January 2020. The Claimant says that anxiety confusion and despair was triggered by a denial for flexible work hours. The Claimant references the GP examination on 3 April 2020 for headache and stress. The Claimant was prescribed Amitriptyline. The Claimant had a negative reaction to the Amitriptyline giving her symptoms resulting in not being able to get out of bed for two days, being unable to cook, drive or go shopping or manage her own childcare. On 25 April 2020 the Claimant describes her experience when she was seen by the Ophthalmologist and Neurologist having multiple diagnostic tests including the CT scan, MRI, X-ray and bloods which the Claimant said she experienced "torture" for insertion of canula needles which ended in inflamed and sore forearms. She was then diagnosed with sixth nerve palsy, possible causes tension, element of medication overuse and vasculitis. The Claimant describes that she was informed she would need to live with the condition of sixth nerve palsy which would class her as disabled to drive and a long term disability. The Claimant was totally shattered and in despair with this prognosis with a sense of uncertainty. She was experiencing depressive episodes, tearful and in despair and withdrew from interaction with friends.

77. By 16 May 2020 the Claimant's vision had returned to near normal and she returned to work on 20 May 2020 on a phased return of 8.75 hours per week. The Occupational Health Report was undertaken by an Occupational Health Nurse by telephone on 4 June 2020. Under "medical issues" the report describes the Claimant had been experiencing migraines/headaches on and off since January 2020. The symptoms got worse this resulted in a period of sickness absence. The Claimant was seen by her GP and the medication resulted in side effects. The Claimant had double vision and right eye pain, she was seen by an Optician and had a change to her glasses prescription. The report also outlined the various tests that we have referenced above. The report goes on to say the Claimant's vision was back to normal and the double vision was resolved, further that the Claimant had no ongoing migraines or headaches. The report describes that the Claimant was experiencing symptoms of stress due to difficulties at work. The report stated that the Claimant was fit for her substantive role with additional management support but the perceived work related issues needed to be resolved through discussion as a priority. Ultimately the nurse stated that she felt a solution to the current circumstances lies outside of a medical remit. The nurse stated that in her opinion the Claimant did not have a clear long term impairment and was unlikely to be covered by the disability discrimination provisions in the Equality Act.

78. Following this the Claimant remained at work thereafter the Claimant describes in her impact statement that from July 2020 she experienced a sense of failure, humiliation of skills, loss of identity, anxiety and shock after being informed that she had not passed her PIP. The Claimant also sadly

lost her brother-in-law who died and she was grieving in that regard but coping with high functioning anxiety and depression. The Claimant describes an ongoing emotion of turmoil between November 2020 and March 2021. The Claimant's impact statement states that she continued to experience anger, anxiety and depression through to December 2021.

79. The only description of the impact of any of the impairments on the Claimant's ability to carry out normal day to day activities was in paragraph 26 of the impact statement where the Claimant states that she relies on the disability of PTSD and anxiety that had impacted on her self esteem triggering crying spells, loss of appetite and insomnia. The claimant was tearful, had insomnia, lack of engagement with friends, loss of trust and fear of being stalked by colleagues.

80. In respect of the post traumatic stress disorder the Claimant confirmed to the Tribunal what had been stated in her response to the Respondent's representative who asked about the lack of any formal diagnosis or reference to this impairment in any of the medical records . The Claimant told the Respondent and reiterated this to the Tribunal that the Claimant had diagnosed her own PTSD which she was qualified to do so as she was a registered psychotherapist.

Recruitment and Commencement of Employment

81. The Claimant is a fully qualified Respiratory Physiotherapist specialising in pulmonary rehabilitation registered with the Health and Care Professions Council (HSPC) and Chartered Society of Physiotherapists (CSP). The Claimant is also a qualified Psychotherapist registered with the British Association of Counselling and Psychotherapy. The Claimant was an experienced practitioner Physiotherapist. The Claimant applied for fixed term contract position of Lecturer in Physiotherapy on a 17.5 hour weekly contract. The post was a Grade 6 role at spinal point 36.

82. Another open ended position became available around the time the claimant had been offered the fixed term position. The start date was to be 6 August 2018. This was in addition to a one year fixed term post that the Claimant had also been offered as Lecturer in Physiotherapy which was also part time.

Probation

83. In accordance with the Respondent's standard terms and conditions the Claimant's employment would be subject to a probationary period of 3 years. Within the terms and conditions, it provided that during the employment the Claimant would be subject to performance management processes operated by the University. It described details of the probationary period (3 years) and that confirmation of the appointment would be subject to the satisfactory completion of the relevant probationary period. If the contract was for a fixed term that is less than the normal probation period applicable to the position the standard probation period would still apply. There was reference to the University's Probationary Policy and Procedure which was available from the Human Resources Department. The terms provided that the Respondent had an absolute

discretion to extend the period of probation or terminate the appointment in accordance with the terms of notice. During the period of probation the employment was subject to the provisions of the University's Charters and Statutes save that the Claimant would not be entitled to the benefit of the provisions of the Statute that related to disciplinary procedures and appeals. The contractual period of notice was 3 months as provided in the offer letter and this was both in terms of notice that the Claimant had to give and the notice required from the University to terminate the Claimant's employment. In summary therefore the Claimant was appointed as a Grade 6 Lecturer and commenced work on 10 September 2018. She initially was employed under two contracts both of .5 FTE one was open ended and one was a fixed term appointment for 12 months until 10 September 2019.

84. The claimant's cross examination focused extensively on questions around whether someone could be "fast tracked" through the probationary period and complete it in less than 3 years. This was despite the Tribunal reminding the claimant repeatedly that this was not relevant to her claims. We address this only because of the extensive focus by the claimant on this issue. We find that there had been occasions where fast track probation had occurred within the Physiotherapy department provided they had completed all of the elements required which were to have completed academic practice, accreditation as a FHEA and had passed the probation objectives to an acceptable standard. We make this finding based on Professor Boivin's conclusions in the informal grievance report and the evidence of Professor Khaliq, who told the Tribunal it was possible to pass probation early provided all benchmarks were passed.

85. This appointment with the Respondent was the Claimant's first experience within higher education having previously been a practitioner. The Claimant initially was managed by Dr Dawn Pickering who is a Senior Lecturer in Teaching and Scholarship. In accordance with the usual practice the Claimant had been appointed a mentor who was a Ms A Bendall.

Probation objectives

86. Dr Pickering met with the Claimant on 26 September 2018 to set her probation objectives. These were set out in an individual training and development plan of that same date.

87. In order to pass probation, the respondent requires employees to satisfy the BLS academic performance benchmarks for Level 7 Teaching and Scholarship Lecturer and the expectations of Cardiff Academic. These are then individualised according to the school in which the employee is employed.

88. These were as follows in respect of the claimant; apply for the FHEA (Fellowship of the Higher Education Academy, which is suitable for individuals with little or no teaching experience), shadow a module leader with the aim of becoming module lead (placement team), fulfil teaching and marking requirements and supervise MSC and BSE projects. It is important to note that within the roles the Claimant had been appointed to teaching and scholarship there were no research activities required of the Claimant.

89. On 30 October 2018 the claimant was offered assistance with lesson plans / learning materials ahead of a session by Ms Bendall as well as an opportunity to undertake more lectures. On 22 November 2018 Ms Bendall suggested to the claimant that she review the content for each module on Learning Central[1]. This was in response to the claimant suggesting new topics for inclusion on the module some of which were already included. Ms Bendall responded positively in that she stated once the claimant had reviewed the materials available they could discuss as a team any suggestions the claimant had. The claimant had a peer review in February 2019 which again suggested she should review the materials available from the academic practice programme as well as suggestions for more recent evidence bases.

90. It was apparent from the documents in the bundle that by December 2018 there were some initial difficulties in interpersonal relationships between the Claimant and her colleagues. On 2 December 2018 Ms Bendall approached Dr Pickering to raise concerns that the claimant was not adequately preparing for sessions, both in terms of her professional appearance time keeping and readiness for teaching and there had been some verbal complaints from students. The claimant had been advised that during practical sessions nail varnish needed to be removed and she needed to arrive to sessions wearing uniform but had not heeded this advice.

91. On 4 December 2018 the claimant and Ms Bendall were teaching a practical class on Auscultation together. Ms Bendall was leading the session as the claimant had not taught it before. The resource materials had been agreed by the whole Cardio Vascular Respiratory ("CVR") team and used previously. A student asked Ms Bendall if one of the examples displayed would be acceptable for an exam and Ms Bendall said it would, then claimant then openly disagreed with Ms Bendall and said it would not. At the end of the session the claimant was openly critical of the exemplar to the students present which Ms Bendall considered undermined her teaching and the resources. After the session Ms Bendall approached the claimant and told her she was upset and had felt undermined and this had caused confusion for the students. She asked the claimant to discuss in advance any issues of concern about materials rather than raise them during teaching in front of the students.

92. On 6 December 2018 the Claimant sent an email to Dr Pickering copied to the Physical Clinical Team. The Claimant stated as a new member in clinical placement she felt a bit lost with minimal information sharing and not having a support person to link in quickly to any issues arising. She said there was no clear delegation of responsibility and support and after replying to an email accidentally copying in a student she had lost some confidence in responding to emails in clinical placement. She stated she was frustrated with clinical placement and said she wanted "willing support from team members". Mr Paul-Taylor (Professional Head for Physiotherapy), who had been copied in on that email, replied to the Claimant noting that he was surprised that she had copied in the team and stated that he considered her email could be read as criticism of her colleagues rather than a plea for help.

[1] This is the respondent's internal system where learning resources are stored

93. In respect of assistance for producing materials Dr Pickering disputed she had provided any extra assistance to Ms Spencer compared to the claimant.

94. On 6 December 2018 Dr Pickering arranged a 60 day review meeting with the claimant. The claimant requested a different mentor. She also asserted that the CVR team's teaching methods were not "evidence based". Dr Pickering asked the claimant to complete a SWOT analysis by their next meeting.

95. Mr Paul Taylor told the Tribunal that around this time, he received feedback from both the CVR and placement team that the claimant asked the same questions repeatedly, was then dismissive of advice and was critical of procedures in both teams. The claimant also was raising concerns about her mentor Ms Bendall and told Mr Paul Taylor she considered her as a competitor.

96. On 13 December 2018 Ms Coles raised an issue with Dr Pickering that the Claimant had failed to turn up to teaching a clinical educator half day course with Ms Coles on the previous Tuesday. Dr Pickering raised this with the Claimant on 14 December 2018 and asked the Claimant that in the future when she requested leave she would need to ensure all of her commitments were covered not just teaching.

97. Also in December 2018 there was an alleged incident where the claimant later claimed as part of her grievance that a colleague had sworn at her. We shall refer to this colleague as "Mr AB". His identity is not relevant and he was not a witness to these proceedings and therefore has not had the opportunity to give evidence about the incident. The claimant was in a shared office discussing her perceived lack of support with a colleague. The door was closed and the claimant alleged that Mr AB knocked the door and without waiting for an answer burst in and said words to the effect "what the fuck are you doing". Mr AB later denied this account and was categoric that at no point had he used the f word.

<u>First alleged protected disclosure dated 10 January 2019</u>

98. This was set out in the list of issues as follows:

"10 January 2019 - the Claimant emailed GPT raising her concerns about the lack of systemic organisational standards and protocol, unprofessional behaviours (including bullying), and lack of management support."

99. The claimant confirmed in her evidence that she relied upon the whole content of the covering email and the attachment as the qualifying disclosure. The email was to Mr Paul-Taylor, subject "Thoughts on Clinical Placement team Service Structure". The covering email stated:

"Hi All,
I have attached here some thoughts on current clinical placement service structure and missing gaps in my view. As I am a newbie in this university but not new to clinical placement operations, please support with your

thoughts. I am happy to clarify or discuss on any queries related to the attached document."

100. The attachment to the email was 6 pages long. It contained two flow charts at the beginning of the document and then three pages of texts discussing quality assurance of practice placement. There was a reference to gaps in practice placement team and operations with roles and responsibilities not being defined and the placement handbook not being up to date or user friendly. There was a further flow chart.

101. The email and attachment were essentially the claimant's observations on her perceived shortcomings regarding the clinical placement procedure.

102. Whilst there was a sentence under *"placement handbook is not up to date"* – it was set out as an example of the type of information the claimant considered should be included in Student essential questions such as; "w*hat can I do if I am a victim of Bullying or witness to this.*

103. There were no words in the email or the attachments that referenced a concern regarding unprofessional behaviours (bullying) and lack of management support. There was a reference to gaps in management of placements which stated "lack of core skills area rating by placement team and student to define learning contract".

104. Mr Paul Taylor told the Tribunal that this email was an example of the claimant's poor understanding of the processes in policies in place suggesting what she regarded to be new or innovative work or omissions were actually in place.

105. We accepted Mr Paul Taylor's evidence on this point as the claimant had only been in post since September 2018 and was unlikely to have been fully familiar and knowledgeable about all of the matters she raised as omissions. For example, students at the university have access to an "Escalating Concerns" policy and attend a taught session preparing them for clinical placements. The claimant had incorrectly cited this as an example of the placement handbook not being up to date as there was a policy in place to deal with escalating concerns.

106. The claimant's witness statement did not address why she considered this amounted to a qualifying disclosure, how the email and attachment showed the health and safety of any individual had been was or was likely to be endangered, a miscarriage of justice had/ was or was likely to have occurred, or a person had failed, was failing or was likely to fail with a legal obligation.

107. Mr Paul-Taylor replied on 11 January 2019 thanking the claimant for the email and advising he would arrange a clinical meeting team, where they could discuss plans going forward. However he had already explained to the claimant that there were policies and processes in place and did not agree there were "gaps" as suggested by the claimant.

108. The claimant and Ms Bendall had a further dispute on 23 January 2019 over the moderation of some exams. Ms Bendall considered that the claimant's questioning in the exam was inconsistent and not in line with what had been agreed during pre marking moderation meeting. The claimant considered that she did not agree she should be asked to ask questions in a certain way as she should have professional autonomy. Ms Bendall agreed when questioned later that the discussion had become confrontational after she had reiterated to the claimant that the way the exam had to be run could not be changed by the claimant. The claimant alleged that Ms Bendall had shouted at her which was disputed by Ms Bendall. It was subsequently agreed with Mr Paul Taylor that a new mentor would be appointed to the claimant. The claimant approached Professor Bundy. Mr Paul Taylor considered the claimant needed a mentor within physiotherapy for programme content and therefore asked Ms Sergeant to also be a co mentor.

109. In late January 2019 the claimant requested an increase in hours to 30 per week. Mr Paul Taylor informed the claimant there was no funding available at that time and she had been engaged on two part time contracts one of which was fixed term. He advised he would review this if any funding became available before the end of the fixed term contract.

110. On 21 February 2019 Dr Pickering finalised the claimant's 5 month probation review objectives. A number of the objectives had to be amended as the claimant by this point had asked to be removed from the placement team and therefore would no longer shadow the module leader. The claimant recorded her disappointment with her perceived lack of opportunity to contribute ideas and growth. The claimant complained that she was being prevented from undertaking and contributing to research. Dr Pickering had concerns about the claimant's performance, team collaboration and mentor relationship and sought advice from HR.

Conferences

111. The claimant was supported to apply for funding to attend the European Respiratory Society conference in 2019. Professor Phillips invited the claimant to speak at a primary care conference in Birmingham. The claimant also attended CSP Physio 2019 which she self funded. The issue with this conference was that the claimant should have applied for study leave to attend and left it until a few days before to make the request. Nonetheless KJ granted permissions, but advised it would be the last one to be approved if it involved taking time off work. The respondent had a policy of funding up to £1000 to attend one conference per annum.

112. KJ told the tribunal, and we accepted that Ms Spencer was only funded 50% of her MSc in year 1 and only study leave for a conference in year 2.

Mediation with Mr AB April 2019

113. On 1 April 2019 the claimant raised a concern with UJ[2] regarding the alleged incident with Mr AB in December 2018. An informal mediation meeting was arranged on 23 May 2019 attended by the claimant, Dr

[2] UJ was Mr AB's line manager

Pickering, Mr AB and UJ. An informal mediator chaired the meeting. Agreement was not reached in so far as the claimant and Mr AB did not agree on the events but Mr AB apologized to the claimant if he had caused offence which had been unintentional.

Events from May 2019

114. Dr Pickering and the claimant met on 14 May 2019 as an MSc student had lost confidence in the claimant's ability to supervise their dissertation. The claimant was evidently still feeling that she had a level of expertise that was not being respected and she wanted to continue to challenge the team as well as considering the CVR team was not open to up to date evidence. Dr Pickering informed the claimant that she was considering setting an objective to "not receive as many concerns" about the claimant "not working with colleagues in a collegiate manner" and if there was no improvement a formal process to manage may become necessary.

115. There was a follow up meeting attended by the claimant, Dr Pickering and UJ regarding MSc student requesting a new supervisor on 21 May 2019. The claimant said she did not want to supervise the topic with that student as she did not understand what the team was trying to measure and thought it was "rubbish". Afterwards Dr Pickering told the claimant she considered her behaviour towards UJ and the team generally had been very rude and disrespectful.

116. A further meeting was held between the claimant, Dr Pickering with Mr Paul Taylor in attendance on 31 May 2019. The claimant had prepared a paper about her values and the respondent's values and alleged that Dr Pickering was not supporting her and was not competent. There was a frank exchange at this meeting. Dr Pickering in summary reiterated her concerns regarding the claimant's relationships with her colleagues and the volume of concerns that had been expressed about the claimant was out of proportion to the hours expected from a line manager.

117. At this meeting the claimant also complained about the workload but the complaint was in contrast to her race discrimination complaint in that she felt Ms Spencer was being allocated more topics than her.

118. In May 2019 the claimant achieved the FHEA qualification.

119. It was subsequently agreed that KJ would take over as the claimant's line manager for the academic year beginning in September 2019. KJ is the Programme Manager for the MSc in Physiotherapy amongst a number of other senior responsibilities within the department. Ms Jones has line managed two employees, including the claimant and had experience in line managing another individual who was facing performance issues with support had turned the issues around.

Events from September 2019

120. At this point, the claimant's fixed term contract had ended and she remained on her open ended 0.5% FTE contract, 17.5 hours per week.

121. The respondent uses a system called "Workload Modelling" ("WLM") for academic staff. There are agreed tariffs for activities and individual tasks are broken down into time units. Sessions could be identified as early career allowing for more preparation time. A FTE would have 1500 hours allocated. The pro rate WLM for the claimant was 750 hours. In 2019 – 2020 the claimant was allocated 662 hours which was 88.27% of her allocation.

122. KJ gave a very detailed witness statement to the Tribunal. Her witness statement was 49 pages and gave a comprehensive and detailed account of her dealings with the claimant. It would not be possible or proportionate to set out in this judgment all of the issues related to the claimant in particular with respect to the performance issues and interactions with students and colleagues that caused issues for KJ and the colleagues. KJ was cross examined by the claimant for 1.5 days. We have focused on the relevant matters relating to the claims brought by the claimant. We found KJ to be a credible and consistent witness and in most instances her evidence was corroborated by contemporaneous documentation in the bundle. She kept detailed records. The impact and time on line managing the claimant on KJ has been significant. The respondent normally allocates 10 hours per year for line management duties. Between September 2019 to August 2020 KJ estimated she had spent 550 hours line managing the claimant. She also had to undertake a stress risk assessment due to the impact line managing the claimant had on her own workload.

123. KJ met with the claimant on 3 September 2019. She had prepared an agenda with proposed objectives for the forthcoming year. This was broken down into learning and teaching (450 hours), Citizenship (62.5 hours) and Scholarship and Engagement (237.5 hours). Each category contained detailed and comprehensive objectives, evaluation measures and timescales for completion. This was subject to discussion between the claimant and KJ and the final version sent to the claimant on 13 September 2019. The scholarship activities were not agreed by the claimant who repeatedly tried to add scholarly duties to the objectives. Eventually on 28 October 2019 KJ summarised the position and made it clear the claimant would need to pass these objectives before she could be signed off probation.

124. The probation objectives were not finalised until 20 November 2019, confirmed in paperwork dated 27 November 2019.

Incident with UJ on 12 September 2019

125. Although this did not form part of the claimant's claim (and the Tribunal repeatedly pointed this out to the clamant), it was evidently an issue of significance to the claimant. The claimant raised this incident either in her answers to cross examination or in questions to the respondent's witnesses repeatedly throughout the hearing.

126. The claimant reported to KJ that during a meeting on 12 September 2019 she had told UJ "you say my ideas are good, but it has not been

acknowledged in action" to which UJ allegedly said in a raised voice with "angry wide eyes", "do not talk to me like that".

127. UJ later confirmed when interviewed as part of the claimant's informal grievance that she had said "do not say that to me" with a slightly raised voice and pointed her finger at the claimant.

128. The claimant reported the incident to Mr Paul Taylor the same day. He responded by email and advised the first approach should be to UJ or discuss with KJ. He sent the claimant the link to the university's dignity and well being contacts and said he would be in touch upon his return to work. The claimant later replied that she did not want to "*waste her time & energy with the CU concept of dignity & well being at work".*

129. KJ investigated the incident and gave the claimant a number of options on how to proceed, including informal mediation or a formal grievance. The claimant was asked to respond by 11 October 2019, extended to 18 October 2019 due to a bereavement. The claimant never responded to KJ who reasonably therefore concluded the matter was closed but subsequently raised this with Professor Whittaker who is the Dean and Head of School of Healthcare Science. On 20 September 2019 the claimant sent Professor Whittaker an email alleging that she had experienced huge bullying, harassing and unprofessional behaviours by colleagues. She requested a confidential discussion and a meeting was arranged for 24 September 2019.

130. On 18 September 2019 KJ emailed the claimant to raise an incident that had occurred in June 2019. At a meeting on 12 June 2019 it was reported that the claimant raised an idea of a photographic guide, spirograms and a video guide with the claimant producing the first two and working with Ms Spencer and Ms Sergeant over the summer to complete the video. It was reported to KJ that the claimant did not attend the video session and refused to undertake the other two tasks which caused her colleagues to have to undertake an additional 5 hours work.

131. The claimant was concerned as to why the incident was only being raised now given the passage of time. Dr Pickering had not raised the issue with her at the time. KJ explained it was because she had only just become aware of the incident.

132. This was discussed at a meeting on 25 September 2019. Following this meeting the claimant and Ms Jones felt it necessary to start making audio recordings of their meetings to ensure there was an accurate record.

133. On 24 September 2019 Professor Whitaker met with the claimant and subsequently decided to instigate an informal grievance investigation on the basis the claimant had actively said she did not want to initiate a formal grievance.

134. There then followed a number of meetings between the claimant and HR, who sought to summarise their understanding of the claimant's complaints. It was this clarification by HR that led to the claimant's email

dated 19 November 2019 which is relied upon as the second protected disclosure and first protected act (victimisation) (see below).

Ethical review

135. The claimant had been allocated the role of Ethics Review lead for level 5 BSc students as part of her 2018-19 objectives and shadowed a Ms Hamana. In error, the claimant contacted the student as the reviewer without first having contacted the supervisor.

Poor grammar and spelling concerns, rude correspondence

136. KJ acknowledged that English was not the claimant's first language. KJ asked the claimant on a number of occasions to check her communications as they often contained poor grammar and spelling errors.

137. KJ had to ask the claimant to amend her out of office reply which read as follows:

"*please refrain from long emails to me, as I am not good to respond due to my time restraints".*

138. During a lecture in March 2020 the claimant had incorrectly spelt the word "Myocardial Infarction" as "infraction" on the module discussion board and pronounced the word incorrectly. This came to the attention of KJ as a student raised the issue on the module discussion board.

139. The respondent works with the British Lung Foundation and holds their partnership in high regard. In February 2019 the claimant had track changed a report completed and signed off by the BLF and asked for feedback in a direct manner ("I require feedback"). The project lead asked the claimant not to do this again and to feed any contact through her.

140. Notwithstanding this request the claimant sent two further direct emails to the BLF the latest in October 2019 was also regarded as direct to the point of potentially rude as there was no please or thank you and the claimant asked for an earliest response.

Personal tutor meetings

141. A number of students reported the claimant had either failed to arrange personal tutor meetings by the deadlines or failed to turn up to meetings arranged.

Decision to place the claimant on a PIP (second whistleblowing detriment and first victimisation detriment)

142. By 6 November 2019 KJ considered that the claimant was not engaging with her probation objectives and not following her advice and direction and so decided to initiate a Personal Improvement Plan ("PIP"). The timing of this decision was an important factor as the claimant alleges that it was a retaliatory reaction (and a detriment) on the grounds of the claimant's second protected disclosure.

143. KJ emailed the claimant on 6 November 2019. Whilst she did not directly mention a PIP she advised as follows:

"Based on the number of issues being raised and issues i would like to discuss with you, please can we meet as soon as possible."

144. The meeting was originally arranged for 21 November 2019 but rearranged to 20 November 2019.

145. KJ told the Tribunal that by 6 November 2019 she had decided to place the claimant on a PIP. This is corroborated by an email from HR to KJ dated 14 November 2019 attaching a PIP to use "as discussed". This means that KJ must have discussed and requested a template PIP with HR prior to 14 November 2019.

Second alleged protected disclosure ("PD2") and first protected act ("PA1")

146. This was set out in the list of issues as follows:

"19 November 2019 - the Claimant sent in details of her complaints about unprofessional behaviour (including bullying) in the form of a detailed, informal grievance letter".

147. This is in reference to an email and attached letter from the claimant to Ms McConkey (HR) and Professor Whitaker dated 19 November 2019. The claimant asserted in her evidence that she relied on all of the contents of the email as the qualifying disclosure.

148. The ET1 described this document in the context of it amounting to a protected act as follows:

The Claimant provided this on 18th November 2019, as a detailed informal grievance. The Claimant relies on this informal grievance as one of the protected acts she made.

The Claimant's document specifically cited her concerns at discrimination, harassment and bullying towards her. The treatment suffered included (but was not limited to) being shouted at in meetings, being ostracised from colleagues, being sworn at, relationship breakdown, unmanageable trivial workload (admin), denying any leadership roles or networking roles, comments on her appearance and a lack of induction support and other opportunities within the Respondent's organisation been passed over to another new white candidate recruited at the same time of Claimant's recruitment.

149. This email was 13 pages long with close typed text. In summary the contents can be described as follows:

- The claimant complained about her line manager (KJ);
- The incident with UJ on 12 September 2019 (which the claimant described as harassment);

- Mention of “biased measure” as Ms Spencer had been recruited to a Grade 6 and was given a role to lead a cohort in clinical placement team and module leadership;
- The achievements the claimant considered she had reached to date which she maintained were not being recognised by Ms Jones;
- Complaints about Dr Pickering generally and specifically that she was biased in line management between the claimant and Ms Spencer and in relation to WLM allocation;
- That her complaints about Mr AB had not been kept confidential;
- Complaints about her workload allocation (not being provided enough teaching);
- Complaints about Ms Bendall and the mentoring process;
- Complaints about other members of staff;
- Unwelcome sexual comments (the claimant denoted this heading to the incident where she alleged Mr AB had addressed the F word to her (“What the fuck are you doing”); the claimant also asserted Dr Pickering’s handling of the matter had been “a deep hurt and harassment”;
- A comment that a colleague had said to the claimant the way she dressed meant she did not look like a physiotherapist, which was alleged to have been a strong comment which offended her ethnic group;
- Intimidating culture within the physio team; alienation, lack of eye contact with the claimant;
- Unfair workplace rules.

150. There was no direct or indirect reference to any of the allegations being a contravention of the Equality Act 2010 or that the treatment was on the grounds of her sex or race. This is contrary to what was suggested in the claim itself; there was no reference to Ms Spencer as “another new white candidate”.

151. The claimant sought the following solutions:

“As I am willing to grow within CU, I would need amicable response that address and consider the following:
1. Support to address Unprofessional behaviors
2. Support to develop clear transparent policies for working in physio (T&S) healthcare science.
3. Clear transparent criteria for completion of probation at different timelines in 3 year scheme with no unconscious bias.
4. Support for increasing my hours from 17.5 hrs to 30 hrs to manage the living cost.
5. Consider working in more M.Sc. modules. and MDT approach.
6. Support for part-time Ph.D.
7. Team working and conflict resolution as mandatory training for all team members
8. Support for educational and CVR specific fellowship /grant writing support- CLIL/Digital PR PAL.
9. Support for leadership, quality assurance training and roles
10. Support to identify buddy and mentorship scheme
11. Support for collaborative growth - CPD points development. “

<u>PIP meeting 20 November 2019</u>

152. KJ had prepared the PIP document and held a meeting with the claimant on 20 November 2019 to discuss the document. The PIP set out areas to improve, how it could be achieved, the success measures and by when. It was a detailed and comprehensive document with understandable and achievable areas to improve. They were closely aligned with the claimant's probation objectives meaning if she could complete the PIP aims she would also meet her probation objectives.

Issues raised by the claimant regarding her workload

153. On 19 December 2019 the claimant emailed Mr Paul Taylor advising she considered she was "down 51 hours on her WLM allocation". She had undertaken her own calculations of tasks and set them out in a table she says was based on the respondent's guidelines. He asked her to raise this with KJ. The claimant raised a concern with KJ about supervision of 6 students for BSc dissertations, but KJ told the Tribunal the WLM was not changed as the model would allow for less workload in other areas and therefore there was no need to reduce the workload. In other words the supervision of the students had already been accounted for in the WLM calculations.

Investigation of informal grievance

154. On 12 December 2019 Professor Whitaker wrote to the claimant advising that he had appointed Professor Boivin to investigate her complaints in accordance with the provisions of Statute XV which covers the procedures governing academic employees.

Protected disclosure detriment 1 and victimisation detriment 2

155. On 13 December 2019 the claimant alleges that Mr Paul-Taylor told the claimant he did not like matters to be dealt with by external members outside of Physiotherapy. This was the first alleged protected disclosure detriment. The claimant's witness statement did not deal with this allegation at all and she presented no evidence for it. Mr Paul Taylor refuted this allegation entirely. He recalls a meeting with the claimant that day but the subject matter was Workload Modelling. Mr Paul Taylor told the Tribunal he has no objections to issues being dealt with externally and he certainly would not have expressed any opinions in respect of this to the claimant during a meeting. He welcomed external scrutiny. He may have said it may be uncomfortable for staff being investigated.

156. We find that Mr Paul Taylor did not make the comment alleged. The claimant had led no evidence on this matter and Mr Paul Taylor had done so and refuted it.

Direct marriage discrimination allegations

157. This was another claim in the list of issues that had not been dealt with in the claimant's evidence. Her witness statement was completely silent on

this issue. The claim was set out in the claimant's further and better particulars as:

"In Jan 2020 Mr Paul-Taylor declined to give an admission tutor role to C, following an exchange in which he had questioned her availability for work in connection with C's status as a (married) single mother. C was asked: "how will you manage your childcare on Saturdays".

158. The claim is described as follows in the list of issues:

"Did the respondent decline to give the claimant an admission tutor role and ask her "how will you manage your childcare on Saturdays"?

159. There was an email in the bundle dated 3 April 2020 from Mr Paul Taylor to the claimant providing feedback as to why she had been unsuccessful in applying for the admissions role. This stated as follows:

"Dear Shakila
I wanted to thank you for your interest in the admissions role and let you know that this time you were unsuccessful. Firstly I want to apologise for the length of time it has taken to feedback. I wanted to share that it was really clear to both myself and Jill that you had prepared well and your knowledge of the bursary, placements and our partners, changes in placement provision with the new programme and some innovative ideas about how to improve the admissions experience for candidates were welcome. For future applications consideration of how you would learn about present activities (for example with this role: MMI's and debriefing, student involvement in admissions, engaging with schools) and seek to influence this will be helpful."

160. Mr Paul Taylor's evidence was that the claimant was unsuccessful in her application as there was candidate who performed better at interview. The feedback given at the time was that the claimant had prepared well, displayed good knowledge and had some innovative ideas. He denied making the comment. His evidence, which we accepted was that he knew the claimant was married and became divorced towards the end of her employment but not specifically when. He accepted he may have discussed that open days took place on a Saturday to confirm she would be able to support such events,

161. We prefer Mr Paul Taylor's account, given there was no account from the claimant and also that there was no contemporaneous record that the claimant raised this as an issue or a comment that had been made at the time. We find that given the claimant's propensity and awareness of raising other multiple issues if such a comment had been made it is implausible that the claimant would not have made a complaint about it.

162. The candidate who was offered the role was Welsh, married with one child.

<u>Events in late 2019 and 2020</u>

163. Turning back to late 2019 and 2020, the claimant had been placed on a PIP in later November 2019. There had been a number of further issues that were raised by KJ. We do not deal with all of these but highlight those we consider to be relevant to the issue of the claimant's capability. These were:

164. The claimant had been tasked with being involved in developing a new research module at level 5 for the newly validated BSc Physio Programme. The claimant failed to attend two planning meetings. When she later sent a teaching plan it was not in keeping with the module information that had previously been sent.

165. The claimant was late for an Auscultation session on 4 December 2019 where she had been appointed as lead. The claimant was reported as under prepared focusing on anatomy and technical points which had already been previously covered in another lecture. This resulted in colleagues taking over the session. The claimant sought to later blame Ms Bendall for supplying the wrong lesson plan. KJ checked the position and it had been the correct plan provided.

166. In January 2020 two of the claimant's level 5 BSc students requested a change of dissertation supervisor. Attempts were made to discuss their concerns and restore the relationship but the students maintained their request. The reasons provided were; loss of confidence by the students, poor supervision experience (limited contact, unanswered emails, unable to understand / conflicting responses and suggesting meetings when the claimant was not in the university.

167. After a manual handling session on 29 January 2020 the second facilitator raised concerns regarding the demonstrations being unsafe for students. A fact finding investigation was initiated during which the claimant blamed the facilitator.

168. The outcome was that the students had to be retrained and an action plan was added to the claimant's objectives that she complete 5 manual handling sessions as second facilitator.

<u>PIP review meeting 30 January 2020</u>

169. KJ held this meeting with the claimant. The meeting was minuted and the PIP document was updated along with the claimant being given the opportunity to comment. KJ remained concerned that concerns were still being raised (see above). She considered that the claimant did not provide any evidence of achievements. KJ's evidence was that the claimant tried to defend the issues even though there was strong evidence to the contrary and the claimant repeatedly demonstrated strategies to deflect concerns rather than take responsibility for errors.

170. On 31 January 2020 Ms Morgan (Programme Manager) submitted a letter to KJ and Mr Paul Taylor in which she made a number of complaints

regarding the claimant describing the situation as “untenable”. In summary Ms Morgan asserted that she felt unable to trust the claimant to carry out her duties and was not confident in leaving her to lead sessions independently.

171. In early February 2020 KJ was informed that the claimant had applied for a research proposal (EIT Health Start Up Amplifier). This would have been an activity outside of her T&S role and she had not discussed this with her line manager before making the application.

172. At a staff student feedback panel on 20 February 2020 the claimant’s sessions were identified as not to the standard expected with “jumbled” information and delivered in a way that was hard to follow. It was reported some students were actively avoiding the claimant’s sessions.

173. On 26 February 2020 Ms Morgan informed the claimant that another of the level 6 BSc students had requested a change of supervisor. This was now a total of 5 students who had requested a change.

PIP meeting 28 February 2020

174. KJ was of the view the claimant was still not meeting the standards required nor was she achieving her objectives. In particular KJ considered that the claimant was unable to show she could self reflect on the various incidents and gave an example that when they discussed the students who had requested a change in supervisor the claimant had laughed and said “good”. The focus of her final PIP review was to evidence critical reflective skills.

175. The claimant responded to the final PIP review in a detailed feedback document rejecting all of KJ concerns. She explained she had laughed and said good as it was relief from an undefined Workload Model where there was no defined direction for undergraduate student supervision.

176. In March 2020 the claimant’s final BSc Physio Level 6 student requested a change in supervisor.

177. At the start of 2019 academic year, the claimant had taken over one of the module leadership responsibilities from a Ms Sergeant. The claimant alleged that Ms Sergeant had not handed over materials to her. KJ took this up with Ms Sergeant in early September 2019 and was informed that Ms Sergeant had met the claimant two weeks previously and gone through most of the module information / launch, content, assignment and where to find all of the materials with all of the information being on learning central. KJ then took this back up with the claimant advising on 10 September 2019 that her claim to not have been shown materials was not consistent with what Ms Sergeant had explained. On 13 March 2020 Ms Morgan requested that the module leadership be removed from the claimant. This followed questions raised by students to Ms Morgan as no materials had been placed in the assignments folder in the Learning Central system. Of the material that was present it contained an incorrect date for submission of an assessment. This led to negative feedback from the staff student panel. When materials were then loaded they contained errors which had to be

rectified by Ms Morgan and Ms Sergeant. The claimant's explanation was that it was Ms Sergeant's fault as she had failed to pass on appropriate information.

178. The claimant began a period of sickness absence from 27 March 2020 and returned to work on a phased return from 20 May 2020. The phased return was 50% of her contracted hours which lasted until 1 July 2020. During this time her work consisted of 2 tasks namely:

- Supervision of 3 level 5 BSc Physio students who were due to submit ethical review proposals in June 2020 and;
- Return to the role of co-Ordinator for Ethics Review for Physio.

179. The final PIP review had been postponed during the claimant's sickness absence. It was rearranged for 24 July 2020. KJ completed a detailed and thorough review of the claimant's achievements against the objectives and concluded that she was not satisfied with her progress and did not believe the claimant likely to be able to change. She decided that she would be recommending the claimant had failed he PIP and that would be a consideration that she should fail probation. This was formally communicated to the claimant on 3 August 2020. The claimant asserts that she was informed that she had failed her probation on this date and asserts that to be a whistleblowing detriment and a victimisation detriment. However the text of the email from KJ does not say the claimant has failed her probation. It read:

"Based on this review, I am informing you that my original decision will stand, in that I do not see evidence that your performance has improved significantly or consistently across the PIP objectives and therefore my recommendation to Professor David Whitaker, Head of School (HoS) will be that you have failed your PIP. Please see attached PIP documentation for your records. I will send these to HR and copy you in.

Alongside the PIP your other objectives also evidence a level of performance which is not meeting the School's expectations. Therefore, I have to advise that my next step will be to produce a report for HoS to this effect and I will be recommending that consideration is given that you fail probation. The HoS will then initiate a formal hearing process."

180. We find that the claimant was informed she had failed her PIP but not her probation.

181. The claimant was on bereavement leave from 4 August 2020 followed by annual leave from 12 August 2020 – 11 September 2020.

<u>Professor Boivin investigation – informal grievance</u>

182. Professor Boivin had been conducting the investigation since December 2019. She interviewed eight witnesses and a 60 page report was produced. This report was not initially shared with the claimant <u>(fourth protected disclosure detriment).</u> Professor Whitaker told the Tribunal it is not university practice to share the entire report only a summary. This was

confirmed by evidence from Ms K Davies, HR Business partner who explained that as Professor Whitaker had commissioned the report the report had been prepared for Professor Whitaker and not the claimant.

183. There were the following intervening events that Professor Boivin explained had delayed the report (third protected disclosure detriment):

a. UCU Industrial action between 20 February 2020 – 13 March 2020;
b. The Covid-19 pandemic with the first UK Lockdown commencing on 23 March 2020 and the move to home working;
c. The claimant's sickness absence between 27 March – 20 May 2020.

184. The outcome of the investigation was relayed to the claimant at a meeting with Professor Whitaker on 3 August 2020. This was followed by letter dated 13 August 2020 which set out the following:

"The Report concluded by outlining several areas which the University and the School should consider as lessons for best practice, but it contained no evidence to substantiate your claims of serious discriminatory practice. I will therefore not be taking any disciplinary action against the members of academic staff who you accused of such practice.

The conclusions also included issues for you to consider and reflect on, and these, along with a summary of the report, will be forwarded to you in due course. It is not standard practice to share this kind of report in its entirety.

Based upon the outcomes of the Report, I am satisfied that the accusations you made cannot be used as mitigation for a lack of performance against your probation objectives. I will therefore be writing to you in the near future to invite you to a Probationary Hearing where these performance issues can be discussed in more detail."

185. The additional information was subsequently sent to the claimant on 2 October 2020.

Third alleged protected disclosure ("PD3") and second protected act ("PA2") (victimisation)

186. On 21 August 2020 - the Claimant filed a formal grievance. This was confirmed in the list of issues to be PD3 and PA2.

187. This was a seven page letter. The claimant's witness statement did not explain what parts of the letter amounted to the qualifying disclosures nor why or which parts referenced the necessary elements of the sub sections relied upon (health and safety, miscarriage of justice or breach of legal obligations). It also does not address why the claimant believed the disclosure of the information was made in the public interest. It also did not address why it amounted to a protected act under S27 EQA 2010. The ET1 stated:

"This included (but was not limited to) concerns over her contract of employment (notably biases over the same), probation support, training and development, abused with terms of "not enough" lack of support from her manager, the PIP implementation, criticised and belittled for her communications."

188. We have carefully considered the letter. It can be summarised into the following headings:

a. Complaints about the claimant's contract in that she had been offered a less favourable contract compared to Ms Spencer and that she perceived this to be direct discrimination through the recruitment process (citing Ms Spencer as allegedly having less experience). The claimant stated she was "not sure why she has been treated differently" and this was repeated a number of times in the letter;
b. Complaints about lack of research and PHD opportunities and not being offered a wide enough range of work;
c. Concerns that the OH and stress risk assessment had not been actioned;
d. Lack of probation support;
e. Claimant's contributions not being valued;
f. Implementation of the PIP
g. Complaints about various colleagues;
h. Delays in the investigation of the formal grievance.
i. The claimant set out three desired outcomes:
j. Waive probation, remove "bias in contract" and promotion to Grade 7;
k. Increase hours to full time;
l. Address OH assessment and stress risk assessment.

189. Again, as with the first communication relied upon as a protected act there were allegations within the letter but there was no direct or indirect reference to any of the allegations being a contravention of the Equality Act 2010 or that the treatment was on the grounds of her sex or race. Indeed the claimant herself said she was not sure why she was being treated differently.

190. Professor Whitaker acknowledged the letter in a formal response letter dated 10 September 2020. This letter comprehensively addressed the issues raised by the claimant. It explained that the claimant had been appointed to the posts she had applied for as had Ms Spencer. He considered that some parts the claimant's letter was repeating the complaints investigated by Professor Boivin. He identified other matters raised that would be addressed by the planned probation hearing and other new matters would be addressed in a formal grievance investigation.

191. On 11 September 2020 the claimant confirmed she would not have any further communications with KJ and would not return to work under her line management. This was followed by a later communication that she was also unwilling to discuss anything with Ms Paul-Taylor and requested she was placed on exceptional leave.

192. Ms Davies (HR) had written to the claimant about the arrangements for the formal grievance and steps outlined by Professor Whitaker as well as the stress risk assessment. It was agreed the probation hearing would be

delayed until the outcome of the grievance and that the claimant would be placed on exceptional leave from 16 September 2020.

193. The claimant was asked to confirm that Professor Whittaker's letter of 10 September 2020 summarised the concerns going forward for a grievance investigation. The claimant responded on 12 October 2020 outlining 20 concerns some of which were new. These included allegations against Professor Whittaker which the claimant also escalated to the Vice Chancellor who appointed a Professor Riccardi, Deputy Head in a separate school, to act an Investigating Officer under the formal grievance procedure. Professor Ian Weeks was formally appointed to hear the grievance on 9 November 2020.

Investigation of Professor Riccardi / outcome of formal grievance

194. Professor Riccardi was given the remit of investigating the claimant's grievance save for those matters that fell under performance related issues and the PIP. During December 2020 she interviewed the claimant, Professor Whittaker, Ms Spender, KJ, Mr Paul Taylor and the UCU representative. Her report dated 1 February 2021. It was comprehensive and detailed totaling 172 pages and 16 appendices. The conclusion was:

"The current investigation reaches the same conclusions as the previous informal investigation and the new issues identified by the complainant appear to be unchanged. Based on the current and existing information, I have not found evidence in support of SDP allegations, even though there is no question that SDP "feels" that the Head of school, the CVR team, and current and previous line managers and mentors do not appreciate or support her. All the evidence suggests that this is largely accounted for by a combination of her inability to listen to others, a lack of familiarity with the context SDP operates in and in her desire to operate at a much higher level, as a researcher even though she was appointed on a T&S contract, despite the absence of the relevant background, or of a demonstrably strong research track record. Taken together, these issues may have impacted on the uptake rate of her own suggestions, on SDP performance management and on the strained working relationships with colleagues, who now avoid talking to her to prevent conflict, or because conversations don't seem to yield any improvement. Based on these considerations, there appear to be major difficulties in identifying a positive and constructive way forward. According to DW and members of the CVR Team, "many attempts have already been made to resolve conflict, with very limited effect" and "change appears to be neither possible nor likely". Last, but no least, I believe a broader picture needs to be considered, including the impact on the morale and output of other members of the Team, who feel they need to limit their interactions to the minimum indispensable to avoid conflict. Since these issues with SDP have arisen, the number of meetings is limited to the bare minimum, and all team meetings are being recorded. This severely impairs the essence of academic collegiality, cooperativity and the ability to spark ideas off each other, with strained working relationships. Some team members have themselves felt undermined by SDP dismissive attitude of their own work, or have had to step in to address issues of performance shortfall, with major repercussions on their own mental health and wellbeing. The risk of not addressing these issues is the potential loss of

valuable staff and/or a decrease in overall performance of one of the flagship programmes within HCARE. "

195. Professor Weeks met the claimant on 4 March 2021 to discuss the report. The claimant provided further information / complaints on 11 March 2021. Professor Weeks provided a grievance outcome letter on 24 March 2021 as well as a copy of the report. The letter set out his reasons for not upholding the grievance. The letter is too long to set out in summary, the expressed reason was:

"Having considered all the information available to me I concur with the findings, as outlined in the investigation reports provided by both Professor Boivin and Professor Riccardi both of whom established that there was a lack of evidence and that as a result your grievance is not founded. I also note with concern the investigation findings that the whole team has been impacted by this situation. "

196. The claimant appealed the outcome of the grievance on 6 April 2021. We return to this below.

Probation hearing 7 April 2021

197. The probation hearing had originally been scheduled to take place on 9 February 2021. This was rescheduled a number of times as the respondent considered it necessary to await the outcome of the grievance. The final date arranged was 7 April 2021. It was chaired by Professor Innes, Head of the School of Dentistry and took place on Teams. The claimant was accompanied by her trade union representative. The claimant had prepared her own probation report and Professor Innes also had the report prepared by KJ and a supporting pack of all of the associated documents.

198. The outcome was adjourned pending further enquiries by Professor Innes. On 9 April 2021 she prepared a draft decision letter which the Tribunal had sight of however the letter was not sent as the claimant appealed her grievance outcome and this meant the probation outcome had to be stayed.

Grievance appeal

199. Helen Mullens, Head of HR was appointed to make the administrative arrangements for the grievance appeal which was to be heard by a panel of three. The claimant's grounds of appeal were in summary that the grievance had made perverse findings of fact on bullying and harassment, the investigation had been one sided and biased, the job description and recruitment process, probation, PIP, conflict resolution, OH recommendations delays and that the claimant had been offered a settlement in November 2020. All of these matters have been discussed above save the settlement offer. The fact of, but not the details of the settlement offer had been openly referred to in the respondent's responses and the minutes and documents of the grievance appeal. The panel ultimately concluded this was outside their remit as it has been a without prejudice discussion and we need discuss that no further.

200. The grievance appeal hearing was arranged for 2 July 2021 on Teams. On or around 28 June 2021 the claimant alleged that the Teams site was missing relevant documentation and requested a delay. On 30 June 2021 the claimant uploaded a folder to the Teams site of the documents she considered to be outstanding. The hearing was rearranged for 23 July 2021 and conducted by a panel the chair of which was Ms A Phillips. The claimant was accompanied by her union representative and made a presentation and went through her 36 page statement.

201. On 2 August 2021 the claimant was informed the appeal had not been upheld.

Probation outcome

202. On 10 August 2021 Professor Innes provided the claimant with the outcome decision that she had failed her probation as she concluded the claimant had failed to meet the standards required of her post of Lecturer and the claimant had not been able to provide Professor Innes with sufficient assurances regarding her future ability to perform the duties of her role. In particular, the following issues were cited as the key contributing factors to the decision to dismiss:

- Your quality of teaching
- Evidenced complaints from your students, resulting in an unprecedented number of requests within the School for transfers to another supervisor
- Volume of evidenced complaints around your performance from other members of staff
- Inappropriate conduct in relation to external parties, and
- Inappropriate use of Social Media.[3]

203. Professor Innes further concluded:

"There was evidence for reflecting on teaching activities themselves but I saw little evidence demonstrating your ability to self-reflect on performance and feedback as is expected from a healthcare professional. Given the amount of support you received to date, it is my strong belief that an extension to your probation period would be ineffective at this stage."

204. As a consequence of the probation failure the claimant was informed in the letter that she was dismissed:

"I therefore have to confirm that your appointment as Lecturer will be terminated and come to an end, with immediate effect (your last day of service being today – 9 August 2021). The University will pay you three month's pay in lieu of your contractual notice period. Further, you will be paid for all of your accrued, but untaken annual leave up to and including today, 9 August 2021. "

205. The claimant was given the right and exercised the right to appeal the decision. The appeal panel was chaired by Professor Khaliq and heard on

[3] This did not feature in the claim and we heard no evidence about this.

29 November 2021 and 18 January 2022. The panel did not uphold the claimant's appeal and she was advised of the decision on 28 January 2022.

206. Professor Innes' evidence was that she was unaware of the claimant's alleged protected disclosures when she sat on the probation hearing panel. She was not challenged about this under cross examination nor were any questions put to her about the disclosures and her knowledge. She set out a detailed explanation in her witness statement as to why she reached the decision the claimant had failed her probation. This contrasted with no evidence offered by the claimant as to why Professor Innes failed the claimant's probation on the grounds she had made a protected disclosure. The claimant did not even put to Professor Innes the contention that she had reached the decision for the reason of the protected disclosures.

Notice pay

207. The dismissal letter confirmed (see above) that the claimant would receive three month's notice pay in lieu. The claimant accepted she had received this payment. When she was asked on what basis therefore the claim was brought the claimant stated that she should have been allowed to work her notice and could have contributed to the university during her notice period.

Events post dismissal (victimisation claim)

Redeployment (issue 12.2.4)

208. Professor Whitaker gave evidence about why redeployment of the claimant was not considered after she had failed her probation. He told the Tribunal the reasons were unrelated to any protected act or disclosure:

209. It is not normal process or appropriate to search for redeployment if someone has failed their probation;

210. Redeployment would have been particularly unsuitable in the claimant's case as she had been on exceptional leave since September 2020 (at her request) and there had been a breakdown in the relationship with the team. She had also refused to be line managed by KJ and Mr Paul Taylor. Further in light of the significant performance issues the respondent considered she would have been unsuitable for any roles on a comparable grade within the university.

211. The claimant did not address this claim in her witness evidence and agreed she had not done so when asked under cross examination. The claimant told the Tribunal this was addressed in her further particulars. This essentially repeated what was in the list of issues with no detail. We do not know what positions the claimant says she could have been redeployed to.

212. In the absence of any evidence from the claimant and having no reason to doubt Professor Whitaker's evidence we accepted the respondent's evidence as to the reasons for not offering redeployment.

Fitness to practice report to HCPC (issue 12.2.5, 12.2.8 and 12.2.9)

213. The HCPC guidelines on fitness to practice were in the bundle. One of the grounds for referral was lack of competence which was defined (non exhaustively) as:

> – Lack of knowledge, skill or judgement (usually repeated and over a period of time). For example, poor record-keeping; inadequate professional knowledge; inadequate risk assessments; or poor clinical reasoning.

214. Under the section titled: What concerns should I tell you about? It stated as follows:

Whether or not you need to tell us about a concern will depend on the circumstances and its seriousness. However, we should be told if:

> – *the behaviour or actions of a registrant have raised concerns about their fitness to practice;– you have dismissed or suspended a registrant or issued them with another sanction.*

215. The HCPC also required the claimant to inform them she had been dismissed. It was unclear whether the claimant had done so. She was however informed by the HCPC that the respondent had raised a complaint against her in November 2021. The claimant has provided her own evidence to the HCPC and complained about 5 individuals. The claimant was asked why she considered the respondent had unlawfully refused to disclose the nature of the respondent's referral to the claimant. The claimant told the Tribunal that she believed it was a breach of data protection.

216. Professor Whitaker told the Tribunal he did not want to refer the claimant to the HCPC but given her dismissal considered he was required to do so, given the above guidance. If he had not done so this could have placed the department and the university at risk. He sought advice from HR and decided to seek initial advice from HCPC without naming the claimant. On 13 September 2021 he submitted an enquiry to the HCPC confirming a dismissal had occurred and an appeal was ongoing. On 8 October 2021 the HCPC confirmed they required a referral prior to the outcome of the appeal. Professor Whitaker informed the claimant about the referral on 16 December 2021 and that he would be supplying the requested information to the HCPC after the appeal. When the appeal was dismissed, the respondent took some months to forward the information to the HCPC with it eventually being sent on 8 August 2022. The reason for the delay was attributed to the need to redact staff and student data.

Claimant's personal property (issue 12.2.6)

217. The claimant asserted that a further act of detriment was that the respondent failed to provide her with her personal property after her dismissal. Her witness statement did not address this allegation. Ms Davies told the Tribunal that a colleague had posted the items to the claimant form the post office in Pontprennau on 7 November 2021. They have been

unable to locate proof of postage but did take a photograph of the items that were sent back. The claimant told the Tribunal that she had actually moved address from the address the respondent had on record and not informed the respondent, however she had a diversion in place and contended that this should not have impeded the delivery of the items.

The Law

218. Unfair dismissal (S94 Employment Rights Act 1996)

219. The Respondent relied upon capability as the reason for dismissal which is a potentially fair reason for dismissal under Section 98 (2) of the Employment Rights Act 1996 ("ERA 1996"). Under S98 (4), in a capability case it is necessary to consider whether a fair procedure has been followed. "An employer should be very slow to dismiss upon the grounds that the employee is incapable of performing the work which he is employed to do without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity to improve his performance." **(James v Waltham Holy Cross UDC [1973] IRLR 202).**

220. Protected disclosure claims

Existing S43B definition:

43B Disclosures qualifying for protection

(a) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—

(b) that a criminal offence has been committed, is being committed or is likely to be committed,

(c) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(d) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(e) that the health or safety of any individual has been, is being or is likely to be endangered,

(f) that the environment has been, is being or is likely to be damaged, or

(g) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

221. In **Kilraine v Wandsworth London Borough Council [2018] ICR 1850**, the Court of Appeal held that the concept of information in S43B (1) was capable of covering statements which might also be allegations. In order for a statement to be a qualifying disclosure it had to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) and this was a question of fact for the Tribunal. The disclosure should be assessed in the light of the context in which it is made.

222. Where the disclosure is said to be a breach of a legal obligation (S43B (1) (b)), if the legal obligation is obvious then it need not necessarily be identified **(Bolton School v Evans [2006] IRLR 500** (EAT upheld by CA)) and **Blackbay Ventures Ltd v Gahir [2014] ICR 747))**. If it is not obvious, the source of the legal obligation should be identified by the Tribunal and how the employer failed to comply with it. The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong **(Eiger Securities LLP v Korshunova [2017] ICR 561).**

Reasonable belief and public interest

223. In **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2018] IRLR 837),** the following approach when considering reasonable belief was set out (per Lord Justice Underhill:

224. The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.

225. The exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.

226. The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence.

227. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it.

228. Public interest is not defined in ERA. The question is whether in the worker reasonably believed the disclosure was in the public interest, not whether objectively it can be seen as such. **Chesterton** also discussed the issue of public interest (paragraphs 34 and 37) - this was a case where the disclosure was in relation to a breach of the employee's own contract).

Detriment claim

229. Under S47B ERA 1996 the employee has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

230. A detriment will exist if by reason of the act or acts complained of a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he thereafter had to work. An unjustified sense of grievance cannot amount to a detriment but it is not necessary to demonstrate some physical or economic consequence **(Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11).**

Causation

231. If the employee establishes that they made protected disclosures and there were detriments , S48(2) ERA 1996 provides it is for the employer to show the ground on which any act or deliberate failure to act was done, only by showing that the making of the protected disclosure played no part whatsoever in the relevant acts or omissions. The standard of the burden of proof required is if the protected disclosure materially influences (in the sense of more than a trivial influence) the employer's treatment of a whistle-blower **(Fecitt v NHS Manchester [2012] ICR 372).**

232. An employer will not be liable if they can show the reason for the act or failure to act was not the protected act but one or more features properly severable from it **(Martin v Devonshires Solicitors [2011] ICR 352, Panayiotou v Kernaghan [2014] IRLR 500).**

Time Limits – Detriments

233. S48(3) ERA 1996 provides that the Tribunal shall not consider a complaint unless it is presented before the end of three months beginning with the date of the act or failure to act to which the complaint relates, or where that act or failure is part of a series of similar acts or failures, the last of them. If the claim is presented out of time the test is one of reasonable practicability.

234. S48(4) provides that where an act extends over a period, the "date of the act" means the last day of that period and a deliberate failure to act shall be treated as done when it was decided on.

235. Time will start to run from the date of the act or failure to act, not the date on which the employee becomes aware **(McKinney v Newham London BC [2015] ICR 495).** In **Tait v Redcar and Cleveland Borough Council [2008] All ER**, disciplinary action was found to be capable of being classified as 'an act extending over a period'. There was also a finding that although there was no doubt that there had been an initial 'act' of suspension, the state of affairs thereafter in which the employee remained suspended pending the outcome of the disciplinary proceedings could quite naturally be described not simply as a consequence of that act but as a continuation of it.

236. It is important not to confuse the act with the effects of the detriment if they continue to be felt. Furthermore, the meaning of "series of similar acts" in S48(3) (a) differs to the meaning of an act extending over a period of time in S48(4) (a). We note the guidance in **Arthur v London Eastern Railway**

Ltd [2007] ICR 193 (per Mummery LJ) (in order to determine whether the acts are part of a series some evidence is needed to determine what link, if any, there is between the acts in the three-month period and the acts outside the three-month period).

S103A Unfair Dismissal

237. An employee has the right not to be unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

238. There is a different causation test to the detriment claim as the disclosure must be the primary motivation rather than a material influence.

Breach of contract

239. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that proceedings may be brought before an employment tribunal in respect of a claim for the recovery of damages provided the claim is one is within the jurisdiction and the claim arises or is outstanding on the termination of the employee's employment.

Discrimination

240. The Claimant brought claims for direct race and marriage discrimination pursuant to Section 13 and failure to make reasonable adjustments under Sections 20/21 and victimisation under Section 27 of the Equality Act 2010 ("EA 2010").

Disability

241. The issues before the Tribunal were to determine whether the Claimant was a disabled person for the purposes of the Equality Act 2010 as defined in Section 6. The burden of proof lies with the Claimant.

242. The steps that the Tribunal are required to examine in such matters are whether the Claimant has a physical or mental impairment that has a substantial adverse effect and a long-term adverse effect on the Claimant's ability to carry out day to day activities.

243. The substantial adverse effect is one that is more than minor or trivial and a long-term effect is one that has lasted for at least 12 months, is likely to last for at least 12 months, or is likely to last for the rest of the life of the person. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities it is treated as having continued to have that effect if the effect is likely to recur.

244. Section 6 of the Equality Act provides:

6 Disability

(a) A person (P) has a disability if—

(b) P has a physical or mental impairment, and

(c) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(d) A reference to a disabled person is a reference to a person who has a disability.

(e) In relation to the protected characteristic of disability—

(f) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

245. **In determining whether a Claimant is disabled the Tribunal must take into account of the statutory guidance on the meaning of disability as it thinks relevant (2011 Guidance on Meaning of Disability).**

Direct discrimination claims

246. Section 8 EQA 2010 provides:

8 Marriage and civil partnership

(a) A person has the protected characteristic of marriage and civil partnership if the person is married or is a civil partner.
(b) In relation to the protected characteristic of marriage and civil partnership—

(*a*) a reference to a person who has a particular protected characteristic is a reference to a person who is married or is a civil partner;
(*b*) a reference to persons who share a protected characteristic is a reference to persons who are married or are civil partners.

247. The protection is afforded to the status of the marriage itself; **Hawkins v Atex Group [2012] IRLR 807, [2012] EqLR** 397 confirmed in **Gould v St John's Downshire Hill [2020] IRLR 863 and Ellis v Bacon [2023] IRLR 262** where it was also said that the correct comparison is with someone in a close relationship but not married to the person in question.

248. Section 13(1) of the Equality Act 2010 ("EQA 2010") provides that direct discrimination takes place where a person treats the claimant less favourably because of the protected characteristic of sex than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

249. Under s136 EQA 2010, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in **Igen Ltd v Wong [2005] IRLR 258** regarding the burden of proof (in the context of cases under the then Sex discrimination Act 1975). The Tribunal must approach the question of burden of proof in two stages.

250. The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act if the complaint is not to be upheld. To discharge the burden of proof "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 sex," (per Gibson LJ).

251. In **Nagarajan v London Regional Transport and others [1999] IRLR 572 HL** held that the Tribunal must consider the reason why the less favourable treatment has occurred. Or, in every case of direct discrimination the crucial question is why the Claimant received less favourable treatment.

252. The key to identifying the appropriate comparator is establishing the relevant "circumstances". In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** this was expressed as follows by Lord Scott of Foscote:

"...the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

253. **Hewage v Grampian Heath Board [2012] IRLR 870 (SC)** endorsed the guidelines in **Madarassy v Nomura International [2007] IRLR 246 (CA)** concerning what evidence is required to shift the burden of proof. Facts of a difference in treatment in status and treatment are not sufficient material from which a Tribunal could conclude that on the balance of probabilities there has been unlawful discrimination; there must be other evidence.

Victimisation

254. Section 27 EQA 2010 provides:

27 Victimisation

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

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

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

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

(3) 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.
(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

255. Under S27 (c), an act can be done in reference to the legislation if it is done "in the broad sense even though the doer does not focus his mind specifically on any provision of the Act" **(Aziz v Trinity Street Taxis Ltd & Others ICR, 534, CA).**

256. Under 27(2((d) it is not necessary for there to have been an express clear reference to the Equality Act. If a claimant asserts things have been done which breach the Act but does not say those things are contrary to the Act, this will not amount to a qualifying allegation **(Waters v Metropolitan Police Comr [1997] IRLR 589.**

257. The asserted facts must be capable of amounting to a breach of the Equality Act 2010.

258. We were referred to the cases of **Durrani v London Borough of Ealing UKEAT/0454/12** (unreported, 10th April 2013) and **Fullah v Medical Research Council UKEAT/0586/12** (unreported, 10th June 2013) as authority for the submission that a mere reference to discrimination without identifying the protected characteristic does not amount to a protected act.

259. In **Durrani**, Langstaff P said:

'I would accept that it is not necessary that the complaint referred to race using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies.

The Tribunal here thus expressly recognised that the word "discrimination" was used not in the general sense familiar to Employment Tribunals of being subject to detrimental action upon the basis of a protected personal characteristic, but that of being subject to detrimental action which was simply unfair.…

260. The treatment must be by reason of the protected act. The Tribunal must consider the employer's motivation (conscious or unconscious); it is not enough merely to consider whether the treatment would not have happened 'but for' the protected act. See also **Martin v Devonshires Solicitors [2011] ICR 352, Panayiotou v Kernaghan [2014] IRLR 500)** approved in **Page (appellant) v Lord Chancellor and another (respondents) - [2021] IRLR 377.**

Conclusions

Was the claimant a disabled person within the meaning of S6 EQA 2010?

261. The burden of proof in establishing a disability lies with the Claimant. The evidence before us was limited. We deal with each disability as follows:

Migraines

262. In April 2020 the claimant was described by the consultant as having a three month history of headaches. The letter specifically states there are no migrainous features. The GP records notes the headaches started in January 2020. By May 2020 the claimant had returned to work and on 4 June 2020 the occupational health reports the headaches / migraines had resolved. There was no evidence as to how the migraines had a substantial and long term adverse effect on the claimant's ability to carry out normal day to day activities.

263. Further, the evidence before us shows the headaches / migraines had lasted for a maximum period of 6 months. We conclude the claimant was not a disabled person by reason of migraines.

Insomnia

264. There was no mention of insomnia in any of the medical records before us. The claimant mentioned insomnia in her impact statement but did not say when it started or how long it had lasted. She also did not say how the insomnia had substantial and long term adverse effect on the claimant's ability to carry out normal day to day activities. We consider the claimant has totally failed to discharge the burden of proof in regard to this impairment.

Depression, PTSD and/or anxiety.

265. We deal firstly with PTSD. The claimant admitted that she had self diagnosed this impairment. She also did not advance any evidence as to when she began to experience symptoms of PTSD, how long they lasted, the frequency, what the symptoms were or how the impairment impacted on her ability to carry out normal day to day activities.

266. Whilst a formal diagnosis of an impairment is not obligatory when considering whether someone meets the definition of a disabled person, it cannot in our judgment be sufficient for a person to diagnose themselves even where qualified to do so, without some evidence as to how the impairment impacted on their normal day to day activities.

267. We consider the claimant has totally failed to discharge the burden of proof in regard to this impairment.

Depression and or anxiety

268. There were no medical records before us to confirm the claimant had consulted her GP as regards to these impairments. The only evidence before us was the claimant's impact statement and very limited witness evidence in her witness statement (see paragraphs 76, 78 and 79 above). There is no mention of effect on her day to day activities. The claimant does mention not being able to get out of bed for two days, being unable to cook, drive or go shopping or manage her own childcare but this was attributed to a short lived negative reaction to Amitriptyline which ceased when the medication was changed.

269. After tests on 25 April 2020 and a diagnosis of sixth nerve palsy (which was not relied upon as an impairment) the Claimant says she was "totally shattered and in despair with this prognosis with a sense of uncertainty. She was experiencing depressive episodes, tearful and in despair and withdrew from interaction with friends." However there was no evidence as to how long this lasted or what was the frequency. By 20 May 2020 she had returned to work on a phased return of 8.75 hours per week. The Occupational Health Report says the Claimant was experiencing symptoms of stress due to difficulties at work but nothing about depression or anxiety. She was fit for her substantive role with additional management support.

270. Following this the Claimant remained at work thereafter the Claimant describes in her impact statement that from July 2020 she experienced a sense of failure, humiliation of skills, loss of identity, anxiety and shock after being informed that she had not passed her PIP. The Claimant also sadly lost her brother-in-law who died and she was grieving in that regard but coping with high functioning anxiety and depression. The Claimant describes an ongoing emotion of turmoil between November 2020 and March 2021. The Claimant's impact statement states that she continued to experience anger, anxiety and depression through to December 2021.

271. The only description of the impact of any of the impairments on the Claimant's ability to carry out normal day to day activities was in paragraph 26 of the impact statement where the Claimant states that she relies on the disability of PTSD and anxiety had impacted on her self esteem triggering crying spells, loss of appetite and insomnia. The claimant was tearful, had insomnia, lack of engagement with friends, loss of trust and fear of being stalked by colleagues. Again, we do not know when these symptoms began, the frequency, how long they lasted for, how often these activities were impacted.

272. We are not satisfied that the impairments have had a substantial and long-term adverse effect on the Claimant's ability to carry out normal day-to-day activities and in our judgment the claimant has failed to discharge the burden of proof.

273. As we have concluded the claimant is not a disabled person we have not considered her claims under S20/20 Equality Act 2010. Had we done so we say the claimant would not have succeeded at the very least on the issue on knowledge.

<u>Unfair dismissal – s.103A ERA 1996 and/or s94/98 ERA 1996</u>

274. We deal firstly with whether the claimant made qualifying disclosures as this relates to the reasons for the dismissal.

275. In regard to the claimant's case that she made disclosures that she believed tended to show a miscarriage of justice had occurred, was occurring or was likely to occur there was absolutely no basis for this contention whatsoever. There was no evidence before us in any of the disclosures or the claimant's claim, or further and better particulars as to what the miscarriage of justice was supposed to be.

276. Before we go on to consider the specific disclosures we observe that notwithstanding the significant case management of this claim, we were in a position of having to speculate what, within the extensive communications relied upon as a whole, the claimant asserted amounted to a qualifying disclosure. There was no specificity in documents up to 13 pages long as to what was information said to be disclosed rather than facts the claimant advanced about her own personal situation.

277. This on its own in our judgment was sufficient for the claim to fail. Nonetheless we consider the disclosures as follows.

First protected disclosure – email to Mr Paul Taylor dated 10 January 2019

278. We deal with this at paragraphs 98 - 106 above. This was not as described in the list of issues. When the email and the attachment was examined it can more properly be described as the claimant's observations on the clinical placement service. The claimant herself describes it as "*some thoughts on current clinical placement service structure and missing gaps in my view.*

279. The email and attachment were essentially the claimant's observations on her perceived shortcomings regarding the clinical placement procedure. We find ourselves speculating on what the claimant asserts to have been a qualifying disclosure which evidently means the claim should fail. There was a sentence under *"placement handbook is not up to date"* – set out as an example of the type of information the claimant considered should be included in essential questions for students such as; "w*hat can I do if I am a victim of Bullying or witness to this.*

280. We found that there were no words in the email or the attachments that referenced a concern regarding unprofessional behaviours (bullying) and lack of management support. There was a reference to gaps in management of placements which stated, "lack of core skills area rating by placement team and student to define learning contract".

281. We conclude that this email and attachment did not amount to a qualifying disclosure. Whilst there was a reference to gaps in practice placement team, operations with roles and responsibilities not being defined and the placement handbook not being up to date or user friendly in our judgment this did not amount to have sufficient factual content and

specificity such as was capable of tending to show one of the matters listed in S42 (b) (b) or (d). We do not know what the alleged breach of legal obligation was. There was no evidence to explain whose health and safety was being or was likely to have been endangered.

Second protected disclosure

282. We deal with this at paragraphs 146-151. This was the informal grievance letter dated 19 November 2019. This was even more problematic in terms of the claimant having completely failed to provide the Tribunal with clear evidence as to what parts of the letter were relied upon, indeed the claimant clarified it was the whole letter. It is not a function of the Tribunal to consider a 13 page document and try and speculate on what amounted to a qualifying disclosure. The burden should rest with the party bringing the claim to establish this. We have concluded that the claimant did not have a reasonable belief at the time she wrote the email that the content was in the public interest. The email was entirely self serving, a series of complaints about the claimant's own situation succinctly demonstrated by her solutions sought at the end of the email. Further, we have concluded that it would not have been a reasonable belief that one colleague saying to another colleague "what the fuck are you doing" amounted to a breach of a legal obligation that was in the public interest. We say the same for the comment that one colleague commenting to another colleague the way they were dressed meant they did not look like a physiotherapist. To conclude otherwise in our judgment offends the very nature and purpose of the legislation.

283. There was absolutely no evidence led by the claimant as to how this grievance email disclosed information regarding health and safety, e.g. whose health and safety was being endangered and why.

284. For these reasons we find the second disclosure did not amount to a qualifying disclosure.

Third protected disclosure

285. This was the claimant's formal grievance dated 21 August 2020. We deal with this at paragraphs 186-189 above. This was a seven page letter and we reached the same conclusions about this letter as the second protected disclosure in so far as having to speculate about what parts of the content were relied upon to amount to a qualifying disclosure. The letter was again wholly self serving; complaints about the claimant's own work issues and in no way in the public interest. There was nothing we could conclude amounted to a breach of a legal obligation or health and safety. In our judgment this did not amount to have sufficient factual content and specificity such as was capable of tending to show one of the matters listed in S43 (b) (b) or (d) and as such we find that the third disclosure did not amount to a qualifying disclosure.

286. For these reasons, we dismiss the claimant's claim of automatic unfair dismissal under S103A and detriment claim under S47B ERA 1996.

Unfair Dismissal

287. The Claimant was dismissed and paid in lieu of notice on 9 August 2021.

288. We have concluded that the claimant was dismissed for failing to pass her probation which amounted to poor performance. Capability is a potentially fair reason for dismissal under S98 (4) ERA 1996. There was a significant amount of evidence to support the respondent's asserted reasons for the dismissal which we have dealt with extensively in the findings of fact above.

289. In our judgment, the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The claimant was set probation objectives which were clear in terms of how they needed to be achieved along with reasonable timescales. There were regular reviews against those objectives. The claimant's colleagues including her mentors and line managers sought to assist the claimant. We concluded that the claimant had a genuine but unreasonable belief in her own level of abilities that rendered her unable to accept direction or constructive criticism from her peers. The claimant was inexperienced in lecturing and teaching in a higher education environment yet refused to accept the assistance the respondent attempted to provide to enable her to pass her probation objectives, believing that she knew better. When there were issues that were of her making she sought to blame others and was unable to take responsibility or reflect on why things had gone wrong even with her personal tutor relationships with students she had been assigned to support. The claimant was assigned two different line managers and two mentors and eventually refused to be line managed by KJ or the department head. If we are to accept the claimant's contentions, everyone, including her colleagues, line managers and students she taught and supported who raised concerns were wrong and the claimant was right. This is not a contention supported by the evidence before us and also not a plausible contention.

290. In addition to setting objectives, the claimant had the opportunity to provide feedback and challenge the conclusions that were reached by her line manager. There was a probation hearing conducted by an independent panel who reviewed all of the evidence put forward including that of the claimant. Professor Innes gave detailed and credible evidence as to why the panel reached the conclusion the claimant had failed to pass her probation and would be unable to ever meet those objectives. The claimant was given the right to appeal and again a detailed appeal procedure was followed. There was adequate consultation and in our judgment a fair procedure was followed.

291. We considered whether the claimant should have been provided with alternative employment. The respondent had not at the time of dismissal suggested other vacancies that the claimant could apply for. The claimant had asserted that she could have been redeployed to another vacancy but we did not know what this was or whether the claimant would have been suitable (see paragraph 208-212 above).

292. Given the issues that had arisen during the claimant's probationary period and the extensive breakdown in her relationship with her colleagues as well as students in our judgment it was reasonable for the respondent to not have considered alternative vacancies.

Wrongful dismissal / Notice pay

293. This claim was wholly without merit. The claimant agreed that she had been paid her 3 month's notice pay in lieu of notice. She based this claim on a contention that she should have been permitted to work her notice which in our judgment had no reasonable prospect of success given the circumstances surrounding her departure.

Direct marriage discrimination - section 13 Equality Act

294. Our findings of fact are at paragraphs 157-162 above. The claim is out of time. The alleged comment was made "in January 2020". Even if we take the last date in January of 31st the primary limitation date is 30 April 2020. Early conciliation commenced on 26 October 2021 and the claim was presented on 28 October 2021. There was no evidence as to why it would be just and equitable to extend time. The incident was not in our judgment of sufficient nexus to amount to conduct extending over a period. Further, we found that Mr Paul Taylor did not make the comment as alleged. This claim therefore fails.

Direct race discrimination - section 13 Equality Act 2010

Issue 10.1.1- fail to provide the Claimant with discussions of ways to lighten her work load;

295. The claimant has not told the Tribunal when this treatment is alleged to have happened. She was last in work on 3 August 2020. It is therefore out of time unless the claimant can evidence it was part of conduct extending over a period.

296. The evidence before the Tribunal was that the claimant was allocated less work than her hours would normally provide for under the WLM (see paragraph 121). We know the claimant challenged her WLM allocation and thought she was actually down 51 hours (see paragraph 153), but when this was raised with KJ she was of the view the WLM allocation was correct. By March 2020 the claimant was not supervising any of the BSc Physio Level 6 students as they had all requested a change in supervisor (paragraph 176). Also in March 2020 the module leadership was removed form the claimant (see paragraph 177). From May 2020 the claimant only had two tasks (see paragraph 178), to which she had agreed. Further, at various times the claimant complained that Ms Spencer was being given more work than her to do.

297. We have carefully considered whether the respondent failed to provide the claimant with discussions of ways to lighten her workload. We have

concluded that this was not supported by the evidence before us. KJ frequently discussed with the claimant the need to focus on the objectives she had been set within her PIP but the claimant on at least one occasion can be seen to have focused on applying for a research project that was not part of her objectives or her role. Mr Paul Taylor and Dr Pickering also discussed this with the claimant when she raised the issue. They did not agree with the claimant but this does not follow that there was less favourable treatment. We do not know what the detriment is said to have been. If anything the evidence showed that the claimant was complaining she was given less work than her comparator and was seeking more hours and is not supportive of her allegation. We therefore conclude that the claimant has not proved facts from which we could conclude the claimant was treated less favourably. There was no evidence as to how and why the claimant was treated worse than her comparator. The burden of proof has not shifted. As such this claim fails.

10.1.2 fail to provide the Claimant with assistance in producing materials for her presentations;

298. This was not addressed by the claimant in her witness statement. The further and better particulars asserted that Ms Spencer had been provided with "assistance in producing materials for her presentations". We do not know when this was said to have been. The claimant has not told the Tribunal when this treatment is alleged to have happened. She was last in work on 3 August 2020. It is therefore out of time unless the claimant can evidence it was part of conduct extending over a period.

299. The evidence before the Tribunal showed in our judgment that the claimant was provided with assistance in producing materials. There was a structured system in place for accessing course material and content which was on Leaning Central. For reasons that are unclear to this Tribunal the claimant frequently ignored or did not access or review the material (see paragraphs 88 and 177). Dr Pickering disputed generally that she had treated the claimant differently to Ms Spencer (paragraph 93). When materials were provided that had been used before and in agreement of the team, the claimant criticised the materials in front of students (paragraph 91).

300. The claimant has failed to prove this allegation and it is dismissed,

10.1.3 fail to enable the Claimant to write a book review and attend conferences;

Book review

301. This was not addressed by the claimant in her witness statement. The further and better particulars asserted that Ms Spencer had been "enabled to write a book review and attend conferences". We do not know what book review the claimant had wanted to write, when and why she says it was not permitted. We do not know what book review the comparator was said to have been enabled to write and when. The claimant has not told the Tribunal when this treatment is alleged to have happened. She was last in

work on 3 August 2020. It is therefore out of time unless the claimant can evidence it was part of conduct extending over a period.

302. The claimant has failed to prove this allegation and it is dismissed.

Attendance at conferences

303. This was not addressed by the claimant in her witness statement. The further and better particulars asserted that Ms Spencer had been "was further assisted by being enabled to attend conferences". We do not know what conferences the claimant says she was not assisted to attend or when she was not assisted. We do not know what conferences the claimant says the comparator was said to have been enabled to attend and when. We know Ms Spencer attended two conferences the same as the claimant from KJ's evidence. The claimant has not told the Tribunal when this treatment is alleged to have happened. She was last in work on 3 August 2020. It is therefore out of time unless the claimant can evidence it was part of conduct extending over a period.

304. We deal with the evidence before us regarding conferences at paragraphs 111 - 112 above. The claimant was provided with funding to attend a conference in 2019 which was in accordance with the respondent's policy of funding up to £1000, to attend one conference per year. She was also provided with study leave for a second conference. Therefore this does not support the claimant's allegations and in fact directly contradicts it.

305. The claimant has failed to prove this allegation and it is dismissed.

10.1.4 stripped roles that the Claimant had been working on from her

306. This was not addressed by the claimant in her witness statement. The further and better particulars asserted that roles the claimant had been working on were removed and passed to Ms Spencer. We do not know (according to the claimant) what these roles were and when they are alleged to have been passed to Ms Spencer. The claimant has not told the Tribunal when this treatment is alleged to have happened. She was last in work on 3 August 2020. It is therefore out of time unless the claimant can evidence it was part of conduct extending over a period.

307. We did hear evidence from the respondent, supported by documents in the bundle that confirmed the claimant did have roles removed from her. At her request in February 2019 she was removed from shadowing the module lead of the placement Team (see paragraph 110). This was at the claimant's requested so the role was not "stripped". There was no evidence it was then passed to Ms Spencer. In March 2020 she was removed as module lead (see paragraph 177) but this was due to performance concerns as was plainly evidenced by the contemporaneous documents before us. Therefore the less favourable treatment was not because of her race. It was also not then given to Ms Spencer but reverted to the previous module leader and Ms Morgan.

308. Both of these role removals are out of time unless the claimant can evidence they were part of a continuing act.

309. We have concluded the claimant has failed to prove this allegation and it is dismissed.

10.1.5 passed over the Claimant for opportunities to network at conferences or contribute to scholarly publications.

310. We have addressed our conclusions on this at paragraphs 301-305 above as it is the same complaint.

Victimisation - section 27 Equality Act 2010

311. The claimant relied upon the following protected acts:

12.1.1 On 19 November 2019, the Claimant sent in details of complaints of discrimination in the form of a detailed, informal grievance letter ("PA1"); and

12.2.3 On 21 August 2020, the Claimant filed a formal grievance complaining of racism and less favourable treatment ("PA2").

PA1

312. Our findings of fact regarding this communication are at paragraphs 146 - 149 above. This was a long letter and the claimant did not address in her evidence what specific parts of the letter she relied upon to qualify as a protected act nor which sub section of s27 (2) she says applied. The ET1 set out information about why this was said to have amounted to a protected act (see paragraph 148 above).

313. The claimant alleged that she had been subjected to "unwelcome sexual comments" (in reference to the allegation where Mr AB is alleged to have said "what the fuck are you doing"). She also asserted that she had been passed an offending comment regarding the way she dressed she did not look like a physiotherapist. This was described as a strong comment that offends her ethnic group. she also mentions harassment and bias.

314. It was not specified under which sub section of S27 (2) the claimant relied upon. We discount sub sections (a) and (b) as they clearly could not have applied. In our judgment, this did not amount to a protected act within the meaning of S27 (c) EQA 2010 as the claimant had not done anything "by reference or in connection to" the Act. She did not make any assertions that we could sensibly understand to have been by reference or in connection to the Act. The claimant did not lead any evidence or make any submissions as to why this was the case. Her pleaded claim (reference to a newly appointed white female") was erroneous as the grievance contained no such assertion.

315. In our judgment this was not a protected act under S27 (d) as it set out various allegations but it did not contain any words that could be construed as alleging there had been a contravention of the Act.

PA2

316. Our findings of fact regarding this communication are at paragraph 186 - 189 above. Whilst this communication alleged "direct discrimination", it did not identify a protected characteristic specifically or even indirectly. We consider, applying the decision in **Durrani,** that this was also a case where the claimant was complaining about discrimination in the sense of unfair treatment but not being subject to detrimental action upon the basis of a protected personal characteristic. This was clear in our judgment by not only the lack of reference to any protected characteristics but also the view expressed on more than one occasion that she did not know why she was being treated differently to Ms Spencer.

Conclusions on protected disclosures and victimisation detriments

317. Although we have decided that the claimant did not make qualifying disclosures or qualifying protected acts, as we have made findings of facts in respect of the alleged detriments we consider it proportionate to set out our conclusions about the causation factors in respect of the alleged detriments. Some detriments are pleaded in respect of both claims and where this is the case we specify this below in reference to the paragraphs number in the list of issues.

S47B detriment 1 (5.1.1)and victimsation detriment 2 (12.2.2)

318. This was an allegation that on 19 December 2019 Mr Paul Taylor said he did not like matters to be dealt with by external members outside Physiotherapy / Mr Paul Taylor criticised the claimant for pursuing her complaint. It is out of time.

319. Our findings of fact are at paragraph 155-156. We found Mr Paul Taylor did not make the comment alleged. This complaint therefore fails.

S47B detriment 2 (5.1.2) and victimisation claim 1 (12.2.1) - the claimant was placed on a PIP on 20 November 2019. Our findings of fact are at paragraphs 142 – 145.

320. This claim is out of time unless the claimant can show it was one of a series of acts or failures under S48 (3) ERA 1996 or it was not reasonably practicable to have presented the claim in time (detriment claim) or a series of conduct (S123(3) EQA). The claimant has not led any evidence as to why it would not have been reasonably practicable to present the claim within three months or why it would be just and equitable to extend time.

321. The claimant relied upon PD1 (10 January 2019 email regards the clinical placement team), PD2 and PA1 (informal grievance dated 19 November 2019) and PA1.

322. The protected disclosure relied upon can only have been the first protected disclosure as we found that KJ had already decided to place the claimant on a PIP by 6 November 2019 which was before PD2 and PA1 on 19 November 2019. As such, the decision cannot have been on the grounds of the informal grievance.

323. We go on to consider therefore whether the decision to place the claimant was a detriment. Whilst we acknowledge that PIP's can sometimes be viewed and intended to assist an employee improve their performance we consider it does amount to a detriment. We consider a reasonable employee would take the view that being placed on a PIP would be a disadvantage in which they had to work given the requirements to work towards objectives and the consequences of not doing so, which could result in dismissal.

324. However we conclude that the decision to place the claimant on a PIP was not on the grounds of the email sent on 10 January 2019. The clear and unassailable reason the claimant was placed on a PIP was due to the concerns about her performance well documented by KJ and set out above.

S47B detriment 3 (5.1.3) – unreasonable delay and dilatory investigation and prosecution of the claimant's grievance. Our findings of fact are at paragraphs 146-151, 154, 182-185, 186-190, 192, 193-195.

325. It was not clear whether this applied to the informal grievance or the formal grievance. We therefore deal with both.

326. The informal grievance was raised on 19 November 201. This detriment can only rely upon the first protected act which was the email of 10 January 2019.

327. Professor Boivin's report was completed on 3 August 2020 and communicated to the claimant on 13 August 2020.

328. This claim is out of time unless the claimant can show it was one of a series of acts or failures under S48 (3) ERA 1996 or it was not reasonably practicable to have presented the claim in time. The claimant has not led any evidence as to why it would not have been reasonably practicable to present the claim within three months.

329. Whilst we acknowledge that the remit of the investigation was extensive given the number of complaints raised by the claimant, we consider that a 9 month period to complete a grievance investigation would disadvantage the claimant. She was absent from work at that time initially on sick leave then on special leave and occupational health had recommended matters be resolved to enable a return to work. We also acknowledge that the period of time on which the investigation covered included the UK entering into the first lockdown due to the Covid 19 pandemic and all that that meant for normal work related matters.

330. However in our judgment the reason for the delay in investigating the claimant's informal grievance was not on the grounds of the email sent on

10 January 2019. There was absolutely no causal link between Professor Boivin's investigation, the time frame and that email. The reason for the delay, whilst unsatisfactory was the UCU strike, the breadth of the allegations and the Covid 19 pandemic.

331. Turning now to the formal grievance. The grievance had been initiated on 21 August 2020. Professor Riccardi's report was completed on 1 February 2021. The claimant was provided with a grievance outcome letter on 24 March 2021.

332. This claim is out of time unless the claimant can show it was one of a series of acts or failures under S48 (3) ERA 1996 or it was not reasonably practicable to have presented the claim in time. The claimant has not led any evidence as to why it would not have been reasonably practicable to present the claim within three months.

333. The formal grievance was raised on 21 August 2020. The allegation of a detriment in delay can only rely upon the first protected act which was the email of 10 January 2019 and the second protected act which was the informal grievance of 19 November 2019.

334. We reach the same conclusion as regards to detriment as above. There was a 7 month delay in investigating the formal grievance and we consider this would have put the claimant to a detriment for the same reasons as explained above.

335. In our judgment the reason for the delay in investigating the claimant's formal grievance was not on the grounds of the email sent on 10 January 2019 or the informal grievance. Again there was absolutely no causal link between Professor Riccardi's investigation, the time frame and those communications. This was not even put to the witnesses by the claimant. There was no evidence to suggest that communications materially influenced the respondent's treatment of the claimant in respect of the grievances. The reason for the delay was on this occasion the sheer breadth of the allegations.

<u>S47B detriment 4 (5.1.4) – on or around 30 September 2020 the unreasonable refusal to share with the claimant the full grievance report</u>

336. This claim is out of time unless the claimant can show it was one of a series of acts or failures under S48 (3) ERA 1996 or it was not reasonably practicable to have presented the claim in time. The claimant has not led any evidence as to why it would not have been reasonably practicable to present the claim within three months.

337. Our findings of fact are at paragraph 182. The respondent accepts it did not share the full report with the claimant. The claimant had not led any evidence as to how and why she considered she was subjected to a detriment by a failure to share the entire report as opposed to the summary. In these circumstances we have concluded that the claimant has not proven the detriment. Further we have concluded that the reason the respondent did not share the full report was as explained by Professor Whitaker and Ms Davies in that this was not the usual practice of the university when an

informal investigation has been instigated. We do not consider there to be any causal link between the refusal to share the report and the communications of the claimant she asserted were protected disclosures.

S47B detriment 5 (5.1.5) rejection of the formal and informal grievances

338. The informal grievance outcome was completed on 3 August 2020 and communicated to the claimant on 13 August 2020.

339. The formal grievance outcome was completed on 1 February 2021. The claimant was provided with a grievance outcome letter on 24 March 2021.

340. Both complaints are out of time unless the claimant can show it was one of a series of acts or failures under S48 (3) ERA 1996 or it was not reasonably practicable to have presented the claim in time. The claimant has not led any evidence as to why it would not have been reasonably practicable to present the claim within three months.

341. Rejection of a grievance amounts to a detriment in our judgment.

342. We conclude that the rejection of both grievances was based on an assessment of detailed investigations that concluded the claimant's grievances were not substantiated and neither decision was in any way on the grounds of the claimant's communications relied upon as protected disclosures.

S47B detriment 6 (5.1.6) – that on or around 3 August 2020 the decision that the claimant failed her probation

343. There was an issue with this detriment as the claimant had not failed her probation on this date but she had been advised she had failed her PIP (see paragraph 179-180).

344. This claim is out of time unless the claimant can show it was one of a series of acts or failures under S48 (3) ERA 1996 or it was not reasonably practicable to have presented the claim in time. The claimant has not led any evidence as to why it would not have been reasonably practicable to present the claim within three months.

345. The claimant can only have relied upon the first and second protected disclosures as they pre dated this alleged detriment.

346. Failing a PIP would amount to a detriment given the potential consequences to an employee.

347. We have concluded that KJ did not decide the claimant failed her PIP on the grounds of the communications she relied upon as protected disclosures. The reason was that the claimant had not met the performance objectives she had been set and KJ did not consider there was any prospect of her doing so. See our conclusions at paragraphs 288-289 above. This complaint therefore fails.

S47B detriment claim 7 (5.1.7) the decision not to permit the claimant to work her notice period following her dismissal.

348. This decision was communicated by Professor Innes in her letter dated 9 August 2021. This was not addressed by the claimant in her witness statement. When asked about this under cross examination she says she could have contributed to the university. We respectfully reject this suggestion given the breakdown in the relationships between the claimant and her colleagues and the performance issues for which she was dismissed. The claimant has not established a detriment. We conclude that the reasons she was not permitted to work her notice period were wholly unrelated to the communications she relied upon as protected disclosures but for the reasons we set out in the sentence above.

S47B detriment claim 8 (5.1.8) non payment of pay in lieu of notice

349. This claim was misconceived as the claimant was paid three months' notice pay.

Remaining victimisation detriments

12.2.3 on 3 August 2021 the claimant was advised she had failed probation

350. Our findings of fact are at 197, 198, 202 – 206. The decision was communicated on 10 August 2021. Failing probation resulted in dismissal which was a clear detriment. The reason the claimant failed her probation was due to performance issues which we have addressed extensively above

12.2.4 From the 9 August 2021 dismissal decision onwards, there was no consideration given to redeploying the Claimant to another role that was vacant at the time of the Claimant's dismissal.

351. We have already dealt with the reasons redeployment was not considered and repeat our conclusions above. It was in no way because she had raised complaints in her communications relied upon as protected acts.

12.2.5 Paul Whittaker sent a fitness to practice report to the HCPC.

352. This complaint (and 12.2.6, 12.2.8 and 12.2.9 below) had been advanced by an amendment application dated 8 August 2022, permitted on 24 November 2022. The amendment decision did not specify whether this was subject to time limits. However we do not consider it necessary to address the time issues as we have found the protected acts relied upon were not protected acts. We further conclude that the reason the claimant was reported to the HCPC was not because of her alleged protected acts but because Professor Whitaker was required to do so under HCPC guidance (see paragraphs 213 – 216 above). Indeed Professor Whitaker was some what reluctant to report the claimant but considered he had no choice given the guidance and the risk to the university had he not sone so. This complaint therefore fails.

12.2.6 Fail to provide the Claimant with her personal property following her termination

353. Our finds of fact are at paragraph 217 above. We found that the respondent had sent the claimant her personal property. The reason it did not reach the claimant was that she had moved address and not told the respondent so it was sent to the wrong address. It was nothing to do with her alleged protected acts. This complaint therefore fails.

12.2.7 Fail to take action over the Claimant's probation appeal

354. The Tribunal did not understand what were the alleged failures. Again there was no evidence from the claimant regarding any alleged failures or how and why the decision not to uphold her appeal was because of alleged protected acts. Our findings of fact are at paragraph 205. The claimant failed to put this claim to Professor Khaliq instead extensively focusing on fast track probation. This complaint fails.

12.2.8 The nature and timing of the Respondent's provision of information to the HCPC in a retaliatory manner

355. We repeat our conclusions at paragraph 352. Further the reasons for the timing of the provision of the information was also due to the need to redact information so as to not identify students.

12.2.9 Unlawfully refuse to disclose to the Claimant the nature of the referral

356. There was no evidence led by the claimant as to why a refusal to disclose the nature of the referral was unlawful other than what she told the Tribunal under cross examination, that it was a breach of data protection. There was nothing in the HCPC guidance that suggested that a referral had to be disclosed to the subject of the referral and to not do so would be unlawful. We have concluded that this complaint is not proven and without foundation.

357. For all of the above reasons, the claimant's claims fail and are dismissed.

Employment Judge S Moore
Date: 6 June 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 7 June 2023

FOR EMPLOYMENT TRIBUNALS Mr N Roche

APPENDIX 2

The agreed List of Issues to be determined at the final hearing – Liability Issues
at the listed hearing in March 2023, the Remedy Issues at a subsequent Remedy
Hearing if appropriate.
IN THE WALES EMPLOYMENT TRIBUNAL
CASE NUMBER: 1601704/2021
BETWEEN:
MS S D PERUMAL
Claimant
V
CARDIFF UNIVERSITY
Respondent

AGREED & FINAL LIST OF ISSUES
24.02.23

The issues the Tribunal will decide are set out below.

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 26 July 2021 may not have been brought in time.
1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
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1.2.3 If so, was the claim made to the Tribunal within three months
(plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the
Tribunal thinks is just and equitable? The Tribunal will decide:
1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?
1.3 Was the detriment complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:
1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?
1.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. **Unfair dismissal – s.103A ERA 1996 and/or s94/98 ERA 1996**

2.1 Was the Claimant dismissed?
2.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal?
2.2.1 Was the reason or principal reason for dismissal that the
Claimant made a protected disclosure?
If so, the Claimant will be regarded as unfairly dismissed
2.3 The Respondent says the reason was capability (poor performance).
2.4 If the reason was capability, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

2.4.1 The Respondent genuinely believed the Claimant was no longer capable of performing their duties;
2.4.2 The Respondent adequately consulted the Claimant;
2.4.3 The Respondent carried out a reasonable investigation; and
2.4.4 Whether the Respondent could reasonably be expected to provide the Claimant with a further opportunity to improve.
2.5 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

3. **Remedy for unfair dismissal – DEFER TO REMEDY HEARING, IF ONE IS APPROPRIATE**

3.1 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?
3.2 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.
3.3 If re-engagement is ordered, what should the terms of the reengagement order be?
3.4 If there is a compensatory award, how much should it be? The Tribunal will decide:
3.4.1 What financial losses has the dismissal caused the Claimant?
3.4.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
3.4.3 If not, for what period of loss should the Claimant be compensated?
3.4.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
3.4.5 If so, should the Claimant's compensation be reduced? By how much?
3.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance

Procedures apply?
3.4.7 Did the Respondent or the Claimant unreasonably fail to comply with the ACAS Code of Practice?

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3.4.8 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
3.4.9 If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
3.4.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
3.4.11 Does the statutory cap of fifty-two weeks' pay or £89,493 apply?
3.5 What basic award is payable to the Claimant, if any?
3.5 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

4. Protected disclosure – s.43B ERA 1996

4.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:
4.1.1 What did the Claimant say or write? When? To whom? The Claimant says s/he made disclosures on these occasions (N.B: any further alleged disclosures can only be considered following a successful application for amendment by the claimant):
4.1.1.1 10 January 2019 - the Claimant emailed GPT raising her concerns about the lack of systemic organisational standards and protocol, unprofessional behaviours (including bullying), and lack of management support
4.1.1.2 19 November 2019 - the Claimant sent in details of her complaints about unprofessional behaviour (including bullying) in the form of a detailed, informal grievance letter
4.1.1.3 21 August 2020 - the Claimant filed a formal grievance
4.1.2 Did she disclose information?
4.1.3 Did she believe the disclosure of information was made in the public interest?
4.1.4 Was that belief reasonable?

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4.1.5 Did she believe it tended to show that:
4.1.5.1 the health or safety of any individual had been, was being or was likely to be endangered;
4.1.5.2 a miscarriage of justice had occurred, was occurring or was likely to occur; and
4.1.5.3 a person or persons had failed, was failing or was likely to fail to comply with any legal obligation.
4.1.6 Was that belief reasonable?
4.2 If the Claimant made a qualifying disclosure, it was a protected disclosure because it was made to the Claimant's

employer.

5. Detriment - section 47B Employment Rights Act 1996

5.1 Did the Respondent subject the Claimant to the following detriments:
5.1.1 On 19 December 2019, Mr Paul-Taylor stated he did not like matters to be dealt with by external members outside Physiotherapy;
5.1.2 On 20 November 2019, the Claimant was placed on a Performance Improvement Plan;
5.1.3 Unreasonable delay and dilatory investigation and prosecution of the Claimant's grievance;
5.1.4 On or around 30 September 2020 the unreasonable refusal to share with the Claimant the full grievance report;
5.1.5 The rejection of both her formal and informal grievances;
5.1.6 On or around 3 August 2020 the decision being made that the Claimant had failed her probation; and
5.1.7 The decision not to permit the Claimant to work her notice period following notice of her dismissal.
5.1.8 Non-payment of pay in lieu of notice.
5.2 By doing so, did it subject the Claimant to detriment?

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5.3 If so, was it done on the ground that s/he made a protected disclosure?

6. Remedy for Protected Disclosure Detriment - DEFER TO REMEDY HEARING, IF ONE IS APPROPRIATE

6.1 What financial losses has the detrimental treatment caused the Claimant?
6.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
6.3 If not, for what period of loss should the Claimant be compensated?
6.4 What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?
6.5 Has the detrimental treatment caused the Claimant personal injury and how much compensation should be awarded for that?
6.6 Is it just and equitable to award the Claimant other compensation?
6.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
6.8 Did the Respondent or the Claimant unreasonably fail to comply with it?
6.9 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
6.10 Did the Claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the Claimant's compensation? By what proportion?
6.11 Was the protected disclosure made in good faith?
6.12 If not, is it just and equitable to reduce the Claimant's compensation?
By what proportion, up to 25%?

7. Wrongful dismissal / Notice pay

7.1 What was the Claimant's notice period?
7.2 Was the Claimant paid for that notice period?

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7.3 If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

8. Disability – s.6 EqA 2010

8.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:
8.1.1 Did she have a physical or mental impairment, namely migraines, insomnia, depression, PTSD and/or anxiety?
8.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
8.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
8.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
8.1.5 Were the effects of the impairment long-term? The Tribunal will decide:
8.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
8.1.5.2 if not, were they likely to recur?

9. Direct marriage discrimination - section 13 Equality Act 2010

9.1 Did the Respondent decline to give the Claimant an admission tutor role and ask her "how will you manage your childcare on Saturdays"?
9.2 Was that less favourable treatment?
The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.
If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.
The Claimant says s/he was treated worse than a Welsh candidate who had no children.

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9.3 If so, was it because of marital status?

10. Direct race discrimination - section 13 Equality Act 2010

10.1 Did the Respondent do the following things (where the claimant has referred in F&BPs to 2 part-time contracts but has not alleged that her contractual status was discriminatory and she may wish to amend her claim, and where she has categorized bullying by more than person as "mobbing" but makes no discrete claim of "mobbing"):
10.1.1 fail to provide the Claimant with discussions of ways to lighten her work load;
10.1.2 fail to provide the Claimant with assistance in producing materials for her presentations;
10.1.3 fail to enable the Claimant to write a book review and attend

conferences;
10.1.4 stripped roles that the Claimant had been working on from her; and
10.1.5 passed over the Claimant for opportunities to network at conferences or contribute to scholarly publications.
10.2 Was that less favourable treatment?
The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.
If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.
The Claimant says she was treated worse than Ms Holly Spencer.
10.3 If so, was it because the Claimant is of Indian-Asian ethnicity and Irish nationality?

11. Reasonable Adjustments - sections 20 & 21 Equality Act 2010

11.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

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11.2 A "PCP" is a provision, criterion or practice. Did the Respondent apply the following PCP of requiring the Claimant to carry out her contractual duties in an ongoing discriminatory practice.
11.3 Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?
11.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?
11.5 What steps could have been taken to avoid the disadvantage?
The Claimant suggests that relevant measures that the Respondent could action were identified in the 28-29 May 2020 stress risk assessment,
11.6 Did the Respondent take such steps as it was reasonable to have taken to avoid the disadvantage caused by the PCP?

12. Victimisation - section 27 Equality Act 2010

12.1 Did the Claimant do a protected act as follows:
12.1.1 On 19 November 2019, the Claimant sent in details of complaints of discrimination in the form of a detailed, informal grievance letter; and
12.2.3 On 21 August 2020, the Claimant filed a formal grievance complaining of racism and less favourable treatment.
12.2 Did the Respondent do the following things:
12.2.1 On 20 November 2019, the Claimant was placed on a Performance Improvement Plan.
12.2.2 On 19 December 2019, the Claimant had been criticised by Graeme Paul Taylor for pursuing her complaint.
12.2.3 On 3 August 2021, the Claimant was advised she had failed probation.
12.2.4 From the 9 August 2021 dismissal decision onwards, there was no consideration given to redeploying the Claimant to another role that was vacant at the time of the Claimant's

dismissal.
12.2.5 Paul Whittaker sent a fitness to practice report to the HCPC.
12.2.6 Fail to provide the Claimant with her personal property following her termination;

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12.2.7 Fail to take action over the Claimant's probation appeal
12.2.8 The nature and timing of the Respondent's provision of information to the HCPC in a retaliatory manner.
12.2.9 Unlawfully refuse to disclose to the Claimant the nature of the referral.
12.3 By doing so, did it subject the Claimant to detriment?
12.4 If so, was it because the Claimant did a protected act?
12.5 Was it because the Respondent believed the Claimant had done, or might do, a protected act?

13. **Remedy for discrimination or victimisation - DEFER TO REMEDY HEARING, IF ONE IS APPROPRIATE**

13.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?
13.2 What financial losses has the discrimination caused the Claimant?
13.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
13.4 If not, for what period of loss should the Claimant be compensated?
13.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
13.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?
13.7 Is there a chance that the Claimant's employment would have ended in
any event? Should their compensation be reduced as a result?
13.8 Did the ACAS Code of Practice on Disciplinary and Grievance
Procedures apply?
13.9 Did the Respondent or the Claimant unreasonably fail to comply with it?
13.10 If so is it just and equitable to increase or decrease any award payable to the Claimant?

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13.11 By what proportion, up to 25%?
13.12 Should interest be awarded? How much?