Case No: 1400283/2018
1400615/2019
1403339/2019

EMPLOYMENT TRIBUNALS

Claimant: Simwinji Zeko

Respondents: (1) The University of the West of England
(2) Peter Clegg
(3) Sean Watson
(4) Steven Neill
(5) Shay Dare
(6) Steven West
(7) Jane Harrington
(8) Alison McIver
(9) Sally Moyle
(10) Judith Thorne

Heard at: Bristol Civic Justice Centre

On: 15, 16, 17, 18, 19, 22, 23, 24, 25 May 2023

Before: Employment Judge S Moore
Ms Y Neves
Ms G Rees

Representation
Claimant: In person
Respondent: Mr D Mitchell, Counsel

JUDGMENT having been sent to the parties on 12 June 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Introduction

1. The Claimant brought three claims against multiple Respondents. The remaining Respondents are set out above. Where we refer to the

Respondent in these reasons, we are referring to the first Respondent.

2. We have set out a schedule of the relevant early conciliation certificates in Appendix A. The first claim (1400283/2018) was presented on 21 January 2018. The second claim (1400615/2019) was presented on 22 February 2019. The third claim (1403339/2019) was presented on 5 August 2019 and contained an application for interim relief (thus explaining why there are no EC certificates for some of the individual Respondents).

3. The Tribunal consisted of a Judge and non legal members from the Wales region who travelled to hear the claim in the South West region. This external Tribunal panel was assigned to hear the case following the appointment of a former Respondent and employee of the first Respondent as a non legal member in the South West region.

Reasonable adjustments

4. On 10 May 2023 the Claimant emailed the Tribunal to request reasonable adjustments. He explained he experiences visual impairment and strong white light which when combined with looking at computer monitors could result in eye strain. He also requested reasonable adjustments for his witness, Dr van den Anker but did not explain what was required.

5. Reasonable adjustments were discussed at the outset of the hearing (advance notification of what adjustments were required had been requested by the Tribunal). Both the Claimant and his witness (Dr van den Anker) required regular breaks. Dr van den Anker remained for the duration of the hearing apart from one afternoon. It was agreed these would be every 1.5 hours and if additional breaks were needed they would be provided. No other adjustments were raised with the Tribunal at that stage but when Dr van den Anker came to give her evidence the Tribunal was told of further adjustments that were required that necessitated a short adjournment to make the appropriate arrangements. These were assistance with the table and document layout, assistance to turn pages in the bundles and move the bundles and time to read the bundle and to add documents to the bundle. All of these were permitted save the last request as this was not a request for a reasonable adjustment but a request to add documents that had not been disclosed to the agreed bundles.

Preliminary hearings, claims and issues

6. There have been nine preliminary hearings prior to the final hearing. A number of claims have been struck out (claims and claims against some of the named Respondents) and a number of claims have had deposit orders made.

7. The hearing was listed as liability only. The first day was a reading day. On the second morning (16 May 2023) the Tribunal discussed with the parties the claims and issues to be determined at the hearing using the issues listed in the Preliminary Hearing Order of Judge Midgely dated 3 and 4 March

2020. These were agreed as set out in attached Appendix B and were derived from the list of issues from that order and the Claimant's subsequent further and better particulars dated 18 March 2020. The claims were:

i. Unfair Dismissal (S98 Employment Rights Act 1996 ("ERA 1996");
ii. Automatic unfair dismissal (s.103A and s104 ERA 1996);
iii. Direct discrimination on grounds of race, sex and associative direct discrimination on the grounds of association with a person with a disability(S13 Equality Act 2010 ("EQA 2010"):
iv. Harassment on grounds of race, sex, or Dr Van den Anker's disability (S26 EQA 2010;
v. Detriments contrary to Regulation 6 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("FTC Regulations") and ;
vi. Breach of Regulation 8 of the FTC Regulations (the Respondent's refusal to employ the Claimant under a permanent contract).

Documents and witnesses

8. There were two bundles before the Tribunal. The Respondent's bundle was 730 pages long and contained some redactions due to third party personal data and matters relating to Dr van den Anker's ongoing Tribunal proceedings. The Claimant had given permission to rely on a supplementary bundle amounting to 294 pages. Some of the redacted documents appeared in his bundle in unredacted versions. The Respondent initially objected to the admission of the supplementary bundle on the basis it contained documents that were either a duplication of existing evidence in the hearing bundle, or otherwise irrelevant to the issues for determination in the case for example there were a large number of documents relating to senior staff expenses. This was not pursued after an indication from the Tribunal that we would assess the relevance of the documents during the hearing and our deliberations.

9. On 11 May 2023 the Respondent had submitted a timetable to the Tribunal which suggested the Respondent's witnesses would give their evidence first. The Claimant opposed this citing Judge Midgely's order of 4 March 2020 which specified that the Claimant would give his evidence first. The Tribunal directed that the Claimant would give his evidence first and an amended timetable was subsequently agreed with the parties.

10. The Claimant had exchanged four witness statements. On the second day the Claimant informed the Tribunal that one of his witnesses, Ms L Yousiff Dafa'Alla resided in France and wanted to give evidence by video. He had not previously informed the Tribunal as he had only recently become aware that she was not intending to travel back to the UK to give her evidence in person. The process for obtaining permission for this witness to give evidence from abroad was explained to the Claimant. It was subsequently agreed that this witness would be interposed during the Respondent's witnesses to accommodate her travel arrangements. Mr Mitchell informed the Tribunal and the Claimant that he had no questions for this witness. The

Tribunal also had no questions for this witness, whose witness statement concerned her own dispute with the Respondent and other than to give background information about a dispute in 2018 between this witness and another lecturer it was not relevant to the Claimant's claims. This was all explained to the Claimant. The Claimant considered that it was unfair that Mr Mitchell was not asking the witness any questions and suggested this amounted to gagging his witness and it would deny the witness the right to testify. It was explained that the Respondent was not obliged to ask the witness questions, the Tribunal was not denying the witness the opportunity to give evidence and that her witness statement was admitted but as there were no questions for the witness if she came in person she would be sworn in and then released. As she was coming from France this was a significant undertaking given the absence of questions. The Claimant decided that he still wanted to call this witness in person and was permitted to do so. He was also given the opportunity to ask permission to file a supplementary statement for this witness as he suggested he had wanted to ask her further questions after cross examination. The Claimant did not make an application for the witness to add to her evidence exchanged and did not seek to ask any further questions when she was called.

The witnesses were:

Claimant:

In person and questioned:

- Claimant
- Dr Van den Anker
- Ms L Youssiff Dafa'Alla

A witness statement was admitted for Joanna Richards but she did not attend. Ms Richard's witness statement was a narrative about her own personal circumstances did not contain any evidence relevant to the Claimant's claims and we attach no weight to it.

Respondents:

- Dr S Watson;
- Ms H Spilsbury;
- Professor P Clegg;
- Dr S Moyle;
- Ms J Thorne;
- Ms S Dare;
- Professor J Harrington;
- Ms A McIver;
- Professor S Neill

11. As part of the ongoing timetable discussions throughout the hearing, it had been agreed that Professor West (R6) would be giving evidence at 2pm on 22 May 2023. On the morning of 22 May 2023, at the start of the hearing, Mr Mitchell informed the Tribunal that Professor West needed to leave as soon as possible for private but very serious family reasons. These were

explained but are not necessary to repeat in these written reasons other to say they were compelling and grave. Mr Mitchell asked if Professor West could therefore give evidence first and then leave. The Claimant was not prepared to cross examine Professor West even though he was due to give evidence at 2pm and wanted at least one hour to prepare. The Claimant was asked when he had intended to prepare for this witness given he was due to give evidence at 2pm in any event but no satisfactory answer was provided leading us to conclude the intention must have been to prepare at lunchtime as this was the only time available for the hour the Claimant said he needed to prepare for this witness.

12. After hearing the Claimant's position Mr Mitchell informed the Tribunal they would not call Professor West so he could be released to attend his family emergency. The Respondent confirmed they were content to rely on his statement being admitted with the risk that no weight was attached to it as the Claimant would not have the opportunity to cross examine the witness.

13. The following day the Claimant expressed surprise that Professor West was not returning to give evidence. The Tribunal had explained the above position to the Claimant the previous day and that it was a matter for the Respondent if they chose not to call a witness. The only exception would be where a party considered it was necessary for someone to give evidence and request a witness order. No witness order was requested and if it had been this would have been refused. Professor West was only being called as he had been named a Respondent in the proceedings despite having no involvement whatsoever in the Claimant's claims.

Other issues arising during the hearing

14. On 19 May 2023 there was a fire alarm and the building was evacuated. This occurred between 11.10am with the hearing restarting at 11.55am.

15. As the Claimant was a litigant in person, he did not have a representative to deal with re examination after cross examination of his evidence. Time was given to the Claimant to think about any matters he might want to revisit himself arising from cross examination. After a break the Claimant said he wanted to revisit a number of matters but would do so in cross examination of the Claimant's witnesses. It was explained it would be better to raise these matters as new evidence could not be put to witnesses during cross examination but the Claimant was content he had raised what he needed to.

Application for specific disclosure

16. On 22 May 2023 the Claimant raised that he had an outstanding application for specific disclosure. He was not able to say when it had been sent or what was the subject matter. The Claimant was asked to resubmit the application in writing and it would be addressed. On 23 May 2023 the Claimant advised that it had been sent on 3 February 2023 and followed up on 11 May 2023 but he had not re-sent it as had been requested. The Claimant subsequently forwarded two letters at 12.02 attaching an application dated 19 January

2023 and follow up letter dated 11 May 2023.

17. The application was for the following disclosure:

a. A copy of a recording that was referenced in an investigation report by Dr Watson in October 2016 (this was said to be a recording of Dr Watson's meeting with the female students who made a complaint about a lecturer see below). The Respondent's position was that that a search had been undertaken for this recording and it could not be found. This had been Dr Watson's evidence earlier in the course of the hearing.

b. Emails between Ms Thorne and M/s Eversheds who were the Respondent's solicitors. This request had been refused by the Respondent on the basis that emails sent from Judith Thorne to Eversheds-Sutherland International LLP were for the purpose of seeking legal advice and as such are protected by legal privilege and are therefore not disclosable.

18. The Claimant disputed this on the basis that an email to let Eversheds know of impending dates to avoid over an eight month period was not seeking legal advice and Ms Thorne was not a Respondent in the Claimant's claims.

19. The Claimant also sought:

a. The disclosure of the engagement letter between UWE and Eversheds to the extent that it defines and documents, who the client is, disclosure of any internal UWE protocols that define and document who the client is, disclosure of the dates and times of emails sent by Judith Thorne to Eversheds Sutherland International LLP between 04 June 2019 and 31 July 2019, dates and times of emails sent by Eversheds Sutherland International LLP to Judith Thorne between 04 June 2019 and 31 July 2019.

b. Critical Log list: the memoranda attached to the process and decisions made that placed the Claimant on the critical log list.

20. The Tribunal refused the application.

21. With regards to the audio recording. The Tribunal had agreed to hear evidence around the student complaints on the basis it may be relevant as background or in regard to inferences (see below) but we considered that the content of that audio was highly unlikely to be of relevance to the claims and issues. Further, Dr Watson had told the Tribunal when giving evidence that whilst there had been a recording made (not by him) but by a colleague on her Ipad, by the time a request came for the recording it no longer existed. The Tribunal cannot make an order to disclose something that no longer exists.

22. With regards to the request for the documents between Ms Thorne and the Respondent's solicitors, this was refused as the Claimant was seeking disclosure of documents covered by legal professional privilege. The Claimant appeared to be under a misapprehension that as Ms Thorne was

not a Respondent to these proceedings that communications between her and the lawyers was not covered by privilege. Ms Thorne was acting on behalf of the Respondent whilst liaising with the lawyers in her capacity as an HR advisor.

23. With regards to the critical log list the Claimant had not set out why this would be relevant to the claims and issues.

Breach of contract claim

24. After the list of claims and issues were agreed, the Claimant subsequently informed the Tribunal that he had brought a breach of contract claim and this had not been included in the discussions. The basis of this claim was very unclear and the Claimant was directed to address this issue in writing with reference to earlier correspondence he was referring to. On 17 May 2023 the Claimant told the Tribunal he had raised the issue about an outstanding breach of contract claim in an email dated 7 November 2022. It was established that this had been addressed by Judge Cadney at the preliminary hearing on 16 December 2022. His order recorded as follows:

"The Claimant applied by a letter dated 7 November 2022 to amend claim 1403339/2019 to include a claim for breach of contract. The Claimant has confirmed that it is a claim for unpaid salary for 1 – 31 July 2018 and is in effect a repeat of an earlier application to amend 1400283/2018 on 9 July 2019 in respect of the same loss.

In the event it has not been necessary to determine the application as the Claimant stated that this is not an application to add a new freestanding head of claim, but was in fact as loss he contends was occasioned by the matters covered in his existing claims. If and the extent that he succeeds in liability in respect of any claim revenant to this loss he will be seeking compensation for the loss of earnings as part of his remedy."

25. A copy of this order was provided to the Claimant and the Tribunal's decision was that there was no breach of contract claim before us for the reasons set out in Judge Cadney's order.

Findings of fact

26. The Tribunal was referred to a number of historical disputes that did not form part of the Claimant's claim but we were invited to consider the evidence by the Claimant who maintained it was relevant as background and as an indication of the overall culture within the first Respondent. We address these matters below. We have not made findings on all evidence before us only that which we consider to have been relevant to the claims and issues.

27. The Claimant identifies as Black African male.

28. The Claimant commenced employment on 10 June 2013 on a TSU contract (TSU is an abbreviation of the Temporary Staffing Unit). This is a unit within the Respondent that normally oversees the engagement and employment of short term staff. He was employed as a TSU Admin Assistant Support Worker for Dr van den Anker who was a Professor within the School of Social Sciences. Dr Van den Anker has early onset Parkinson's disease. It is accepted that she is a disabled person within the meaning of the Equality Act 2010.

29. The Claimant was employed on a "Grade D position". The hourly rate of pay upon appointment was £10.46 and the hours were specified "as agreed with line manager". The TSU contract specified that Dr van den Anker was the Claimant's Line Manager. At this time, the Claimant was required to complete timesheets in order to be paid. These had to be signed by an authorised signatory. Dr van den Anker was not an authorised signatory. The timesheets were signed by Dr Watson, Professor Clegg, Dr Moyle and other more senior members of the department.

30. The Respondent's fixed term contract policy provided that TSU contracts would normally be for a maximum period of nine months. In respect of fixed term contracts it provided that it such a contract had to be justified by necessary transparent and objective reasons and it would be for a maximum period of normally two years.

31. Thereafter the Claimant's TSU contract was extended on a frequent basis for short term periods.

32. Whilst having to obtain signatories for his timesheets, the Claimant experienced issues in getting them signed. On some occasions he had to travel to different campus for signature and payments to him were missed causing him financial hardship.

33. On 26 March 2015 Dr Watson (who was Dr van den Anker's line manager) was advised by a Mr M Foster (who was in charge of the TSU) that the Claimant should be on a fixed term contract as this would avoid problems with the salary and timesheet signatories. Dr Watson replied authorising an extension of the TSU contract and stated that he was "perfectly happy" for the Claimant to be moved to a fixed term contract but explained the situation was complicated as the post was funded by Access to Work. Access to Work funding is provided by the Department of Work and Pensions to support disabled employees to remain in the workplace, either through the provision of equipment or support workers.

Access to Work

34. We had regard to a flow chart before us of the Respondent's explaining the Access to Work process in the bundle. The flow chart demonstrated that the initial application process was employee led; the employee must apply for the funding. The next stage involved the Line Manager or HR at the point where equipment was to be purchased and/or adjustments to be made. The

Line Manager and HR would arrange to claim back the cost of Access to Work through the faculty or service finance team.

35. Access to Work had agreed to fund a support worker for Dr van den Anker. On 28 March 2013 a letter was sent to the Respondent. It specified the funding was for between 14-21 hours a week and would be in place until 20 March 2015. Access to Work informed the Respondent that they would be required to sign the declaration on the claim form to confirm days of work. Claims made more than six months ago may lead to the claim being refused. Dr van den Anker first of all had to sign the claim forms, then it had to go to the employer for an authorised signatory and then on to Access to Work.

36. For reasons that remain unclear to this Tribunal but are not relevant to these proceedings no claims were ever made[1] to Access to Work throughout the duration of Dr van den Anker's funded period. This meant that the First Respondent fully funded the Claimant's salary and associated employment costs throughout the duration of his employment.

Claimant's contract status – July 2015 onwards

37. In July 2015 Mr Foster contacted Dr Watson and Dr van den Anker again raising the issue of the Claimant's TSU contract status. In September 2015 Dr van den Anker raised that she wanted to apply for further support hours from 21 to 36. Dr Watson referred the request to the Respondent's charity partner Action on Disability and Work UK ("ADWUK"), who provided advice to the Respondent to enable support for disabled employees. Dr van den Anker spoke to Access to Work and there was a discussion about her wanting to apply for more hours. Dr Watson explained to Dr van den Anker that ADWUK had advised they should await their report before applying for increased funding. There was an initial report provided in September 2015 in which ADWUK recommended that a staged approach be taken to apply for the extra hours funding and a follow up meeting was to be arranged.

38. This meeting took place in December 2015. By this time the Respondent had learnt that no claims had been made from the 2013 Access to Work funding to fund the Claimant's support worker hours. Both Dr Watson and Ms Spilsbury's witness statements referred the Tribunal to a job description they said applied to the Claimant in the context of these failures to claim funding.

39. We found that the said job description referenced by these witnesses was the Claimants job description as it stated the job post was to provide support for a member of staff with Parkinson disease which must have been a reference to Dr Van den Anker. It was not clear to the Tribunal when or how this had ever been issued to the Claimant but it had not been part of the Claimant's case that he had not been issued with it. It stated as (as one of the main duties and responsibilities) the job holder was required to assist with Access to Work administration especially in accessing large files of information and organising around completing of forms.

[1] Subject to below see paragraph 52

40. Dr van den Anker was asked to contact Access to Work about funding and she forwarded an email to Dr Watson on 10 December 2015 which confirmed that almost £22,000 had been unclaimed and commented that this *"illustrated how much can be lost if there is no system.*"

41. In January 2016 Dr van den Anker was being assisted by ADWUK.

Hostile stares, glares and disdain (harassment claims)

42. We turn now to an allegation that is relied upon for the Claimant's harassment claim. It is alleged that in "Spring 2016" Dr Watson gave Dr van den Anker hostile glares, stares, and looks of distain on at least three occasions. Dr Watson wholly denied doing so in his witness statement. Dr van den Anker did not deal with this in her witness statement nor did the Claimant. It was not in the Claimants later letter before action[2] even though he raised other issues in respect of Dr Watson in that letter. The Claimant did not mention it when he was later interviewed as part of a grievance investigation that Dr van den Anker had brought telling the investigator Nicola Hartland that he had never witnessed any harassment or bullying of Dr van den Anker by Dr Watson[3]. For these reasons we prefer Dr Watson's evidence and we find that he did not give Dr van den Anker hostile glares, stares, and distain in Spring 2016.

Events in 2016

43. We turn to other events at that time. Discussions had been ongoing between Dr Watson and Dr van den Anker regarding the support worker activities and it was evident from an email we saw in the bundle that Dr Watson understood that Dr van den Anker was making an application for an academic support worker. On 24 May 2016 Dr Watson emailed Dr van den Anker asking her to proceed with the Access to Work application, he stressed the importance of it and Dr van den Anker acknowledged the email saying it (his instruction) was very clear. On 10 May 2016 HR sent an email to Dr van den Anker to advise that the Claimant's contract was due to expire on 30 June 2016 and that they were not prepared to renew the TSU contract any further. Dr van den Anker was asked to submit a request for the fixed term contract as soon as possible. Dr van den Anker was chased on 24 June 2016 by Mr Foster who requested confirmation that she had submitted the application to Access to Work.

44. On 1 July 2016 Dr van den Anker emailed Dr Watson and Helen Spilsbury to say that she was unwell and she had not submitted the Access to Work application. She asked them to extend the Claimant's contract (which had expired the day before) and said that she had found someone, (not the Claimant) to help with organisation and sought permission to employ this individual. Ms Spilsbury replied that same morning, she offered to help look at the draft Access to Work application. She also stated that given that Dr

[2] See paragraph 80-86 below
[3] See paragraph 94 below

van den Anker's support was being reviewed it did not make sense to move the Claimant onto a fixed contract at that stage. We find this was a reasonable position to have taken. The Access to Work application had not even been submitted let alone approved and Dr van den Anker herself was requesting permission to employ someone else to do a different role in addition to the Claimant.

45. It was agreed to extend the Claimants TSU contract until the end of August 2016. By 4 July 2016 Helen Spilsbury discovered that there had been no Access to Work funding in place since the expiry of the funding at the end of March 2015 and reported as much to Dr Moyle (also that no claims had ever been made from the previous funding in any event). She also learned that Dr van den Anker had been given a deadline by Access to Work of 24 June 2016 to apply for funding but had not done so. We make no findings as the reasons as they are not relevant to this proceedings. Dr Moyle nonetheless approved a contract extension for the Claimant notwithstanding discovering that there was no funding in place.

46. The communications with Access to Work around that time became somewhat confused. Access to Work took the view that as no claims had been made under the funding that had been provided between 2013 and 2015 that the Respondent had been funding support worker and under their guidance this meant that they would not help where an employer has been giving support to an employee and withdraws it for what they referred to as a "money saving strategy".

47. Ms Spilsbury sought advice from WECIL who were the organisation that followed ADWUK. The Respondent was advised that they should not try and claim retrospective payments, they should not agree to fund the extra 15 hours as it would be likely to jeopardise the funding previously granted (21 hours). Further that claiming the Access to Work claims should be part of the support worker role and that someone in HR and finance should then be responsible for checking these claims. They also explained that Access to Work would only provide the funding if the support worker was doing less than 20% of the supported employee's role and recommended that Dr van den Anker had a full reassessment.

48. Access to Work then issued a letter confirming they would fund 21 hours and Respondent would fund 15. The Respondent rebutted this and explained that the reason that they had been funding all of the hours was due to internal errors or words to that effect. Access to Work then issued an amended funding letter clarifying they would fund 21 hours with the reference to the Respondent funding 15 hours removed.

49. Following a meeting on 26 July 2016 Dr van den Anker agreed to stay within the 21 hours and request a reassessment. She signed an Access to Work declaration, initialling and specifically crossing through the section where it stated the Respondent would fund the 15 hours that same day clearly limiting the declaration to 21 hours per week. .

50. The notes of the meeting on 26 July 2016 noted that the support worker activity log (which was required to apply for the funding) contained details of activities undertaken by the Claimant that Access to Work would not approve. On 28 July 2016 Access to Work issued the letter referenced in the above paragraph approving the funding of 21 hours for a period between 6 July 2016 and 5 July 2019 removing the earlier reference to the Respondent funding 15 hours. Following this it was agreed that the Claimant would be moved from a TSU contract to a fixed term contract and Ms Spilsbury told Dr van den Anker that she would speak to Dr Watson about this. Input was required from Dr van den Anker to draft an updated job description for the Claimant.

51. Dr van den Anker sent Ms Spilsbury an email on 3 August 2016 in which she stated as follows: *"As I am now the support workers Line Manager as well as the Claimant of the grant I will sign the Access to Work forms and ask you countersign the forms".* For this reason and also that it stated so on the earlier contract we find that Dr van den Anker was the Claimant's Line Manager. She had denied this when it had been put to her under cross examination.

52. Dr van den Anker had been sent an email by Access to Work on 29 July 2016 along with claim forms and instructions on how to claim. On 3 August 2016, Dr van den Anker returned to Ms Spilsbury a partially completed claim asking of her to complete part of the form. On 8 August 2016 Ms Spilsbury emailed Dr van den Anker again saying she would liaise with Dr Watson over the issuing of the fixed term contract and informing her that Dr Watson would countersign the claim forms.

53. In that email, Ms Spilsbury also said as follows to Dr van den Anker: *"it is not appropriate for your support worker to be working when you are not in the office, the role is to support you"*. Ms Spilsbury said that if Dr van den Anker was going to be away they needed to discuss whether the Claimant should be in that location (the office) and she stressed that it was very important that the declarations to Access to Work adhered to the basis of the funding. The Respondent was only able to claim for the support work hours if the Claimant was doing the appropriate activities that had been authorised in the grant. She asked Dr van den Anker to clarify the position.

54. In September 2016 Dr van den Anker was chasing the issuing of the fixed term contract for the Claimant by sending several emails. Dr Watson also chased Ms Spilsbury about this matter.

<u>Belittling comments about the Claimant marking student work</u>

55. On 7 October 2016 there was a meeting between Dr van den Anker, Dr Watson, Ms Spilsbury, and Professor Clegg also attended by Ms J Roberts of WECIL. This was the meeting that the Claimant alleged that Dr Watson made belittling remarks amounting to unlawful harassment about the Claimant's ability to mark student work. We saw notes of the meeting that was authored by Ms Roberts. Those notes record that the Claimant was not at the meeting itself but was at a debrief attended by Ms Spilsbury and

Dr van den Anker (but not Dr Watson). The notes record that Ms Spilsbury was still finalising the job description for the Claimant and she expected a contract to be issued the following week. Ms Roberts recorded that Dr Watson's behaviour was "unhelpful and could be construed as discriminatory." She appears to attribute this to observing that Dr Watson having no eye contact with Dr van den Anker and raising an eyebrow at Professor Clegg. Dr Watson explained the following when he was asked about this under cross examination. He said that he was reticent about stating his concerns at that meeting about Dr van den Anker's marking not being done on time and also her failures to turn up to classes and not telling students. Professor Clegg was aware of this state of affairs. We make no findings about those concerns but this was his explanation for the behaviour that is alleged to be discriminatory in the notes.

56. Dr Watson acknowledges that he exchanged a glance with Professor Clegg at the point where Dr van den Anker asked "what she could do better" as he felt the reticence described above and he did not consider it to be an appropriate forum for such a discussion with Ms Roberts present who was an external individual. Dr Watson said that he was offended by suggestion that he displayed discriminatory behaviour at that meeting.

57. The Claimant's witness statement did not address the harassment allegations other than as follows (and we note the contemporaneous note by Ms Roberts do not support his contention he was even at the meeting with Dr Watson):

"(Sean) Watson asked me in the meeting if I was able to mark student work. I perceived this as a discriminatory attitude and an instance of micro aggression from Sean Watson."

58. Dr Watson accepted that marking was discussed around that time with Dr van den Anker in terms of marking support and we have seen that there were discussions about the potential of employing an academic support worker. His reasons for doing so was that he wanted to ensure a suitably qualified person was marking the student work in order to comply with the university's quality obligations. He explained that another concern was that if the Claimant was marking work it may have been encroaching on Dr van den Anker's role considering that the support worker was only supposed to engage in no more than 20% of the supported employees duties.

59. Dr Watson said that he did not know what the Claimant's qualifications are / were and therefore he could not have disqualified him as a candidate or discount him or infer that he would not be qualified. The Claimant accepted under cross examination that he could not do marking as a support worker and there would needed to have been a process of appointment but said "that was not entertained."

60. There was no evidence as to why this enquiry was related to the Claimant's race, sex or association with Dr Van den Anker's disability. The more plausible explanation (and we find) was that those discussions arose from a reasonable concern of Dr Watson to ensure that university standards in

terms of marking would be adhered to and also that it would not encroach on the 20% funding. We find such a concern would have been in regard to any individual where it was being proposed they were or could mark student work which was not within their job role.

61. We turn now to an incident in October 2016 where a number of students complained about another lecturer. There was discussion throughout the proceedings about the relevance of this matter. It did not feature in any of the Claimant's claims other than being referred to in his letter relied upon as the protected disclosure. We were invited by the Claimant to consider the relevance in regard to background information and also potential for it to become relevant if the Tribunal needed to consider drawing inferences. Therefore we set out our findings as follows.

Student complaints October 2016

62. In early October 2016 issues arose between some students and a lecturer. It is not necessary nor is it relevant to name either of those parties save Ms L Youssiff Dafa'Alla was one of the students as described in her witness statement, which was all about these events. The lecturer had sought support of how to deal with one particular student, he said he was being disruptive in the lessons. Four students described by Dr van den Anker as African linked females complained to Dr van den Anker about this lecturer alleging that he was displaying discriminatory behaviour. The Respondent commenced an investigation. On 4 October 2016 Dr Watson emailed Dr van den Anker to advise that he was dealing with the complaint and did not feel that she had a further role to play. On 8 October 2016 Dr van den Anker and the Claimant had a discussion with this particular lecturer which was later described as going on for two or three hours. It was unclear to the Tribunal how or why this came about given Dr Watson's instruction to Dr Van den Anker. The lecturer later complained to Dr Watson that he had been "interrogated" by Dr van den Anker and the Claimant and he felt like he had "not been in an investigation but an inquisition". On 10 October 2016 Dr Watson emailed Dr van den Anker about this. He was evidently frustrated which was clear from the contents of the email and tone, referencing his earlier instruction said that he regarded their conduct in having this discussion with the lecturer as *"unacceptable interference"* and that he had referred the matter to Professor Clegg.

Hostile glares, stares and disdain Dr Watson to Claimant October 2016

63. We now turn to deal with the claim by the Claimant that Dr Watson also on at least two occasions gave hostile glares, stares and looks of disdain to the Claimant. Dr Watson strenuously denied behaving in such a way. We have therefore to make a finding of fact about a matter that took place almost 5 years ago. We have one individual, the Claimant saying that something happened and the person who was alleged to have engaged in that conduct saying it did not. In such a scenario we look to see if there is any contemporaneous corroborating evidence in supporting either account. We took into account that evidently relationships around that time were strained because of the student complaint and that Dr Watson was frustrated with

Dr van den Anker and the Claimant not having heeded his instructions. We also took into account that no grievance was ever raised about this conduct, apparently the Claimant raised this with Dr van den Anker but he accepted that she did not in turn raise that with anybody else. Dr van den Anker does not address this in her witness statement, she was here to support the Claimant's account. The Claimant's witness statement lacked specificity. He stated that it was "in and around October and November 2016" that he was subjected to "hostile, baleful and intimidating glares from Sean Watson". This created the harassment environment. There was no evidence as to why the Claimant considered this to be related to his race, sex or association with Dr van den Anker's disability. If anything, the Claimant pointed to the fact that Dr van den Anker had been involved in the student complaint rather than any protected characteristic. The Claimant does not mention this in his later letter before action in November 2017 but he does complain about other matters relating to Dr Watson. Taking into account all of the above and balancing all of those factors, given the Claimant's propensity to raise matters that concerned him, we prefer Dr Watson's account. We find there were no hostile glares, stares and looks of disdain from Dr Watson to Claimant around October 2016.

Fixed Term contract delay

64. We return now to the situation surrounding the alleged delay in issuing the fixed term contract which is also relied upon as an act of direct discrimination by the Claimant. Authority had been given to place the Claimant on a fixed term contract from the Access to Work funding at the end of July 2016 (see above at paragraph 50). On 11 October 2016 Dr Watson referred to the student complaint as a "serious crisis" as the reason for the delay in issuing the fixed term contract.

65. By 14 November 2016 the Claimant had applied for the role so by that point the arrangements for the formal recruitment must have been underway. By 1 December 2016 Dr Watson accepted he had not yet arranged an interview. The interview process was completed by 13 December 2016 and the fixed term contract was issued on 15 December 2016. This was for a period up to 5 July 2019 and the Claimant emailed on 25 December 2016 to advise he accepted the contract (acknowledging the salary error - see below) and signed to accept those terms on 18 January 2017.

66. We find that the reason for the delays in issuing the contract were a number of matters namely student complaints, administrative delays within HR and compilation of the Claimant's job description in discussion with Dr van den Anker.

67. A new job description was issued with the fixed term contract. This specifically stated under duties and responsibilities that the Claimant was to assist with Access to Work administration particularly around the completion of forms and claims.

Changes to the Claimant's contract between October – December 2016

68. The Claimant did not speak of this in his witness statement. He was asked by Mr Mitchell what were the changes he was complaining about. The Claimant told the Tribunal the complaint was the refusal to entertain contribution to 36 hours support for Dr van den Anker.

69. We heard evidence from Dr van den Anker on this issue. Her evidence was that the job had been lowered from Grade D to "ungraded" and the rate of pay changed from cumulative to static. The change in grade was corroborated by the TSU contract and the FTC contract which recorded the grade as "offscale". It was not clear what the reference to static pay was. Further she alleged that the amount of hours had been 24 and this was lowered to 21 hours a week. This cannot be correct as Dr van den Anker had signed a declaration stating the funding would be for 21 hours (see above) on 26 July 2016.

70. Dr van den Anker also asserted that there was a newly inserted clause that the Support Worker would be responsible for claims being made to ATW for his salary plus on costs. However we found above that this was in his original job description so this was not a change. Further, this had been recommended by ADWUK and was unsurprising given the lost funding that had taken place thus far.

71. Dr Watson was responsible for raising a request for the Claimant's FTC in the internal system called "eRAF" but handed over the HR for the inputting of the details of the contract itself. He had no input in the job description or any of the contract term decisions.

72. We saw an email from Dr B Oliver who had been on the interview panel with Dr van den Anker to HR, copied to Ms Spilsbury regarding the difficulties she was having in completing the follow up form to the interview dated 14 December 2016.

73. We also saw a recruitment checklist signed by someone call A Geary that had scribbled out Grade D and changed it to "off scale". They had also changed number of hours from 24 to 21.

74. The Claimant was initially offered a salary of £12095 on salary point 16 grade D. In a further email dated 15 December 2016 Ms Geary confirmed this had been an error and the salary was £11950 offscale. Ms Spilsbury told the Tribunal that this was because the Respondent needed the Claimants salary plus employment costs to be equal to the funding grant.

<u>Events from April 2017</u>

75. We move forward now to April 2017. Ms Spilsbury told the Tribunal that she discovered that Dr van den Anker and the Claimant had again not been submitting claim forms to Access to Work (despite Dr van den Anker agreeing she would do so – see above). In December 2016 Ms Spilsbury had had a discussion with Dr Van den Anker and talked through how to complete the forms. Some forms had apparently been returned to Dr van

den Anker having been incorrectly filled in. Ms Spilsbury asked Dr van den Anker to send her the correspondence from Access to Work so she could look into it. She offered to set up a meeting with Jan Richardson who was the Line Manager of Ms Sims another support worker and the Claimant's comparator for some of his claims (we return to that individual below). Dr van den Anker replied that it was for her Line Manager to follow up and reclaim the funding but she said she would post the form to Ms Spilsbury. By this point we heard that Dr Van den Anker was refusing to speak to her line manager Dr Watson or attend any meetings where he was present.

76. By 30 May 2017 Dr van den Anker had not sent the form and was chased by Ms Spilsbury. She asked Dr van den Anker if the Claimant could meet and have a discussion with Jan Richardson who would advise on how to facilitate the Access to Work claims. She stressed it was critical as they only had six months to make the claims or the funding could be lost.

Redundancy consultations

77. In early June 2017 Dr van den Anker went off sick. From this time the Claimant did not attend work and was being paid in full by the Respondent. By September 2017 discussions had started internally with HR and Professor Clegg about the Claimant's position. The Claimant had no work to perform because Dr van den Anker was absent on sick leave. The Respondent was not allowed to claim any funding from Access to Work on that basis. It was agreed therefore to start a redundancy consultation procedure.

78. Professor Clegg emailed the Claimant on 25 October 2017 stating that he had tried to call him and that he needed to meet with him. He acknowledged that a Trade Union representative should be present at the meeting. A meeting was arranged for 2 November 2017. Ahead of that meeting Professor Clegg had a note of advice from HR of what should be discussed; the note said that it was to be an informal meeting, it stated that there was no work for the Claimant in the role and that there would be a planned first formal meeting on 9 November 2017. A letter was prepared to give to the Claimant at the end of the informal meeting on 2 November 2017. There were no notes of the informal meeting but Professor Clegg told the Tribunal and we accepted his evidence that the Claimant stated he was at the university for a particular role and would not do any other activities.

79. There was a very strong response from the Claimant to this informal consultation meeting. On 6 November 2017 the Claimant sent a letter before action followed by High Court proceedings to Professor Clegg, copied to Professor Neil, Dr Watson, Ms C Parker, Ms Spilsbury, and the university legal department. This is the letter relied upon as containing the Claimant's protected disclosures. The Claimant subsequently brought a High Court claim again the Respondent and 17 other individual Respondents including M/s Eversheds. The High Court claim was struck out on 3 December 2020 on the basis the particulars of claim disclosed no reasonable grounds for bringing the claim against any of the Defendants.

An order for costs in the total sum of £38,310 which remains to date unsatisfied.

Protected disclosure letter

80. The Claimant did not speak of this letter in his witness statement. There was no evidence from the Claimant as to how and why it amounted to a qualifying disclosure or around his beliefs regarding the public interest at the time he wrote the letter. We have considered the letter as a whole and picked out parts where we consider the Claimant could be relying upon, as we had no evidence from the Claimant directly.

81. The letter was headed as a *"Letter for claim to likely co-defendants under paragraph 3 of the practice direction for pre action conduct."* There are two relevant parts to this letter that we need to address as according to the list of issues, they were relied upon for the protected disclosure claim. The first protected disclosure claim asserts that the Claimant complained in a letter about a breach of Regulation 8 of FTC Regulations. There is one section of the letter that could feasibly be said to relate to the FTC Regulations. This is where the Claimant makes reference to his temporary contract status:

I was engaged initially as a temporary staff member through the UWE Temporary Staff Unit (TSU) on short term contracts ranging from one month to three months. This situation is normally for up to six months as a temporary measure. However, this continued for 41 months up to December 2016. Inaction, foot dragging and unconscionable omissions by Dr Watson were the main precursors for this. There was little or no action to effect a permanent contract despite Dr van den Anker's repeated requests for this.

Even when the process for a more durable contract was initiated, Dr Watson found a way or excuse to disassociate himself from seeing it through. Dr Clegg took on the responsibility of doing this by arranging, hurriedly, an interviewer and a room. It is asserted Dr Clegg did this to cover up for Dr Watson's reluctance and/or failings.

82. The Claimant was asked about this under cross examination. It was put to the Claimant that his letter does not even refer to the FTC Regulations and he replied "No that was before the invocation" which we understood to refer to his later invocation of FTC rights in 2019 which we address below. By this time, in November 2017 the Claimant had acquired 4 years continuous service (as of June 2017) and as such, if the Claimant was genuinely raising an issue about a breach of the regulations at this time we think he would have said so directly in that letter. We find that this was not in the Claimant's mind at all when he write the letter. This is corroborated by the Claimant referencing a period of 41 months (not 4 years) which was the period between the start of his employment and the issuing of the fixed term contract.

83. In his witness statement, the Claimant also did not speak of what sections of the letter amounted to a qualifying disclosure in respect of alleged breaches of the Equality Act 2010.

84. The Claimant states in the letter *"Dr van den Anker has informed me of derogatory and inappropriate comments made by Dr Watson of me in the course of my work. However intentioned the remarks were, I fully intend to pursue a course of action in that regard as it reflects elements of unconscious and conscious bias and prejudice."*

85. The Claimant had set out in the letter the background regarding the student complaints in October 2016 and that he and Dr Van den Anker had been accused of interfering in the investigation:

"You will recall, Dr Clegg, that Dr Watson accused me and Dr van den Anker, in October 2016, of 'interfering with management' in the debacle over the four students who complained of inappropriate and offensive behaviour by the departed [name of lecturer]."

The Claimant goes on to say:

"The direct and indirect discrimination, mistreatment, hostility, delay, effective side-lining and oppression experienced by Dr van den Anker and me over months and years are issues which will be pleaded in my particulars of claim …

And

Dr Neill, in the course of some meetings where I was present, made some highly inappropriate comments that condoned sexism and stated his displeasure at the role Dr van den Anker had taken in assisting the students to be heard and listened to in their complaints regarding Dr Schilling and the handling of their concerns. You Dr Clegg, Dr Neill and Dr Watson were found wrong, or at least found wanting, in your roles and participation in that saga. It is in that context, and your continued complicity in the negative behaviours of Dr Watson relative to Dr van den Anker, that explains your actions, or omissions, regarding negative significant processes initiated against her and against me with the complicity of Human Resources. I specifically refer to the initiatives to investigate Dr van den Anker with the possibility of dismissal and your possibly premature moves to place my role at 'risk of redundancy'. This is partly why Ms Catherine Parker and Ms Helen Spilsbury are co-defendants in my proposed claim too.

And

The University, as a public authority under the Human Rights Act 1998, and other relevant statutes, is under a duty and obligation to comply with and meet certain standards. These duties and their non-compliance will be laid out in more detail in my proposed claim.

86. With regards to the alleged concealment disclosure, the Claimant did not speak to this in his witness statement. He told the Tribunal that it was the following section relied upon in the letter:

Hiding behind 'the University' is a favoured tactic and strategy of those involved in the above mentioned factors and behaviours.

87. Also on 6 November 2017 the Claimant emailed Professor Clegg to tell him that the date that Professor Clegg had proposed to meet for the formal consultation redundancy meeting was not suitable and proposed 15 or 16 November 2017 instead. Professor Clegg replied on 14 November 2017 suggesting the 16th and he also informed Dr van den Anker he had commenced a redundancy consultation process with the Claimant. The Claimant did not attend the meeting on 16 November 2017, it was rescheduled for 23 November 2017 and he also failed to attend this meeting, it was subsequently rescheduled for 30 November 2017. On 28 November 2017 the Claimant emailed Professor Clegg and told him that he would not be taking part in the redundancy process and he alleged that it was designed to undermine and dismiss Dr van den Anker. It should be borne in mind that at this point the Claimant had not been in work yet being paid in full since the summer of 2017.

Placing the redundancy process on hold rather than stopping it

88. On 6 December 2017 events overtook as Dr van den Anker made contact with the Respondent and said that she wanted to return to work. On 11 December 2017 Professor Clegg sent an email to the Claimant explaining that as Dr van den Anker was going to be coming back on a phased return the redundancy process would be paused. The Claimant reiterated on 31 December 2017 that he would not take part in a redundancy procedure. Professor Clegg also referenced to the redundancy process being paused in an email on 22 January 2018. The Claimant asserted as a direct discrimination claim that the redundancy process was placed on hold rather than stopped.

89. The Respondent accepted at no time was the letter ever sent to say that redundancy process had been halted. The Claimant's evidence under cross examination was that this was like "the sword of Damocles" hanging over him. The Claimant never subsequently raised this issue or asked for clarification from the Respondent about the status of the redundancy process No further redundancy discussions were pursued and in any event the Claimant had made it very clear to the Respondent that he was refusing to engage in that process. There were no consequences to the Claimant in respect of this refusal to engage. Dr van den Anker returned to work and the Claimant carried on in his role as support worker. We find therefore that the Claimant was not under the impression that the redundancy process was on pause rather than halted. It simply fell away.

Reporting the Claimant for breaching parking regulations

90. We now deal with one of the Claimant's claims which was that he was reported for breaching parking regulations in March 2018. The Claimant did

not deal with this in his evidence. The Respondent's witnesses told the Tribunal in various terms that they had heard about reports of someone sleeping in a car parked on the university site and that that car ownership was traced to the Claimant. This was the extent of the knowledge of the Respondents witnesses. Ms Dare explained that she was generally aware of it as it had come up in conversation because parking was part of HR obligations. We have no evidence as to who reported the Claimant and equally no evidence of any detrimental action. The extent of this allegation appears to be that (this was evidence given by the Claimant) under cross examination that it had been raised with Dr van den Anker who raised it with him. He asked why this would be detrimental or less favourable treatment and his reply was that it was "another spoke in the wheel of behaviour towards Dr van den Anker".

91. We find that if the Respondent had received reports someone was sleeping in their car it was reasonable to have raised this with the line manager of the person who had ownership of the vehicle.

Events from October 2018 – Claimant claims he should be issued a permanent contract under the FTC Regulations

92. In October 2018 Dr van den Anker was signed off sick again and therefore after that date the Claimant did not attend work and was being paid in full. On 4 February 2019 the Claimant wrote to Professor Clegg asserting that he had obtained permanent status under the FTC Regulations as of 9 June 2017 and he requested a written statement to this effect. The Respondent rebutted this in a letter of 11 February 2019 authored by Ms J Thorne They set out the reasons why namely that they considered the repeated fixed contracts were objectively justified as the Claimant was employed specifically to support Dr van den Anker and that his employment was exclusively funded by Access to Work.

93. On 5 March 2019 an email was sent to Dr van den Anker as the Claimant's fixed contract was due to expire three months later. We accept that this was an automatic email sent to managers who line manage an individual on a fixed term contract. In the email it stated that if the individual been employed for four years or more on a fixed contract they must be placed on a permanent contract unless it would be objectively justified and it stated that funding was not an objective reason. The Respondent sought to explain this email in that it was generally applied to research academic staff but this is not what the email said.

Hartland report

94. Nicola Hartland had been commissioned to investigate complaints by Dr van den Anker. We had sight of some of that report (large sections were redacted) relevant to the Claimant's claims. It was dated 15 January 2019. It records that the Claimant had told the investigator that he had not witnesses any harassment or bullying first hand of Dr van den Anker by Dr Watson.

Review of support worker contracts

95. Around this time in Spring of 2019 Ms Thorne was asked to conduct a review of the Claimant and Ms Sims support work contractual arrangements. Ms Sims was another support worker on a fixed term contract providing support to another supported employee. She was line managed by Ms J Richardson. Ms Sims had started employment with the Respondent on a TSU contract and moved to a fixed term contract. The difference was that Ms Sims did not report to her supported worker but to her line manager Ms Richardson. This differed because Dr van den Anker was the Claimant's line manager. The Claimant had contacted Ms Sims sometime previously to ask her questions about her role which she appeared to have readily volunteered answers to. She was also funded by Access to Work and told the Claimant that she was on a permanent contract, but this evidently was not the case as we saw a copy of her fixed term contract in the bundle. Ms Sims was not involved in claiming back funds from Access to Work. Her timesheets were sent to her Line Manager, Ms Richardson, they were then sent onto to Access to Work. She also occasionally worked on campus when her supported employee was not in.

96. A report was authored by Ms Thorne. She had reviewed the Claimant and Ms Sims's contractual arrangements who were the only two directly employed support workers within the university, both employed within the Faculty of Health and Applied Sciences. It was reported that other supported employees tended to employ their support workers direct or used a different type of support service. The report showed that over the last two years in respect of the Claimant due to Dr van den Ankers' sickness absence there were 378 days of funding that could not be claimed. Ms Sims had a 102 days of funding that could not be claimed due to absence of her supported individual. It was also highlighted that there was a significant differences in the annual leave entitlements between the support worker and the supported individual which meant that in reality the support workers got the same amount of time off as the supported individual. It highlighted issues such as when the supported employee was off sick that the university could not claim the funding from Access to Work.

Claimant's absence when required to support Dr Van den Anker – summer 2019

97. On 3 June 2019 Dr van den Anker's Trade Union Representative contacted Ms Thorne to ask for a replacement support worker to assist Dr van den Anker at an upcoming appeal hearing. She said in the email *"as you know [the Claimant] is in Zambia visiting his mother who had been unwell"* however this was the first time the Respondent had been made aware of this state of affairs. Ms Thorne wrote to Dr van den Anker about this on 11 June 2019 and asked how the university should treat the leave and when it had started. She also asked what his likely return date was.

98. On 12 June 2019 Dr Moyle embarked on the consultation process with the Claimant and Ms Sims concerning their contractual arrangements. She wrote by email to the Claimant asking him to attend a consultation meeting,

she also explained that they would need to discuss his fixed term contract which was due to expire shortly. She proposed a meeting on 20 June 2019 and we saw that a similar letter was sent to Ms Sims who had already started to engage in the consultation process with Dr Moyle.

99. In terms of timing it is appropriate to deal now with a letter sent by Debbie England who was Director of HR to Dr van den Anker on 17 June 2019 as this was relied upon by the Claimant as an act of harassment against the Claimant and also direct discrimination. This was a long letter. There evidently had been some ongoing disciplinary and grievance issues involving Dr van den Anker and the Respondent. She had been absent since October 2018 and there were discussions around Occupational Health, return to work relationships with colleagues, moving forward and mediation. Ms England informed Dr van den Anker that they would be seeking confirmation from her that she would make claims for her support worker funding in more timely manner in the future. She also asked about the whereabouts of the Claimant.

S104 ERA claim – asserting a statutory right

100. By 21 June 2019 Dr van den Anker had not responded to Ms Thorne's enquiries about the Claimant's absence so she wrote directly to the Claimant via email and posted a letter. She explained the compassionate leave policy was ten days if the individual need to travel abroad and asked for the information to be provided which she had requested in her earlier communication. She told the Claimant that if she did not hear from him by 5pm on 28 June 2019 she would have no choice but to treat him as absent without leave and that his salary would be stopped.

101. On 28 June 2019 Ms Thorne wrote again to the Claimant. She urged him to get in touch to discuss a number of urgent matters. This included a reference to the imminent end of his fixed term contract which was due to expire on 5 July 2019. The letter also informed the Claimant that his current fixed term contract, which was due to end on 5 July 2019 would be extended until 31 July 2019, to allow sufficient time to consult the Claimant.

102. On 28 June 2019 at 5:12pm (so after the deadline that Ms Thorne had imposed) the Claimant responded to Ms Thorne by email. He did not respond or deal with Ms Thorne's reasonable requests for information about his absence. This email is the email relied upon by the Claimant for his s.104 claim in which says that he asserted his statutory right regarding unlawful deduction from wages. He explained he had had "significant issues trying to get an internet connection".

103. The Claimant stated:

"Your letter has made allusions to issues concerning absence without leave, complete pay cuts subject to 'requested information', breach of contract and invoking a disciplinary process.

Further to those factors stated by you and the implicit threat of sanctions, I await your invocation of the same stated sanctions and we will proceed from there."

104. Ms Thorne replied on 2 July 2019. She stated as follows:

"I wrote to you on 21 June 2019 setting out my concerns that the University had not received any details from yourself or your line manager, Associate Professor Van Den Anker about how you were recording your current absence.

I believe this absence may have started sometime in May as you were not available to support Associate Professor Van Den Anker at a meeting on 22 May 2019 on the Frenchay campus. I cannot be sure of exact dates as neither yourself nor Associate Professor Van Den Anker have provided the University with any details.

I asked you to contact me by Friday at 5.00pm on 28th June with this required information and clearly stated that if this was not provided by this time and date I would have no option but to treat you as absent without leave. I subsequently wrote to you again on the morning of Friday 28th June to implore you to get in touch with this information.

I was extremely disappointed that whilst you did contact me by email on Friday 28th June at 5.12pm, you failed to provide me with any details about the duration of your current absence, your likely return date or how it was being recorded, nor did you provide me with the reasons for failing to provide the required information within the timeframe indicated. You also displayed no intention or willingness to provide this information and respond to a reasonable request from the University. I was also concerned about the tone of your email which I found to be hostile and combative and not in line with the style of response that I might have expected in relation to reasonably asking for this information."

105. She also confirmed that Claimant was now being treated as absent without leave and that his pay would be stopped from 1 July 2019 but if a satisfactory explanation was provided it would be reinstated.

106. Also on that date Dr van den Anker replied for the first time to Ms Thorne's initial inquiry some weeks before to advise that the Claimant was returning from Zambia on 5 July 2019. She explained that she had drafted an email earlier but had not realised that it had not sent.

107. Around this time Dr van den Anker had been provided with new Access to Work funding for 36 hours moving forward which would start from 5 July 2019. By 15 July 2019 Ms Thorne had not heard further from the Claimant and the situation remained that they were unable to arrange Dr van den Anker's appeal hearing without a support worker.

108. In the meantime Dr Moyle was attempting to progress the consultation with the Claimant regarding support worker contracts. Dr Moyle had been informed by Ms Thorne that they understood the Claimant

was in Zambia. The Claimant replied to Dr Moyle on 6 July 2019 asserting that in any event he had permanent contract status and that this matter was coming up for judicial determination at a forthcoming Employment Tribunal hearing. He ended by saying he was glad Dr Moyle had reappeared on the scene and looked forward to engaging with the issues that had required real and meaningful redress. He also gave consent to use an alternative email address (a Gmail address). He did not however say that this was the only email address that should be used.

109. Dr Moyle replied on 11 July 2019 and raised a number of enquiries with the Claimant, she asked him if he would be able to extend his hours to 36 to support Dr van den Anker and that they would discuss other queries as part of the consultation procedure. A consultation meeting was suggested for 19 July 2019 at 3pm and the Claimant was asked to confirm his attendance by 17 July 2019. He was warned that if he declined to attend the Respondent may make a decision on his absence. It was explained the Respondent did not wish to use an external email account except in an emergency so it was sent only to the work email address.

110. On 15 July 2019 Ms Thorne wrote again to the Claimant having not had a response to her email of 28 June 2019. She noted he had chosen to correspond with Dr Moyle. Ms Thorne advised as follows:

Furthermore, unless I receive from you the information I refer to above by no later than 5pm on 18 July 2019, I will take the view that the pay which you received from 22 May 2019 (being the first date on which we currently know you were not available for work) until 30 June 2019, must be treated as an overpayment on the grounds that you were absent without leave from work, and therefore not entitled to pay, and I will be taking steps to recover that payment from you. If we discover any other period in which you were also absent without leave, in or around May 2019, we will also recover that payment. In this respect, I rely again on the contractual term and the common law position which I recited above.

If you have information or explanations to counter the decisions I have taken regarding your absence, I urge you in the strongest terms to provide those to me, so that if appropriate these decisions can be reversed and your pay reinstated.

111. The Claimant had not confirmed his attendance at the consultation meeting as requested by Dr Moyle so she wrote again on 18 July 2019 setting out the Respondent's proposals that would have been discussed at the consultation meeting. This time it was copied to the Gmail account. There were two proposals. The first option was to engage a support worker on a self employed basis. The second and expressed preferred option was to employ the support worker on a zero hours contract which would involve removing the administrative burden from Dr van den Anker of employment the Claimant herself. He was advised if he did not respond by 25 July 2019 that decisions would be made in his absence including a possible expiry without renewal of his fixed term contract.

112. The Claimant replied the same day. He explained he had been expecting to hear form Dr Moyle on his Gmail account and apologised for any perceived discourtesy. He went on to say:

For the avoidance of any doubt, notwithstanding UWE's view on the matter, the legal position of my fixed term contract is that it should be a permanent contract that should have been converted in 2017.

UWE will be hoisted by it's own petard in that regard and it remains to be seen whether UWE's view will prevail.

As such, your insistence on 'consultation' meetings is misdirected and misconceived. I stated in my previous response of 06 July 2019 that due to the legal position, consultation meetings were redundant. I consider this to be a good reason not to engage in consultation meetings.

You may not need to refer to the events of November and December 2017, but a precedent was set at that time by Dr Clegg, Dr Watson, Professor Neill and Shay Dare et al.

113. On 25 July 2019 Dr Moyle emailed the Claimant and offered him a new fixed term contract but this time the contract was to be a zero hour contract. The deadline for acceptance was 31 July 2019. The Claimant rejected that offer on 29 July 2019. Approval was being sought by HR for Professor Harington to dismiss the Claimant in the alternative to the expiry of the fixed term contract for some other substantial reason citing an irretrievable breakdown of the employment relationship. [4]

114. The Claimant was subsequently sent a dismissal letter on 31 July 2019. The first reason for dismissal was the expiry of the fixed term contract. The letter went on to say that without prejudice to the Respondent's position that he had not gained permanent status that he was being dismissed due to an irretrievable breakdown in the employment relationship. The Claimant at this point had been in Zambia from either 16 or 17 April 2019 returning on 3 July 2019. The Respondent offered the right to an appeal which was initially progressed but subsequently the Claimant decided not to appeal.

115. The Claimant relies upon letters and emails sent to Dr van den Anker by Ms England and Ms Thorne in June and July 2019 in a claim for harassment. We have already dealt with the email of 17 June 2019 (see paragraph 99 above) and there was only ever one email from Ms Thorne to Dr van den Anker at this time which was dated 16 July 2019. This was in response to Dr van den Anker seeking to postpone a meeting. Ms Thorne advised that they wanted that meeting to proceed as there was much to discuss. There was nothing in any of those communications we find that can sensibly be deemed to amount to harassment under s.26 EQA. The Claimant's witness statement did not deal with this allegation. Those communications were reasonable discussions about Dr van den Anker's return to work and reasonable enquiries as to the Claimant's whereabouts

[4] It was in this email reference was made to a critical log list.

particularly given that he was paid in full since October 2018 and performed no work.

Failure to provide a suitable workstation

116. This was not addressed in the Claimant's witness statement. Dr van den Anker's witness statement said that it would be normal process to welcome someone into the department to provide them with a workstation, this did not happen in respect of the Claimant and he was not incorporated into the phone system.

117. The Tribunal asked the Claimant questions about this claim. He had raised it in his letter before action letter in November 2017. The Claimant's evidence, which we accepted, was that when he first started his employment in 2013 he worked in Dr van den Anker's office and sat on a chair provided for visitors, he was not provided with a desk or supplied with IT or equipment. He was provided with an IT login and a work email address but not included on an internal database of telephone numbers and it was not until Spring of 2018 that Professor Clegg made arrangements at which point the correct workstation was provided.

118. There was a relevant email in the bundle from Professor Clegg to Dr van den Anker dated 20 April 2017. Professor Clegg asked Dr van Anker to contact a specified individual to organise the Claimants dedicated workstation, we do not know why there was a delay between 2017 and 2018 but on the Claimant's evidence such a workstation had been provided by mid 2018.

The Law

Unfair Dismissal – S98 ERA 1996

119. S95 (1) (b) ERA 1996 provides that an employee is dismissed where he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract.

120. S98 ERA 1996 (1) provides that it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. In this case the Respondent relies on the potentially fair reason of "some other substantial reason". Under S98 (4), where the employer has shown the reason for the dismissal, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(*a*) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(*b*) shall be determined in accordance with equity and the substantial merits of the case.

Unfair Dismissal – S103A ERA 1996

121. Protected disclosure claims

S43B provides:

> **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.**

122. 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.

123. 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

124. 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:

125. 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.

126. 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.

127. 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.

128. 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.

129. 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).

S103A Unfair Dismissal

130. 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.

131. There is a different causation test to the detriment claim as the disclosure must be the primary motivation rather than a material influence. Where the employer asserts that the reason for the dismissal was wholly unrelated to any disclosures, the Tribunal must determine the true reason for the dismissal ***(*Abernethy v Mott Hay & Anderson [1974] IRLR 213*).***

S104 ERA 1996 Asserting a statutory right

132. S104 provides:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

> **(*a*) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or**
> **(*b*) alleged that the employer had infringed a right of his which is a relevant statutory right.**

(2) It is immaterial for the purposes of subsection (1)—

> **(*a*) whether or not the employee has the right, or**
> **(*b*) whether or not the right has been infringed;**

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—

> **(*a*) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,**

……..

133. **Mennell v Newell & Wright (Transport Contractors) [1997] IRLR 519 i**s a Court of Appeal authority on this provision. The key points from the decision are:

134. It is sufficient if the employee has alleged that the employer has infringed the statutory right and that the making of that allegation was the reason or principal reason for dismissal. The allegation need not be specific, provided it was made reasonably clear to the employer what right was claimed to have been infringed. The allegation need not be correct, either as to the entitlement to the right or as to its infringement, provided that the claim was made in good faith.

(Obiter):

135. An industrial tribunal has no jurisdiction under the Wages Act to entertain a complaint about a threatened deduction from wages. Section 5(1) makes it clear that the tribunal may only hear a complaint by a worker in a case where the employer "has made a deduction from his wages." In other words, there must be an actual deduction.

136. The employer must be alleged to have actually infringed a statutory right; it is not sufficient to allege they intend to do so in the future **(Spaceman v ISS Mediclean Ltd UKEAT/0142/18).**

137. However in **Simoes v De Sede UK Ltd [2021] IRLR 974,** the EAT held that it was the original instruction to undertake the working (that allegedly contravened the Working Time Regulations) that constituted the infringement of the employee's statutory rights.

FTC Regulations

138. Regulation 6 of the FTC Regulations provides:

(1) An employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part 10 of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3).

(2) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, of his employer done on a ground specified in paragraph (3).

(3) The reasons or, as the case may be, grounds are—

_(a)_ that the employee—
(i) brought proceedings against the employer under these Regulations;
(ii) requested from his employer a written statement under regulation 5 or regulation 9;
(iii) gave evidence or information in connection with such proceedings brought by any employee;
(iv) otherwise did anything under these Regulations in relation to the employer or any other person;
(v) alleged that the employer had infringed these Regulations;
(vi) refused (or proposed to refuse) to forgo a right conferred on him by these Regulations;
(vii) declined to sign a workforce agreement for the purposes of these Regulations, or
(viii) being—
(aa) a representative of members of the workforce for the purposes of Schedule 1, or
(bb) a candidate in an election in which any person elected will, on being elected, become such a representative,

performed (or proposed to perform) any functions or activities as such a representative or candidate, or

_(b)_ that the employer believes or suspects that the employee has done or intends to do any of the things mentioned in sub-paragraph _(a)_.

(4) Where the reason or principal reason for dismissal or, as the case may be, ground for subjection to any act or deliberate failure to act, is that mentioned in paragraph (3)_(a)_(v), or _(b)_ so far as it relates thereto, neither paragraph (1) nor paragraph (2) applies if the allegation made by the employee is false and not made in good faith.

(5) Paragraph (2) does not apply where the detriment in question amounts to dismissal within the meaning of Part 10 of the 1996 Act.

139. 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).**

140. Regulation 7 (time limits) provides that an employment tribunal shall not consider a complaint under that regulation unless it is presented before the end of the period of three months beginning in the case of an alleged infringement of a right conferred by regulation 3(1) or 6(2), with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them. A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

141. Regulation 8 provides where an employee is employed under a contract purporting to be a fixed-term contract, and the contract has previously been renewed, or the employee has previously been employed on a fixed-term contract before the start of the contract, a provision that restricts the duration of the contract shall be of no effect and the employee shall be a permanent employee, if—

(a) the employee has been continuously employed under the contract mentioned in paragraph 1*(a)*, or under that contract taken with a previous fixed-term contract, for a period of four years or more, and
(b) the employment of the employee under a fixed-term contract was not justified on objective grounds.

142. In **Kücük v Land Nordrhein-Westfalen [2012] ICR 682** the CJEU held that a German law stating that to replace one permanent employee with another on a fixed-term contract was not contrary to the Directive. In this case the Claimant had been employed for 11 years under a total of 13 successive fixed-term employment contracts, to cover temporary leave granted to other employees. Although the assessment of the objective reason put forward must refer to the renewal of the most recent employment contract concluded, the existence, number and duration of successive contracts of that type concluded in the past with the same employer may be relevant in the context of that overall assessment. The mere fact that a need for replacement staff may be satisfied through the conclusion of contracts of indefinite duration does not mean that an employer who decides to use fixed-term contracts to address temporary staffing shortages, even where those shortages are recurring or even permanent, is acting in an abusive manner.

143. The FTC Regulations were considered by the Supreme Court in **Duncombe v Secretary of State for Children, Schools and Families [2011] IRLR 498.** In this case, the Claimant was a teacher employed by the Secretary of State to work in European schools under a treaty established to educate children of staff working in EC institutions. The maximum period of secondment was nine years. The Claimants sought a declaration under Regulation 9 (5) that they were permanent employees. The Supreme Court held that the nine year rule was objectively justified. The Directive and the framework agreement are directed at discrimination against workers on

fixed-term contracts in what was in reality an indefinite employment. It may be a desirable policy that fixed-term contracts be limited to work, which is only for a limited term, and where the need for the work is unlimited, it should be done on contracts of indefinite duration. That may even have been the expectation against which the Directive and the framework agreement were drafted. But it is not the target against which they were aimed. Employing people on single fixed-term contracts does not offend against either the Directive or the Regulations. The United Kingdom could have chosen to implement the Directive by setting a maximum number of renewals or successive fixed-term contracts, for example by limiting them to three. It could equally have chosen to implement the Directive by setting a maximum duration to the employment, for example by limiting it to nine or 10 years in total. It is readily understandable why the alternative route of requiring objective justification after four years was taken: this is more flexible and capable of catering for the wide variety of circumstances in which a succession of fixed-term contracts may be used.

144. Further, it was not the nine year rule that required justification, but the use of the latest fixed-term contract bringing the total period up to nine years. The latest renewal or successive contract has to be justified on objective grounds.

Order for considering claims where multiple acts of discrimination are alleged

145. S212 (1) EQA 2010 provides that 'detriment' does not, subject to subsection (5), include conduct which amounts to harassment.

146. S212 (5) EQA 2010 provides that (5) where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic.

Section 26 EQA 2010 – Harassment

147. This provides:

Section 26 Harassment

(1) A person (A) harasses another (B) if—

(*a*) A engages in unwanted conduct related to a relevant protected characteristic, and
(*b*) the conduct has the purpose or effect of—
(*i*) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(*a*) A engages in unwanted conduct of a sexual nature, and
(*b*) the conduct has the purpose or effect referred to in subsection (1)(*b*).

(3) A also harasses B if—

(*a*) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(*b*) the conduct has the purpose or effect referred to in subsection (1)(*b*), and
(*c*) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(*b*), each of the following must be taken into account—

(*a*) the perception of B;
(*b*) the other circumstances of the case;
(*c*) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;
disability;
gender reassignment;
race;
religion or belief;
sex;
sexual orientation.

148. Part 7 of the EHRC Code provides that unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic.

149. In **Hartley v Foreign and Commonwealth Office Services UKEAT/33/15** the employee had been dismissed for capability reasons. The employee had Asperger's syndrome. The EAT held that whether conduct is "related to" a disability should be determined having regard to the evidence as a whole; the perception of the person who made the remark is not decisive.

150. It is a question of fact for the Tribunal as to whether the conduct complained of occurred. If so, the Tribunal must determine if it had the purpose or effect as set out in S26 (1) (b). The test has subjective and objective elements to it. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser has on the Claimant. The objective part requires the tribunal to ask itself whether it was reasonable for B to claim that A's conduct had that effect.

151. In **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495** the EAT held that the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the only necessary or possible route to the

conclusion that the conduct in question is related to the particular characteristic. Nevertheless there must still be some feature or features of the factual matrix identified by the Tribunal which properly leads it to the conclusion that the conduct is related to the protected characteristic. The Tribunal must articulate what these features are.

152. **General Municipal and Boilermakers Union v Henderson 2015 IRLR 451** provides that a single comment could not constitute harassment because it had not reached the necessary degree of seriousness.

153. In **Reverend Canon Pemberton (appellant) v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham (Respondent) - [2018] IRLR 542,** Underhill LJ held: *S 26 of the 2010 Act [entitled "Harassment"] … is not in identical terms to s 3A of the Race Relations Act 1976, with which I was concerned in Dhaliwal … the precise language of the guidance at para 13 of [that] judgment … needs to be re-visited. I would now formulate it as follows. In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the Claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the Claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'*

Direct Discrimination

154. 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.

155. 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:

a. "...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."

156. On the burden of proof Section 136 EA 2010 provides:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

157. In **Igen v Wong [2005] IRLR 258 (CA)** the guidance issued by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd** was approved in amended form. The Tribunal must approach the question of burden of proof in two stages.

a. "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." (paragraph 17, per Gibson LJ)

158. **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.

<u>Time limits – EQA 2010</u>

159. S123 EQA 2010 provides:

(1) [Subject to [[section 140B]]] proceedings on a complaint within section 120 may not be brought after the end of—

(*a*) the period of 3 months starting with the date of the act to which the complaint relates, or
(*b*) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(*a*) the period of 6 months starting with the date of the act to which the proceedings relate, or
(*b*) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(*a*) conduct extending over a period is to be treated as done at the end of the period;
(*b*) failure to do something is to be treated as occurring when the person in

question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(*a*) when P does an act inconsistent with doing it, or
(*b*) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

160. The key date as to when time starts to run is the date of the act **(Virdi v Commissioner of Police of the Metropolis [2007] IRLR 24).**

161. In **British Coal Corporation v Keeble and others [1997] IRLR 336** the EAT suggested the following should assist Tribunals when considering the exercise of discretion. The relevance will depend on the facts of the case. The Tribunal should consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular to:

(a) the length of and reasons for the delay;
(b) the extent to which the cogency of the evidence is likely to be affected by the delay;
(c) the extent to which the party sued had cooperated with any requests for information;
(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and
(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

162. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule (per Lord Justice Auld in **Bexley Community Centre (Trading as Leisure Link) v Francis Robertson [2003] EWCA Civ 576.**

163. **Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530,** provides that when deciding whether there is a continuing act, the focus should be on the substance of the complaints that the Respondent is responsible for an ongoing situation or state of affairs. The question is whether that was “an act extending over a period” as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.

164. Where an alleged act is found not to be discriminatory it cannot be said to be part of conduct extending over a period **(South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168).**

Conclusions

FTC claim regulation 8

165. We consider it appropriate to firstly deal with the fixed term contract status because our findings on the issue of the permanent status would have the potential to effect our findings in respect of the unfair dismissal claim. In other words, if we found that the Claimant should have obtained permanent status in June 2017, this would have meant a different discussion around the reasons for the dismissal relied upon by the Respondent.

166. Our findings of fact regarding the permanent status issue are at paragraphs 28, 31, 33-41, 43, 50, 64-67 and 92-93 above. The Claimant was appointed to his last fixed term contract from 1 December 2016. It was not in dispute that by 10 June 2017 he had been continuously employed for a period of four years in accordance with Reg 8 (2) (a).

167. Regulation 8 provides that where the employee has been continuously employed on a series of contracts for a period of four years or more the employee effectively gains permanent status unless the employment of the employee under a fixed-term contract is objectively justified.

168. The Respondent's objective justification is the operation and provisions of the Access to Work scheme which requires support workers to be engaged through the terms of fixed term contracts, the length of which is dictated by the Access to Work, and which are reviewed on a regular basis. This is not to say that access to work themselves require funded workers to be engaged on a fixed term basis rather that the funding arrangements determine the fixed term.

169. We find that the Respondent has shown objective justification as to why the Claimant's contract was not permanent. The Claimant was recruited specifically to support Dr van den Anker to do a specific role for a specific period. His role was supposed to be wholly funded by the Access to Work grant which was of a fixed duration. The funding decisions were historically and would be in the future made by Access to Work, not the Respondent. The contract was also dependant on the continuing employment of Dr van den Anker's employment as well as her changing and fluctuating need for support dependant on her health at any given time.

170. We do not consider that the email sent to Dr van den Anker that states that "funding is not objective reason" derogates from the Respondent's case. Whilst we found that there was no evidence to support the contention this applied to academic research staff only, it was a generic email sent to all line managers who line managed fixed term staff. In our judgment the Respondent were entitled to consider the funding arrangements in the case of the Claimant objectively justified their decision to keep the Claimant on a fixed term contract given the direct link between

the Access to Work grants and the purpose of the contract namely to support Dr van den Anker.

Regulation 6 detriment claims

171. We address these claims in our conclusions below as the Claimant relied upon the same treatment identified under the harassment / direct discrimination claims.

Unfair dismissal S98

172. The Respondent relies upon the potentially fair reason of some other substantial reason with two "sub" reasons relied upon; the expiry of the fixed term contract and an irretrievable breakdown of the employment relationship.

173. We find that the reason for dismissal was some other substantial reason and that both sub reasons have been proven by the Respondent for the following reasons.

174. Firstly, the Claimant's fixed term contract expired on 31 July 2019 (by extension from 5 July 2019 see paragraph 101 above). This amounts to a dismissal. Secondly, the Respondent has in our judgment proven there was an irretrievable breakdown in the employment relationship. At the time of dismissal he had not been undertaking any work (due to the absence of Dr van den Anker) since October 2018. When the Respondent discovered he was in Zambia and had been for some months (whilst on full pay) he refused to engage in consultation or reply to reasonable requests for information by the Respondent as to his whereabouts and reasons for his leave or when he would be coming back. This was particularly an issue as since at least 22 May 2019 the Claimant was unable to support Dr van den Anker at an appeal hearing as he was out of the country. He was not available to do the work that he was contracted to do and when he was reasonably asked about that by the Respondent we find that his reaction and responses were unreasonable. He refused to provide information that was reasonably requested and we agree that the language and tone was combative.

175. The Claimant appeared to contend that on the basis of an email from Ms Spilsbury (see paragraph 53 above) he had been excluded from the university when Dr Van Anker was absent. There was, in our judgment, a surprising lack of overview of the Claimant throughout the duration of his employment when Dr Van den Anker was absent, sometimes for long periods. We found it surprising that the Respondent did not take any proactive action in regard to the management of the Claimant given that there were long periods of time where he was being paid in full by the Respondent, unable to reclaim those costs, and he was not required to do any work. However we also reminded ourselves that when the Respondent had tried to tackle this issue in November 2017 the Claimant responded in an extraordinarily disproportionate way to an informal consultation meeting

by issuing High Court proceedings at substantial cost to the Respondent and to date the subject of an unsatisfied costs order against the Claimant.

176. Even if we take the Claimant's case on this issue at its highest, that he understood he was not to attend the university when Dr van den Anker was absent, this does not assist the Claimant. This is because when he was required to be available to support Dr van den Anker he was unable to do so as he was out of the country and moreover refused to tell his employer when he was coming back. This impacted on Dr van den Anker's situation. The Tribunal considered that the Claimant's attitude towards his employer when they reasonably asked why he could not undertake this task was wholly unreasonable and showed a fundamental disregard for his employment terms and duties.

177. The Claimant also refused to engage with Dr Moyle and attend consultation meetings as he had done in 2019 when the Respondent sought to engage with him in respect of a redundancy consultation. Instead he referenced litigation as to means to resolve matters. This was a further clear example of the employment relationship being irretrievably broken.

178. The Respondent contended that the Claimant's emails were of a threatening nature. We do not agree they were threatening but they were inappropriate, demonstrated a wholescale disregard for the employment relationship and expressed a wholly misplaced sense of outrage given what he was being asked by the Respondent.

179. We turn now to consider the reasonableness of that decision by the Respondent under s.98(4) ERA 1996.

180. The Respondent sought to consult with the Claimant about changing his terms and conditions of employment as well as the upcoming expiry of the fixed term contract. Even when he had refused to engage he was offered a new fixed term contract albeit on zero hours which in our judgment was reasonable given the long periods of absence since 2013 in which Dr van den Anker had been absent and the Claimant was paid in full with no work to perform. This was not a state of affairs that a reasonable employer could maintain as tenable. The Claimant not only refused to take part in consultations he was unequivocal that litigation was the only way forward. He rejected the new contract offer. It is difficult to envisage what more the Respondent could have done to have avoided the dismissal. We find that the dismissal was fair. The Respondent acted reasonably in treating it as a sufficient reason for dismissing the Claimant.

<u>Protected Disclosures</u>

181. We turn now to s.103A ERA claim. This fails on multiples grounds.

182. Firstly, we found above that the reason for the dismissal was some other substantial reason namely the expiry of the fixed term contract and the irretrievable breakdown in the employment relationship. We do not

consider that the reason or the principal reason for the Claimant's dismissal was that he had made protected disclosures.

183. The Claimant asserted that he had made qualifying disclosure in accordance with s.43(b) in his letter before action dated 6 November 2017. Our findings regarding this letter are at paragraphs 80-86 above. We have concluded that none of the alleged disclosures amounted to qualifying disclosures for the following reasons.

184. There were three grounds relied upon.

a. That the letter disclosed information which in his reasonable belief tended to show the Respondent had failed to comply with Regulation 8 of the FTC Regulations and;

b. That the Respondent was breaching their legal obligations under the Equality Act and;

c. That there had been concealments of those matters.

185. The Respondent's position was that the information in the letter did not amount to a disclosure of information under s.43B and they were no more than "bold assertions and allegations." We have considered the guidance provided in the case of Kilraine v Wandsworth London Borough Council. We had to consider whether the statements made by the Claimant had sufficient factual content and specificity to be capable of tending to show a breach of those legal obligations.

FTC Regulations disclosure

186. At the time the Claimant wrote the letter in November 2017 he had, as of June 2017 already reached a four year period of employment. The Claimant did not quote the Regulations in the letter, but this is not necessary. He was asked why he had not quoted the Regulations in cross examination and explained that he did not refer to the Regulations as it was before his "invocation". We concluded this was plainly in reference to his later letter in February 2019 where he did seek to invoke the Regulations. This supports our finding of fact that the Claimant did not at the time reasonably believe that he was disclosing information that the Respondent was in breach of Regulation 8. We find that this was not in the Claimant's mind at all when he write the letter. This is corroborated by the Claimant referencing a period of 41 months which was the period between the start of his employment and the issuing of the fixed term contract. He did not reference a four year period and that he should therefore be regarded as a permanent employee.

187. Furthermore, having regard to what was actually said in the letter in our judgment, the information did not have sufficient factual content and specificity such as is capable of tending to show he reasonably believed the Respondent was in breach of the FTC Regulations. Whilst he made

reference to being on a series of short term contract, and says there was "*was little or no action to effect a permanent contract"* this was not sufficient to show he was disclosing information that the FTC Regulations were being breached.

188. The Claimant relied upon the following as the public interest element:

"The Respondent is a 'public' body with responsibility to the students and members of the public who use its facilities and services. It is of public interest if such an organization fails to comply with legal obligations prohibiting discrimination."

189. This did not address why an alleged breach of an individual's rights under the FTC Regulations would be in the public interest. In our judgment, the information was not in the public interest. It was self serving – a letter before action and all about the Claimant's own position. The Claimant did not deal with why the information was in the public interest.

Equality Act disclosure

190. We have considered the letter as a whole as we were not directed to which parts the Claimant asserted amounted to the qualifying disclosure(s).

191. We do not consider that the following words amounted to a qualifying disclosure: *"Dr van den Anker has informed me of derogatory and inappropriate comments made by Dr Watson of me in the course of my work. However intentioned the remarks were, I fully intend to pursue a course of action in that regard as it reflects elements of unconscious and conscious bias and prejudice."*

and

"You will recall, Dr Clegg, that Dr Watson accused me and Dr van den Anker, in October 2016, of 'interfering with management' in the debacle over the four students who complained of inappropriate and offensive behaviour by the departed [name of lecturer]."

192. This is because he does not provide any detail that could explain with sufficient detail that the Respondent was breaching the Equality Act. He does not refer to any protected characteristic. He evidently raises issues of alleged wrong doing but we do not consider it to be sufficiently detailed to pin that alleged wrong doing to breaches of the Equality Act in respect of the words used.

The Claimant goes on to say:

"The direct and indirect discrimination, mistreatment, hostility, delay, effective side-lining and oppression experienced by Dr van den Anker and me over months and years are issues which will be pleaded in my particulars of claim …

And

Dr Neill, in the course of some meetings where I was present, made some highly inappropriate comments that condoned sexism and stated his displeasure at the role Dr van den Anker had taken in assisting the students to be heard and listened to in their complaints regarding Dr Schilling and the handling of their concerns.

You Dr Clegg, Dr Neill and Dr Watson were found wrong, or at least found wanting, in your roles and participation in that saga. It is in that context, and your continued complicity in the negative behaviours of Dr Watson relative to Dr van den Anker, that explains your actions, or omissions, regarding negative significant processes initiated against her and against me with the complicity of Human Resources. I specifically refer to the initiatives to investigate Dr van den Anker with the possibility of dismissal and your possibly premature moves to place my role at 'risk of redundancy'. This is partly why Ms Catherine Parker and Ms Helen Spilsbury are co-defendants in my proposed claim too.

193. In this section, the Claimant alleges there has been ongoing direct and indirect discrimination against himself and Dr Van den Anker. He also alleges that Professor Neill made remarks "condoning sexism" and expressed displeasure at Dr van den Anker's support for the students. On this basis we conclude that these words did amount to a disclosure of information that tended to show the Respondent was allegedly breaching the Equality Act.

194. The Claimant had stated that the Respondent was a "public authority" and was under a duty and obligation to comply and meet certain standards. due to the following words:

The University, as a public authority under the Human Rights Act 1998, and other relevant statutes, is under a duty and obligation to comply with and meet certain standards. These duties and their non-compliance will be laid out in more detail in my proposed claim.

195. In our judgment this was not sufficient to show that the Claimant had a reasonable belief the disclosure was in the public interest. The disclosure was made in a letter before action which was followed by a High Court claim. We agreed with the Respondent's submission that this showed the primary purpose of intention was to advance the Claimant's own interests to pursue proceedings against the Respondent and obtain compensation. Other than the reference in the letter to the Respondent being a public body there was nothing to persuade us the Claimant had a reasonable belief that the disclosures at the time were made in the public interest.

Concealment

196. The only evidence suggestion of concealments in the letter came in responses from the Claimant to questions under cross examination. He asserted that he relied upon the section of the letter where he states "*Hiding behind 'the University' is a favoured tactic and strategy of those involved in the above mentioned factors and behaviours.*

197. This in no way had sufficient detail so as to amount to information tending to show any matter falling within any one of the preceding paragraphs under S43B(1) has been, or is likely to be deliberately concealed.

198. The reason or principal reason for the Claimant's dismissal was not the making of the protected disclosure. The reason was due to some other substantial reason as set out above in our conclusions under paragraphs 172-178. The dismissal was nothing with the alleged disclosures and there was no causal link whatsoever in our judgment. This was evidentially demonstrated by the actions of the Respondent after the letter. The Respondent abandoned a redundancy consultation in November through to January 2018, not revisiting this despite further lengthy absences by Dr van den Anker between October 2018 and July 2019, and offered the Claimant a new contract. These were not the actions of an employer seeking to dismiss an employee for having made a protected disclosure some 18 months earlier.

S104 Asserting a statutory Right

199. The Claimant led no evidence on this claim. The Claimant had told Judge Midgely that he replied upon the email that he had sent Ms Thorne on 28 June 2019 as the email containing an assertion of a statutory right not to suffer an unauthorised deduction from wages. We set out the contents of that email above (paragraph 103). The context was that Ms Thorne had told the Claimant that if he did not reply to her reasonable request for information by a certain time that his wages would be stopped. The wording relied upon was as follows:

"*Your letter has made allusions to issues concerning absence without leave, complete pay cuts subject to 'requested information', breach of contract and invoking a disciplinary process.*

Further to those factors stated by you and the implicit threat of sanctions, I await your invocation of the same stated sanctions and we will proceed from there."

200. This claim fails on three grounds. Firstly, in order to succeed in such a claim, it must have made it reasonably clear in the communication what the infringement was said to be. The reader must understand what the right was being asserted. The Respondent said there had been no assertion. We have concluded that a reference by the Claimant to the Respondent "completing pay cuts" was not reasonably clear as to what right he said was

going to be infringed. The Claimant did not set out why the Respondent's proposed action of stopping his wages would be unlawful.

201. Secondly, at this point there had been no deduction from wages and as such there can have been no qualifying assertion that a statutory right had been infringed. We consider that the obiter comments in **Mennell v Newell & Wright (Transport Contractors) [1997] IRLR 519** that an employment tribunal has no jurisdiction to entertain a complaint about a threatened deduction from wages as a binding authority when considered alongside **Spaceman v ISS Mediclean Ltd UKEAT/0142/18.**

202. Thirdly, there was absolutely no basis to conclude that the Claimant's dismissal was for the reason or principal reason that he had asserted a statutory right. The Claimant was dismissed for the reasons we set out above.

S26 – Harassment related to race, sex or Dr Van den Anker's disability

4.2.1 Treatment of the Claimant by way of hostile glares, stares and disdain by Sean Watson on at least two occasions, one of which was in October 2016

4.2.2 Treatment of Dr Van den Anker by way of hostile glares, stares and disdain by Sean Watson on at least three occasions in spring 2016

203. Our findings of fact concerning this allegation are above paragraphs 42 and 63. We found that Dr Watson did not engage in hostile stares to either the Claimant or Dr van den Anker. The claims are also substantially out of time. Further, we consider that the allegations (described as such as we found they are unproven) would not form part of an act extending over a period. The allegations are unconnected to the later acts relied upon in 2019 and were isolated specific acts the latest of which was October 2016.

4.2.3 Belittling comments made to the Claimant by Sean Watson on 7 October 2016 about whether the Claimant could mark student work

204. Our findings of act regarding this allegations are above at paragraphs 55 - 60. The claim is substantially out of time. It is also unconnected to the later acts relied upon which happened almost three years later and related to the Claimant's absence, dealt with by completely different individuals.

205. Further, in our judgment the Claimant has not established that the comment by Dr Watson related to his race, sex or Dr Van den Anker's disability. The Claimant said the comments were made to him in a meeting but the contemporaneous note records that the Claimant was not even present at that meeting and we therefore consider the Claimant's account is less reliable than Dr Watson's.

206. Dr Watson provided a reasonable and entirely plausible explanation for his question which was asked with the purpose and intention of ensuring a suitably qualified person was marking the student work in order to comply

with the university's quality obligations and that if the Claimant was marking work it may have been encroaching on Dr van den Anker's role considering that the support worker was only supposed to engage in no more than 20% of the supported employees duties.

207. The Claimant raised no complaint about this at the time. If he had considered it displaying a discriminatory attitude and act of micro aggression we consider he would have raised the issue even informally and he did not. We therefore consider that the Claimant did not perceive to have suffered the effect in question.

208. We also have concluded objectively that such a comment would not have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. In considering whether the conduct had that effect, whilst we knew what the Claimant's perception (whilst the Claimant says he perceived this as a discriminatory attitude and an instance of micro aggression) he does not explain why. We do not consider it reasonable to have had that effect given what was said and the context in which it was said.

4.2.4 Julie Thorne sending the Claimant emails and/or letters containing demands and ultimatums between 2 June and 31st of July 2019

209. Our findings of act regarding this allegations are above at paragraphs 100-105, 110.

210. We have had some difficulty unravelling the source of this complaint as to where it had been included and detailed as a race and sex related harassment in the three claims. In the Claimant's third claim presented on 6 August 2019, he brought a harassment claim but this was only pleaded as related to Dr Van den Anker's disability; race and sex were not referenced. At paragraphs 15 of his complaint he stated:

"The Respondents saw and seized on an opportunity to wield the stick when they were informed in May 2019 that I had travelled to Zambia. The wielding, and consequent harassment, was done by Judith Thorne, the fifth Respondent who works in Human Resources. A series of demands and ultimatums were made further to which disciplinary action would follow if not acquiesced to. A start was made when Judith Thorne instructed payroll to stop my salary from 01 July 2019."

211. In the Claimant's further and better particulars dated 29 October 2019 at paragraphs 4.15 he states:

"The Claimant does not say the harassment by Judith Thorne (cited as alleged conduct by the Respondents) in this claim (No.1403339/2019) is related to Dr van den Anker's disability. The Respondents put words in the Claimant's mouth."

212. This cannot have been the case as it was the Claimant who had completed his claim presented on 6 August 2019. He had not ticked the

"race or sex" box in the ET1 form, only disability. It is therefore wholly unsurprising that everyone understood the harassment claim presented in the ET1 dated 6 August 2019 was related to disability and not any other characteristic.

213. Our primary finding therefore is that no claim has been presented in respect of a race and sex related act of harassment. Nonetheless we conclude as follows. This allegation was not addressed in the Claimant's witness statement. The correspondence was not related to the Claimant's protected characteristics or Dr van den Anker's associated disability. The correspondence was related to reasonable enquiries about the Claimant's whereabouts given the Respondent discovered the Claimant was unable to undertake his contractual duties to support Dr van den Anker at an appeal hearing and was in fact in Zambia.

214. There was no evidence as to why these communications had to perceived effect in question on the Claimant. We were unable to consider why and how form the Claimant's perspective these communications had violated his dignity or created the proscribed environment.

215. We also have concluded objectively, the contents of these communications would not have had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. It was not reasonable to consider that an employer who was writing to an employee who was absent and refusing to answer correspondence as well as being unable to perform their contractual duty amounted to a harassment environment. To do so in our judgment would derogate from the type of conduct or environment with which S26 is concerned to protect an individual from.

4.2.5 Treatment of Dr van den Anker by the content letters sent by Debbie England on 17 June 2019 and unspecified emails form Judith Thorne (which can only have been the email of 16 July 2019) which enquired as to her ability to return to work and the date on which she might do so

216. See our findings of fact at paragraph 99 above.

217. The letter from Debbie England was sent to Dr van den Anker on 17 June 2019 when the Claimant was in Zambia and had told Ms Thorne on 28 June 2019 that he had been experiencing significant connection issues in respect of a Wi-Fi connection. He told the Tribunal he was in Zambia until 3 July 2019. The Claimant told the Tribunal that he had learned about the letters and email because he had gone to Dr van den Anker's house when he returned to the UK and she had shown him the letters. We do not know why the Claimant says that the content of those letters would amount to race, sex or associated disability related harassment of the Claimant.

218. We find that they in no way relate to the Claimant's protected characteristics or Dr van den Anker's disability. The letters set out the historical and current position with Dr Van den Anker's absences, with

reasonable enquiries and discussions regarding her long term absence and plans for her return to work.

219. Again, there was no evidence about this led by the Claimant as to how a letter sent to someone else resulted in the Claimant having suffered a violation of dignity or the proscribed environment. Letters sent to someone else (not even the Claimant) about their absence and return to work arrangements would not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. It was not reasonable to consider that the content of these communications to Dr van den Anker amounted to a harassment environment. This is a further example of where to do so would derogates the principles of S26.

Direct race, sex and associative disability discrimination

220. The Claimant relies upon Ms Sims a female white support worker and / or hypothetical comparators.

221. Dealing first of all with Ms Sims, we agree that she is not a suitable comparator as she was not in the same position as the Claimant in all material respects. There were no issues in recovering the Access to Work funding for Ms Sim's support worker hours. She was not line managed by her supported employee but by a separate line manager, unlike the Claimant who was line managed by Dr van den Anker. There were also significantly less "lost" hours for Ms Sims than the Claimant due to their supported employee having less time off. Further, Ms Sims engaged in the consultation process whereas the Claimant did not.

222. The Claimant led no evidence about hypothetical comparators.

223. Turning now to the allegations of less favourable treatment.

5.1.1 Delays between March 2014 and December 2016 in relation to the contract finally entered into in December 2016 (Sean Watson)

224. This claim is substantially out of time.

225. We do not know who the comparator is said to have been in respect of this claim. If it was Ms Sims, this must fail as the only evidence we had was that she was also on a TSU contract before being offered a fixed term contract.

226. There was no discussion or focus on how the delay amounted to less favourable treatment. Indeed the Claimant had complained that the fixed term contract contained less favourable terms than the TSU contract (see above).

227. There were communications from Mr Foster from March 2015 that the Claimant should be on a fixed term contract. The reason why there was a period of time where the Claimant was not issued with a fixed term contract was not because of the Claimant's protected characteristics or Dr van den Anker's associated disability. There are a number of factors that contributed to the delay. See our findings of fact at paragraphs 43 – 24 and 64-74. Dr van den Anker had not applied for a renewal of funding when her funding had run out in March 2015 so there were no grant in place from March 2015. Dr Watson sought advice from the Respondent's advisors ADWUK who prepared a report making a number of recommendations that took time to progress. Dr van den Anker decided to apply for more funding and wanted to employ a different support worker to the Claimant for academic support duties. In fact it was the Respondent who told Dr van den Anker they would not extend the TSU contract any further in May 2016. She was asked to submit the request for a FTC for the Claimant as a matter of urgency and she failed to do this before it expired. There was also a failure by Dr van den Anker to then meet the Access to Work deadline. Even then, the Respondent extended the Claimant's contract. There then followed the confusion about the additional 15 hours between the Respondent and Access to Work, followed by the student complaint and the impact the investigation had on Dr Watson progressing matters.

228. All of these factors were the reason why the treatment occurred. None of those factors were related or because of the Claimant's protected characteristics or his association with Dr van den Anker's disability.

5.1.2 Changes to the Claimant's contract in the period October 2016 to December 2016, by which the contract resulted from the terms which had been agreed with the Claimant previously particularly in respect of support hours (Sean Watson).

229. As noted above, the contract was issued on or around 14 / 15 December 2016 and accepted by the Claimant on 25 December 2016. By this time he must have bene well aware of the terms. If there were terms alleged to have been discriminatory then the time began to run from when those terms were decided upon which must have been no later than mid December 2016 when the terms were offered to the Claimant. This claim is significantly out of time.

230. The Claimant told the Tribunal the change he complains about is the refusal to entertain the contribution to 36 hours. However as we see in paragraph 47 above, the reason the Respondent did not agree to fund the extra hours was on advice from WECIL as they were of the view this would jeopardise all of the funding. The Respondent reasonably relied upon advice from this organisation. .

231. Also, the evidence showed that the setting of the terms was nothing to do with Dr Watson. It is unclear exactly who made the decisions on pay (Ms Spilsbury gave evidence as to the reasons why but not the decision maker). What we are able to conclude is that the setting of the terms was not because of the Claimant's protected characteristics or association with

Dr van den Anker's disability. The terms were pegged to the Access to Work funding and the ensuing affordability factors of the employment costs.

5.1.3. In December 2017 alleging that the Claimant and Dr van den Anker were failing to complete the necessary forms to enable the Respondent to claim back payments from Access to Work in respect of the costs of the Claimant's salary (Peter Clegg)

232. This claim is significantly out of time.

233. The Claimant did not speak of this in his witness statement. There was no dispute that the Respondent raised the failures with the Claimant and Dr van den Anker on multiple occasions but we did not find any evidence of a specific incident in December 2017.

234. We do not consider that the Claimant has shown that raising an allegation of this nature amounted to a detriment. As we have seen, nothing happened to the Claimant as a result of the failures to make the claims and all that entailed financially for the Respondent, even though this was part of the Claimant's job description. We were not taken to any evidence about why raising these matters, which we consider to be entirely legitimate matters given the significant financial cost to the Respondent, was because of the Claimant's protected characteristics and/ or association with Dr van den Anker's disability. It is inherently more likely that those matters were raised because the Respondent was losing out on funding that had already been provided at significant cost to the Respondent because the claims were not being made. We repeat we make no finding as to why that was the case, but it is unarguable that that was the position.

5.1.4. Failing to provide a suitable workspace for the Claimant in the period July 2013 until January 2018 (Sean Watson, Peter Clegg, Steven Neill)

235. This claim is substantially out of time. See findings at paragraph 116 - 118. By mid 2018 the situation had been rectified. Professor Clegg had asked Dr van den Anker to make these arrangements in April 2017. We do not know why it took until mid 2018 for these matters to be resolved. Any inaction in proving that provision of that workstation was not because of the Claimant's protected characteristics or association with Dr van den Anker's disability.

5.1.5. Initiating the redundancy process relating to the Claimant's role on 2 November 2017 (Sean Watson, Peter Clegg, Steven Neill)

236. This claim is substantially out of time. The redundancy process was initiated on 2 November 2017. In our judgment it was entirely evident that the reason for initiating the redundancy procedure was that Dr van den Anker was on long term sickness absence and the Claimant was not doing any work. The Respondent could not claim any funding for his salary. That was the reason for that treatment and it was not related to the Claimant's protected characteristic or association with Dr van den Anker's disability.

5.1.6. Reporting the Claimant for breaching the parking regulations at the first Respondent site on 6 March 2018 (R1 only)

237. This claim is substantially out of time.

238. We found this claim to be particularly unmeritorious. The Claimant led no evidence as to who reported him, when and what was the less favourable treatment. Reporting an individual who owns a car that is allegedly being slept in on private property does not amount to a detriment. The only thing that happened to the Claimant by his own report was that Dr van den Anker raised this with him verbally. He was not disciplined or sanctioned in any way. Further, the reason this would have been raised was because he owned the vehicle in question. Whoever reported the vehicle would not have known that at the time of making the report.

5.1.7. Placing the redundancy process in respect of the Claimant on hold rather than stopping it on Dr van den Anker's return to work in December 2017 (Peter Clegg)

239. This claim is substantially out of time. See our findings above. The Claimant has not proven facts from which we could conclude that the Respondent has committed an unlawful act of discrimination as we found that the Claimant did not consider the redundancy process was paused or on hold. It is difficult to square this allegation with the Claimant's position at the time. If someone is refusing to engage in a consultation and no consequences follow from that refusal, it is difficult to understand how that person can therefore consider that consultation to be on hold.

Conclusions on limitation issues of the FTC detriment, harassment and direct discrimination claims

240. The Claimant did not pursue a case that it would be just and equitable to extend time. We heard no evidence on why it would be just and equitable to extend time.

241. We have found that none of the acts relied upon in any event amounted to unlawful acts of discrimination or detriments under the FTC.

242. Lastly, there was no course of conduct that would amount to an ongoing situation or state of affairs. The allegations were distinct, unrelated and against a wide number of individuals with no link.

Regulation 6 FTC claims

243. We have set out above our conclusions as to why the matters relied upon for the FTC detriment claims, harassment and direct discrimination claims occurred. None of these are attributable to the Claimant having done any of the protected acts set out in Regulation 6 (3). For these reasons we are not addressing which detriments were said to have been done on the

ground of which reference to the Regulations, other than to say that many of the detriments pre date and reference to the regulations under Regulation 6 (3) (a) – (i) – (iv) in any event.

Claim against named Respondents

244. Under S109 EQA 2010 an individual employee will be exposed to personal liability if he or she does something which, by virtue of S109, is treated as being done by the employer and that thing amounts to a contravention by the employer of the EQA.

245. In these proceedings the Claimant has pursued such claims against a significant number of individuals involved in their dealings with the Claimant as part of their roles within the Respondent. A number have already been struck out. Judge Midgely recorded in his order dated 3 March 2020:

The Employment Judge explored with the claimant the implications of pursuing claims against nine individual respondents in circumstances where first respondent accepted that it was liable for any acts of discrimination by the individual respondents and was not seeking to run the statutory defence in section 109 (4) EQA 2010.

In particular the Employment Judge raised his concern that if the individual respondents sought to blame the other for acts of discrimination, it could lead to separate legal representation being required for individual respondents, which would likely add to the length of the hearing. In addition, in the circumstances where the claimant was not able to identify acts for which he alleged each of the individual respondents were specifically responsible, there may be concerns that including them as individual respondents would not be compliant with the overriding objective.

The Employment Judge advised the claimant that it was entirely a matter for him, but he might wish to reflect upon whether he wished to continue with the proceedings against all of the individual respondents. However, in relation to 2 specific allegations which are detailed in the Issues below (as addressed at order 1 below) where the claimant identified multiple respondents, the Employment Judge invited the claimant to review the disclosure had received to see which of the individual respondents he said was responsible for the decision about which he complained and to limit the claims to that individual.

246. The Claimant as continued to pursue all 9 individual Respondents in these proceedings, requiring them all to prepare and conduct their defences as named respondents. Apart from where specified in Judge Midgeley's order, it was unclear what complaints were brought against which individual.

247. Ms McIver, Ms Thorne, Dr Moyle and Ms Dare's involvement was limited to administrative HR and consultation functions performed as part of their day to day roles. In particular Ms Dare and Ms McIver had extremely

limited involvement in their dealings with the Claimant. Apart from Dr Moyle's involvement in the alleged harassment, it was not explained why the others had been named as Respondents.

248. Professor Steven West never even met the Claimant or had any dealings whatsoever other than to have been copied into his letter before action in November 2017. The complaint against him was justified by the Claimant on the basis he was the Vice Chancellor and had an element of responsibility of high office. On this basis the Claimant refused to withdraw the claim against him when invited to do so by Mr Mitchell.

249. The claims pursued against individual named respondents were unreasonable and misconceived. Extremely serious, unspecified and unsubstantiated discrimination claims were brought against individual's within the employment of the first Respondent who in the main were undertaking reasonable and necessary line management or HR duties within the course of their employment.

_____
Employment Judge S Moore
Date: 19 June 2023

Judgment sent to the parties on 06 July 2023

For the Tribunal Office

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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

APPENDIX A – SCHEDULE OF ACAS EC CERTIFICATES

Respondent	Certificate number	Day A	Day B
University of West of England	R213199/17/69	27.11.17	29.11.17
Peter Clegg	R214320/17/68	30.11.17	5.12.17
Sean Watson	R214339/17/91	30.11.17	5.12.17
Steven Neill	R214347/17/19	30.11.17	05.12.17
Shay Dare	R214355/17/44	30.11.17	05.12.17
University of West of England	R118405/19/94	14.2.19	14.2.19
Peter Clegg	R118678/19/62	14.2.19	14.2.19
Helen Spilsbury	R118683/19/17	14.2.19	14.2.19

APPENDIX B – LIST OF AGREED ISSUES

The numbering in Judge Midgley's order was retained for ease of reference and as such starts at paragraph number 2. Note text in bold indicates where the further information was subsequently added by reference to the Claimant's further particulars dated 18 March 2020.

2. Unfair dismissal (The Third Claim - R1 only)

2.1. What was the reason for dismissal? The Respondent argues that it was a reason related to some other substantial reason, namely the expiry of his fixed term contract and/or the Claimant's rejection of an offer of new employment and/or an irretrievable breakdown in the relationship of trust and confidence caused by the Claimant's conduct, which is a potentially fair reason for dismissal under s. 98(2) of the Employment Rights Act 1996.

2.2. Was the decision to dismiss for that reason a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

2.3. Did the Respondent adopt a fair procedure?

2.4. If the procedure were unfair, what is the percentage chance that the Claimant would have been fairly dismissed had a fair process been followed and/or when would that dismissal have occurred?

2.5. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? (This requires the Respondent to prove, on the balance of probabilities, that the Claimant committed the misconduct alleged).

3. Automatically unfair dismissal claims S.103A and 104 ERA 1996 (Third claim R1 only)

3.1. What information did the Claimant say or write, to whom did he write it and when did he do so? The Claimant relies upon the following:

3.1.1 . A letter dated approximately 6 November 2017 which was attached to an email sent to Steven West and Jane Harrington in which the Claimant alleged that he and Dr van den Anker had been bullied and harassed and subjected to discrimination contrary to the Equality Act 2010 and/or that R1 had failed to follow a fair redundancy procedure as a consequence of that discrimination.

3.2. Did the information disclosed in the Claimant's reasonable belief tend to show that;

3.2.1. R1 had failed to comply with a legal obligation contained in the Equality Act 2010 or Regulation 8 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 to which the Respondent was subject as the employer of the Claimant and Dr van den Aker?

3.2.2. Or that any of those things were happening or were likely to happen, or that information relating to them had been or was likely to be concealed?

3.3. If so, did the Claimant reasonably believe that the disclosure was made in the

public interest? The Claimant relies on the following matters to prove the reasonable belief:

3.3.1. The Respondent is a 'public' body with responsibility to the students and members of the public who use its facilities and services. It is of public interest if such an organization fails to comply with legal obligations prohibiting discrimination.

3.4. If so, it is agreed that the disclosure was made to his employer.

3.5. Did the Claimant assert his statutory right not to suffer unlawful deductions of wages in a letter(s) attached to an email(s) and sent to Julie Thorne on or about 28 June 2019?

Unfair dismissal complaints

3.6. Was the making of any proven protected disclosure or assertion of a statutory right the reason or principal reason for the dismissal?

3.6.1. Has the Claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure(s)?

3.6.2. Has the Respondent proved its reason for the dismissal, namely some other substantial reason?

3.6.3. If not, does the tribunal accept the reason the Claimant relies upon or does it decide that there was a different reason for the dismissal?

4. Section 26: Harassment on grounds of race, sex or Dr van den Anker's disability (First Claim - Sean Watson and R1; Third Claim Julie Thorne and R1)

4.1. The Claimant self identifies as Black African.

4.2. Did the Respondent engage in unwanted conduct as follows:

4.2.1. Treatment of the Claimant by way of hostile glares, stares and disdain by Sean Watson on at least two occasions, one of which was in October 2016?[5]

4.2.2. T treatment of Dr van den Anker by way of hostile glares, stares and disdain by Sean Watson on at least three occasions in spring 2016?[6]

4.2.3. Belittling comments made to the Claimant by Sean Watson on 7 October 2016 about whether the Claimant could mark student work.[7]

4.2.4. Julie Thorne sending the Claimant emails and/or letters containing demands and ultimatums between 2 June and 31st of July 2019?

4.2.5. Treatment of Dr van den Anker by the content letters on **17 June 2019 sent by Debbie England and emails in June 2019 and July 2019 sent by Judith Thorne**[8] which

[5] Subject of a deposit order as likely to be out of time
[6] Subject of a deposit order as likely to be out of time
[7] Subject of a deposit order as likely to be out of time
[8] Later confirmed in the claimant's further and better particulars dated 18 March 2020

enquired as to her ability to return to work and the date on which she might do so?

4.3. Was the conduct related to the Claimant's protected characteristics or Dr van den Anker's disability?

4.4. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? In particular where the conduct directed towards Dr van den Anker occurred during a period of sick leave and the Claimant was not present when the letters were received.

4.5. If not, did the conduct have the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? (In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.)

5. Section 13: Direct discrimination on grounds of race and sex, and associative direct discrimination on the grounds of association with a person with a disability (First Claim - R1 and individual Respondents as identified)

5.1. Did the Respondent subject the Claimant to the following treatment falling within section 39 Equality Act:

5.1.1. Delays between March 2014 and December 2016 in relation to the contract finally entered into in December 2016 (Sean Watson)[9]

5.1.2. Changes to the Claimant's contract in the period October 2016 to December 2016, by which the contract resulted from the terms which had been agreed with the Claimant previously particularly in respect of support hours (Sean Watson)[10]

5.1.3. In December 2017 alleging that the Claimant and Dr van den Anker were failing to complete the necessary forms to enable the Respondent to claim back payments from Access to Work in respect of the costs of the Claimant's salary (Peter Clegg)

5.1.4. Failing to provide a suitable workspace for the Claimant in the period July 2013 until January 2018 (Sean Watson, Peter Clegg, Steven Neill)

5.1.5. Initiating the redundancy process relating to the Claimant's role on 2 November 2017 (Sean Watson, Peter Clegg, Steven Neill)

5.1.6. Reporting the Claimant for breaching the parking regulations at the first Respondent site on 6 March 2018 (R1 only)

5.1.7. Placing the redundancy process in respect of the Claimant on hold rather than stopping it on Dr van den Anker's return to work in December 2017 (Peter Clegg)

5.1.8. Any of the treatment not found to have been harassment (limited to paragraphs 4.2.1, 4.2.3 and 4.2.4 above).

[9] Subject to a deposit order as likely to be out of time
[10] As above

5.2. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon the following comparators; Ms Sims at the Glenside campus, a female white support worker, in relation to the claims of race and sex discrimination and/or hypothetical comparators.

5.3. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

5.4. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

6. Breach of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002

16.1 Was the Claimant subjected to a detriment by any of the treatment identified is harassment or direct discrimination?

16.2 If so, was that detriment done on the ground that the Claimant:

1. **Brought proceedings under the Regulations;**
2. **Requested a written statement under the Regulations;**
3. **Otherwise did anything under the Regulations in relation to the employer or any other persons;**
4. **Alleged that the employer had infringed the Regulations.**

16.3 Was the Claimant continuously employed under a contract purported to be a fixed term contract which had previously been renewed, or had the Claimant previously been employed on such a fixed term contract, or under that contract taken with the previous fixed term contract, for a period of four or more years?

16.4 If so was the Respondent's refusal to employ the Claimant under a permanent contract justified on objective grounds at the point when it was last renewed and/or at the time when it was entered into?

16.5 The objective justification relied upon by the Respondent is the operation and provisions of the Access to Work Scheme which require support workers to be engaged through the terms of fixed term contracts, the length of which is dictated by the Access to Work, and which are reviewed on a regular basis.

7. Time/limitation issues

7.1. Any act or omission which took place more than three months before the relevant claim was filed (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction to hear it: 1400283/18 presented 21 January 2018; 1400615/19 presented 22 February 2019 and 1403339/19 presented 31 July 2019.

7.2. Can the Claimant prove that there was conduct extending over a period? If so,

is such conduct accordingly in time?

7.3. If not, was:

(claims under the Regulations)

7.3.1. It not reasonably practicable to have presented the claim in time and, if so
7.3.2. Was the claim presented within a reasonable further period?

(Claims of discrimination)
7.3.3. Was any complaint presented within a period which the Tribunal considers just and equitable?