Neutral Citation Number: [2023] EAT 108

Case No: EA-2021-000560-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 August 2023

Before:

MATHEW GULLICK KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

DR OLEG IOURIN **Appellant**

- and -

THE CHANCELLOR, MASTERS AND SCHOLARS OF THE UNIVERSITY OF OXFORD **Respondent**

- -

- -

Mr Allan Roberts (appearing *pro bono*, through Advocate) for the **Appellant**
Ms Anna Beale (instructed by Bevan Brittan LLP) for the **Respondent**

Hearing date: 19 January 2023

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JUDGMENT

SUMMARY

SEX DISCRIMINATION; DISABLITY DISCRIMINATION

The Employment Tribunal did not misunderstand or misapply the burden of proof provisions applicable to direct sex discrimination and victimisation claims. The Employment Tribunal also came to a permissible conclusion, on the evidence before it, that the Claimant was not a disabled person within the meaning of the Equality Act 2010. It did not err in law in not making such a finding based on the issue of "deduced effect".

However, the Employment Tribunal made a material error of law when addressing two of the Claimant's allegations of direct sex discrimination and victimisation. It made a mistake on an issue of undisputed fact, wrongly stating in the operative paragraphs of its written reasons that the Claimant had been found by the Respondent's grievance committee to have committed an act of harassment. It relied on that factual mistake when reaching its conclusion that the Claimant had not been discriminated against when he was subsequently required to undergo harassment training. This was, in the circumstances, a material error of law. It was not possible for the Employment Appeal Tribunal to conclude that the outcome in relation to those allegations would have been the same had the error not been made. Those allegations were remitted to the Employment Tribunal for rehearing.

MATHEW GULLICK KC, DEPUTY JUDGE OF THE HIGH COURT

Introduction

1. In this judgment, I shall refer to the parties as "the Claimant" and "the Respondent", as they were before the Employment Tribunal.

2. This is an appeal by the Claimant against the reserved judgment of an Employment Tribunal sitting at Reading. The members of the panel were Employment Judge Vowles, Ms A. Brown and Ms H. Edwards. The Employment Tribunal held a five-day hearing on 26-30 October 2020; there were two days of deliberations in chambers on 24 and 26 November 2020. The Tribunal dismissed the Claimant's claims against the Respondent under the Equality Act 2010 ("*the Equality Act*"). Those claims were for direct sex discrimination, victimisation and disability discrimination. The judgment and written reasons were signed by the Employment Judge on 19 February 2021 and were sent to the parties on 5 March 2021.

3. The Claimant filed a Notice of Appeal on 9 April 2021, which was considered on the papers by Stacey J. There are eight grounds of appeal. Stacey J dismissed seven of those grounds under Rule 3(7) of the Employment Appeal Tribunal Rules and directed a Preliminary Hearing in relation to the eighth ground. The Claimant applied under Rule 3(10) for reconsideration at a hearing of the decision in relation to the first seven grounds. On 6 April 2022, His Honour Judge James Tayler considered all the grounds of appeal at a combined Rule 3(10) and Preliminary Hearing. He permitted all the grounds of appeal to proceed to Full Hearing, although he expressed "*very considerable misgivings*" about what, if any, practical benefit the Claimant could hope to achieve from continuing the litigation. The Respondent filed an Answer opposing the appeal.

4. Judge Tayler also directed that the Employment Tribunal should provide a statement clarifying one aspect of its decision to dismiss the disability discrimination claim. The statement was provided on 11 August 2022 by the non-legal members of the Employment Tribunal only, as the

Employment Judge had died since the judgment had been sent to the parties. I will return to the issues raised in relation to that statement in due course.

5. The Claimant represented himself before the Employment Tribunal. At the hearing before Judge Tayler, the Claimant had the assistance of Counsel appearing under the Employment Law Appeal Advice Scheme (ELAAS). At the Full Hearing of the appeal, the Claimant was represented by Mr Allan Roberts of Counsel, instructed through the legal charity Advocate. The Respondent was represented by Ms Anna Beale of Counsel, who appeared before the Employment Tribunal. I am very grateful to Counsel for their assistance; and particularly to Mr Roberts both for appearing *pro bono* and for arguing the Claimant's appeal so cogently despite being entirely new to the case and instructed only very shortly before the hearing.

Background

6. I will now set out the essential factual background to the appeal, as it appears from the Employment Tribunal's written reasons.

7. The Claimant has been employed by the Respondent since 19 December 1994 as a post-doctoral research scientist in the division of structural biology. He remains employed by the Respondent. At the time of the events that gave rise to his claim to the Employment Tribunal, one of his colleagues was Ms A (in respect of whose identity a Restricted Reporting Order was made by the Employment Tribunal; a further such order has been made in relation to this appeal).

8. Prior to 2016, the Claimant and Ms A had a good personal and professional relationship. On 21 April 2016, Ms A submitted a written grievance to the Respondent's Human Resources Department. In the grievance, Ms A said that the Claimant had sexually harassed her on 22 January 2016, and that she had been attempting to make a formal report about it to the Human Resources department since but without success. She also complained that the Claimant, subsequent to that event, had on one occasion left a note and gift on her desk and had on another occasion left flowers

on her desk. Ms A asked for disciplinary action to be taken against the Claimant. The allegation of sexual harassment on 22 January 2016 made by Ms A related to conduct alleged to have taken place in the Claimant's car, when he was giving her a lift home from work.

9. The Claimant was informed of Ms A's allegations by Professor Christopher Conlon, the Head of the Respondent's Department of Medicine, at the beginning of May 2016. Nicola Small, the Head of Administration in the Respondent's Department of Physics, was appointed to conduct an investigation into Ms A's grievance. She wrote to the Claimant on 16 May 2016 setting out the allegations and inviting him to an interview. On 17 May 2016, Professor David Stuart, Professor of Structural Biology, informed the Claimant that, where possible, he should try to work from home and that he should not attempt to contact Ms A in any way until the investigation had been completed. The Claimant in fact remained away from his workplace between 18 May 2016 and 12 April 2017.

10. On 14 October 2016, Ms Small completed her investigation into Ms A's grievance against the Claimant. She did not uphold Ms A's allegations. Although the matter would ordinarily have been referred to Professor Conlon for a decision on Ms A's grievance, it was decided that in the particular circumstances that it should instead proceed before a divisional panel (chaired by Professor Sasha Shepperd, the Associate Head of the Medical Sciences Division), which held hearings with both the Claimant and Ms A. On 4 April 2017, Dawn McNish of the Respondent's HR department wrote to the Claimant to state that the panel had found that there was no conclusive evidence to support Ms A's claims of sexual harassment and that the complaint had been found to have been not proven.

11. On 13 April 2017, Ms A lodged an appeal against the grievance outcome. On 25 July 2017, the Claimant also submitted a written grievance. Because Ms A's appeal and the Claimant's grievance were closely related, it was decided that they would be dealt with by the same grievance committee, which would hold hearings in close succession.

12. On 26 April 2018, the grievance committee upheld the Claimant's grievance in part, relating

to a lack of communication and clarity regarding the requirement to remain away from work, a lack of communication regarding the progress of the investigation and delays, and in respect of the information provided to the Claimant at the outset of the investigation of Ms A's complaint. The Claimant's grievance was otherwise dismissed. The Claimant appealed against this outcome, but his appeal was dismissed on 27 July 2018.

13. On 20 June 2018, the grievance committee upheld Ms A's appeal against the panel's decision to reject her grievance, but also only in part. It found that, on the balance of probabilities, the Claimant had attempted to hug and kiss Ms A when they were in the car together on 22 January 2016, but that this conduct was not forceful or aggressive. The committee accepted Ms A's evidence that it was unwanted conduct but found that, in the context of their relationship, it was not conduct of a sexual nature. The committee noted that the Claimant had suggested that Ms A was "*like a daughter*" to him, and that Ms A had said that she regarded the Claimant as a "*grandfatherly*" figure. The committee concluded:

> "Further, whilst we do consider that a kiss or even an attempted kiss can amount to sexual harassment in some situations, on the facts of this complaint, we do not consider it to amount to such. This is because in the context of the relationship we have found it to be [the Claimant] may have felt it appropriate to demonstrate affection in this way. We do not consider that the attempted hug or kiss that we have determined took place (and which is different from [Ms A's] perception of events) could be described as a "violation of dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment", adopting the vernacular of the Bullying and Harassment Policy. Accordingly, whilst we overturn the findings of fact and uphold [Ms A's] version of events to a degree, **we do not make a finding that these actions amount to harassment or sexual harassment**." (emphasis added)

14. The committee also upheld two other elements of Ms A's appeal. It found that the Claimant had left a note with chocolates on Ms A's desk on 25 January 2016, but that this was also not harassment or sexual harassment. The committee also found that the Respondent should have implemented interim measures at an earlier stage than it did after Ms A raised her written grievance on 21 April 2016.

15. Following the decision on Ms A's grievance appeal, Professor Conlon wrote to the Claimant regarding the outcome. He set out his expectation that the Claimant would not contact Ms A, and

that the Claimant would undertake equality and diversity training. The Claimant objected to being required to do the training, but Professor Conlon told him that he had to attend. The Claimant attended the training, which included specific training relating to bullying and harassment.

16. I should add that before the Employment Tribunal (and in his written argument for this appeal, filed before Mr Roberts was instructed), the Claimant alleged that Ms A's grievance against him had been part of a plan by Ms A to secure a promotion by way of transfer to a different department on the basis of intolerable working conditions. The Claimant alleged that the complaint made against him by Ms A was what he described as a "*side product*" of this scheme. The Employment Tribunal did not hear evidence from Ms A; she was not a respondent to the claim before it, and the allegations made against the Respondent in the Employment Tribunal were about the way in which the Respondent treated the Claimant during the process which followed the raising of Ms A's grievance. The Employment Tribunal made no finding of fact about whether the matters alleged by Ms A were true, or about the Claimant's allegations regarding her motivation in raising the grievance. Those were not matters that were before the Employment Tribunal, given the nature of the claims being made against the Respondent by the Claimant.

The Claim to the Employment Tribunal

17. The Claimant's ET1 claim form was received by the Employment Tribunal on 27 March 2018. As I have already set out, the Claimant made claims under the Equality Act of sex discrimination, victimisation and disability discrimination. In the detailed particulars of his claim, at paragraph 117, the Claimant stated that the disability which he relied upon in relation to his claim for disability discrimination was "*transient ischaemic attack ('TIA'), a form of stroke*", and that he had that disability since February 2012.

18. The Respondent filed an ET3 response form resisting the claims. There was a case management preliminary hearing on 12 February 2019 before Employment Judge Vowles. Two

applications to amend the claim were determined (one was allowed, and one refused). The claim was listed for a seven-day full hearing in January and February 2020, with directions for disclosure of documents and exchange of witness statements. The order made by Employment Judge Vowles records that the claims before the Employment Tribunal were of direct sex discrimination, victimisation and failure to make reasonable adjustments in relation to disability, and that the issues were as set out in a list of issues that had been drafted by the Respondent's legal representatives and which was appended to the order.

19. In relation to the issue of disability, the order stated that the Claimant's claim was that he was a disabled person by reason of TIA, a form of stroke. The Claimant was required to provide a statement setting out the impairment relied on, the nature and extent of the effects it was having or had on his ability to carry out normal day to day activities, the period over which those effects had lasted, whether or not there had been any treatment for the impairment and the difference, if any, such treatment had on the effects of the impairment. He was also ordered to provide any medical records, letters or report he wished to obtain in relation to such matters by 30 April 2019.

20. On 27 February 2019, the Claimant applied for reconsideration of the case management order made by Employment Judge Vowles. He requested that the amendment application that had been dismissed should instead be allowed, and that there should be amendments to the list of issues, on the basis that several important issues had been missed out.

21. There was a further preliminary hearing before Employment Judge Vowles on 30 October 2019 when the Claimant's application for reconsideration was allowed in part, and one further allegation was added by way of amendment. The remainder of the application for reconsideration was dismissed. Following the amendment of the claim, the list of issues for determination contained the following allegations:

i) 11 allegations of direct sex discrimination by the Respondent, the comparator relied on being Ms A or a hypothetical female comparator.

ii) The same 11 allegations were also relied on as acts of victimisation by the Respondent. The Claimant relied on four protected acts, the first of which took place on 24 June 2016.

iii) The Claimant alleged that the Respondent had discriminated against him by breaching its duty to make reasonable adjustments for him as a disabled person under section 20 of the Equality Act in relation to the grievance process, and in particular the requirement that he should absent himself from the workplace. The Claimant relied on four instances of a provision, criteria or practice ("PCP") applied by the Respondent. The list of issues for determination also included whether the Claimant was a disabled person at the material times, whether the PCPs put the Claimant at a substantial disadvantage in comparison to a non-disabled person, the Respondent's knowledge of disability and substantial disadvantage, and the reasonableness of the claimed adjustments.

iv) Additionally, the list of issues included whether the Claimant had brought his claim within the relevant time limit under section 123 of the Equality Act and, if not, whether time should be extended.

The Employment Tribunal's Decision

22. In its reserved judgment, accompanied by written reasons running to 20 pages, the Employment Tribunal dismissed all the claims. Because of the nature of the arguments raised on this appeal, it is necessary to set out parts of the Tribunal's reasoning in some detail.

23. At paragraphs 28-34 of the written reasons, the Employment Tribunal set out the law on direct sex discrimination, as follows:

> "**DIRECT SEX DISCRIMINATION – Section 13 Equality Act 2010**
>
> 28. *Section 13*
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

29. Section 23 - Comparison by reference to circumstances

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

30. *Section 136 – Burden of Proof*

(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.

31. There is guidance from the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination, they are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination. The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment.

32. If the burden of proof does shift to the Respondent, in Igen v Wong [2005] IRLR 258 the Court of Appeal said that it is then for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.

33. In Ayodele v Citylink Ltd [2017] the Court of Appeal held that the burden of showing a prima facie case of discrimination under section 136 remains on the Claimant. There is no reason why a Respondent should have to discharge the burden of proof unless and until the Claimant has shown a prima facie case of discrimination that needs to be answered. Accordingly, there is nothing unfair about requiring a Claimant to bear the burden of proof at the first stage.

34. In Law Society and others v Bahl [2003] IRLR 640 EAT it was said that:

> "Tribunals may find it helpful to consider whether they should postpone the question of less favourable treatment until after they have decided why the particular treatment was afforded to the Claimant. Once it is shown that the protected characteristic had a causative effect on the way the complainant was treated, it is almost inevitable that the effect will have been adverse and therefore the treatment will have been less favourable than that which an appropriate comparator would have received. Similarly, if it is shown that the protected characteristic played no part in the decision-making, then the complainant cannot succeed and there is no need to construct a comparator." "

24. The Employment Tribunal then proceeded to determine the 11 allegations of direct sex discrimination in the list of issues, at paragraphs 35-82 of the written reasons. The conclusions reached by the Tribunal in relation to the first nine of the 11 allegations of direct discrimination were, in summary, as follows (paragraph references are to the numbering in the list of issues):

a. **Paragraph 1.1**: In relation to the complaint that restricting the Claimant's access to his workplace from 18 May 2016 was direct sex discrimination, the Tribunal found that factual basis for the allegation had been established because the Claimant's access to his workplace had been restricted. However, it found that Ms A's circumstances were materially different because she was the complainant and the Claimant was the alleged perpetrator. The Tribunal accepted that it was reasonable for the Respondent to decide that the Claimant should work from home. It found that there was "*no evidence*" to indicate that this was because of the Claimant's sex and that it had "*no reason to doubt*" the evidence of the Respondent's witnesses that a woman would not have been treated differently in the same circumstances. It found that there was "*no evidence upon which the Tribunal could find or infer less favourable treatment*" because of sex. See paragraphs 37-40 of the written reasons.

b. **Paragraph 1.3**: The Tribunal found that the Claimant's complaint that the Respondent had directly discriminated against him by failing to re-evaluate the justification for the interim measures during the course of the investigation had not been established on the facts. It concluded that the Respondent's managers had continuously assessed and re-evaluated the situation and indeed that they had expressed concern about the delay in concluding the grievance process. See paragraphs 41-43 of the written reasons.

c. **Paragraph 1.6**: The Claimant alleged that the Respondent had directly discriminated against him by requiring him to remain away from his place of work for 6 months after the investigation report had been produced. The Tribunal noted that the conclusions of the investigation report had to be considered by the panel which determined the outcome of the grievance. It noted that the process had been "*cumbersome, lengthy and delayed*" but that there was "*no indication*" that the Claimant was being treated any differently to Ms A or that he was being treated differently because of his sex. See paragraph 44 of the written reasons.

d. **Paragraph 1.2**: The Tribunal dismissed the Claimant's allegation that he had been directly discriminated against because the Respondent had failed to provide adequate information about the allegations against him prior to the investigatory meetings on 23 May and 25 August 2016. The Tribunal held that the material provided to the Claimant by Ms Small on 16 May 2016 clearly reflected the matters raised by Ms A in her grievance and that the Claimant had been provided with an adequate description of the allegations in advance of the investigatory meetings. See paragraphs 45 to 48 of the written reasons.

e. **Paragraph 1.4**: The Claimant alleged that he had been directly discriminated against because of a failure to provide him with proper updates on the progress of the investigation. The Employment Tribunal found that the factual basis for his allegation was established, but only in respect of the period between May and October 2016. Otherwise, adequate updates had been provided. However, the Tribunal concluded that there was "*no evidence*" that the Claimant had been treated any differently to Ms A, or to a hypothetical female comparator, in this respect. See paragraphs 49 to 52 of the written reasons.

f. **Paragraph 1.5**: The Employment Tribunal found that the Claimant's allegation that he had not been given an explanation for the delay when he was notified of the outcome of the investigation on 29 November 2016 was established on the facts, but that that there was "*no evidence*" that the Claimant had been treated any differently to Ms A, or to a hypothetical female comparator, in this respect. See paragraphs 53-55 of the written reasons.

g. **Paragraph 1.7**: The Claimant alleged that he had been placed at a significant disadvantage by the Respondent hearing Ms A's grievances in breach of its own procedures in several respects. The Employment Tribunal noted that the Respondent's procedures provided for flexibility in the process to be adopted and that there was no

element of unreasonableness or discrimination in the course that had been taken, there being no evidence of any less favourable treatment by reason of the Claimant's sex and "*nothing to suggest that a female person would have been treated any differently*". See paragraphs 56-62 of the written reasons.

h. **Paragraph 1.8**: The Employment Tribunal found that the Claimant's allegation that he had made five complaints to the Respondent which had not been properly addressed was not established on the facts. Three of the complaints relied on had in fact been addressed by the Claimant to the Employment Tribunal: they were concerned with separate proceedings that had been brought by Ms A. They were not complaints made to the Respondent. The Tribunal found that the other two complaints, which had been raised with the Respondent, had been responded to. See paragraphs 63-66 of the written reasons.

i. **Paragraph 1.9**: The Claimant alleged that the delay in dealing with his own grievance – which took more than 300 days to resolve – constituted discrimination. The Employment Tribunal found that there had been extensive delay in dealing with the Claimant's grievance, but that this had also occurred in relation to determining Ms A's grievance. There was no material difference in treatment as between the Claimant and Ms A, and no evidence that a hypothetical comparator would have been treated differently to the Claimant; although the Tribunal considered that the Respondent's procedures were "*complex and cumbersome*". See paragraphs 67-71 of the written reasons.

25. For reasons that will become apparent, it is necessary to set out in full the Employment Tribunal's reasoning in relation to the tenth and eleventh allegations of direct sex discrimination. Those allegations were that the Respondent had required the Claimant to undertake training which was not justified by the grievance outcome (paragraph 1.10 of the list of issues) and that the Claimant

had been required to undertake harassment training, which was "*humiliating and insulting*", whereas Ms A had not (paragraph 1.11 of the list of issues). In relation to those allegations, the Employment Tribunal found as follows:

> "72. As set out above, the Grievance Committee had found that the Claimant had attempted to kiss and embrace Ms A in his car on 22 January 2016 and that on 25 January 2016 he had left a note saying "*I have been a bit clumsy. Sorry. Hope you are not irritated.*" Together with chocolates. The Grievance Committee found that conduct was unwanted but did not amount to sexual harassment. No sanction was posed or recommended.
>
> 73. Professor Conlan said in his evidence:
>
> "*I had to consider, in the light of the Committee's findings, whether there should be disciplinary action against the Claimant. I decided this was not appropriate taking into account the Committee's findings regarding the Claimant's own complaint. However, I had to make clear to the Claimant that he was not to communicate with Ms A or seek to contact her in any way. I also believed it appropriate for the Claimant to undertake equality and diversity training so that he understood appropriate boundaries with work colleagues. This can be arranged with HR and I expect it to cover equality and diversity and harassment training.*"
>
> 74. Professor Conlan confirmed this in a formal letter dated 4 July 2018 to the Claimant. It summarised the findings of the Grievance Committee which had confirmed that the conduct proved to not amount to sexual harassment, but it did call into question his behaviour towards Ms A which caused her upset.
>
> 75. The Tribunal found that the requirement to undertake equality and diversity training, including training on harassment, was justified by the appeal outcome. Harassment is commonly a part of equality and diversity training, and appropriate in this case as the Grievance Committee had found that there was harassment, though not amounting to sexual harassment.
>
> 76. Ms A was not required to undergo such training as her circumstances were materially different than that of the Claimant. There was no finding of unacceptable conduct on her part, as there was in respect of the Claimant's conduct.
>
> 77. The findings of the Grievance Committee were based on the evidence presented to it by both Ms A and the Claimant. The findings were clearly explained in the lengthy and detailed outcome.
>
> 78. The Tribunal accepted Miss McNish's explanation that the training provided to the Claimant, by Miss Morris was appropriate and that Miss Morris was not subordinate to Miss McNish.
>
> 79. Importantly there was no evidence to support the suggestion that a woman in similar circumstances would be treated any differently and would not have been required to undergo equality and diversity/harassment training."

26. The Employment Tribunal summarised its decision on the direct discrimination claim at paragraphs 80-82 of the written reasons:

> "80. In summary, the Tribunal found that although the Respondent's treatment of the Claimant may have been unfair because of the excessive delay dealing with Ms A's grievance against him and his grievance about the Respondent's conduct towards him, it was not discriminatory. Unfair conduct, without more, cannot by itself amount to discriminatory treatment. There was no link between the difference in treatment between the Claimant and Ms A and the difference in gender. The Respondent has shown, through the evidence of its witnesses, that there was a plausible non-discriminatory reason and explanation for the treatment of the Claimant at each step.
>
> 81. There was no evidence of less favourable treatment because of the protected characteristic of sex.
>
> 82. The claims of direct sex discrimination therefore fail."

27. The Employment Tribunal then turned to the allegations of victimisation. Having set out the terms of section 27 of the Equality Act, it found that two of the four matters relied on by the Claimant had been protected acts: a letter of 2 June 2017 and several emails sent on 19 August 2017, 29 September 2017 and 13 October 2017. At paragraphs 90-94 of the written reasons, the Employment Tribunal stated:

> "**Detriments**
>
> 90. The detriments relied upon by the Claimant as acts of victimisation are the same as those set out as allegations of direct sex discrimination at paragraphs 1.1 to 1.11 dealt with above.
>
> 91. The first protected act, found by the Tribunal to be a protected act under section 27, was on 2 June 2017. It follows that none of the earlier events described at paragraphs 1.1 to 1.6 could have been done because of any protected act.
>
> 92. So far as allegations 1.7 to 1.11 were concerned there was no evidence whatsoever that these events, as far as found proved, were because the Claimant had made the protected acts referred to above. There was no evidence whatsoever of any causal link between the protected acts and the events described by the Claimant.
>
> 93. As stated above the Respondent has shown, through the evidence of its witnesses, that there was a plausible non-discriminatory reason and explanation for the treatment of the Claimant at each step.
>
> 94. The complaint of victimisation therefore fails."

28. The Employment Tribunal then went on to determine the disability discrimination claim. It found that the Claimant was not, at the material times, a disabled person and therefore that his claim failed. It did not go on to address any other aspects of the disability discrimination claim. The Employment Tribunal's reasons for making this finding were:

> "**DISABILITY- section 6 Equality Act 2010**
>
> 95. Equality Act 2010
>
> *Section 6*
> *(1) A person (P) has a disability if –*
> *(a) P has a physical or mental impairment, and*
> *(b) The impairment has a substantial and long term adverse effect on P's ability to carry out normal day-to-day activities.*
>
> *Section 212:*
> *(1) – "substantial" means more than minor or trivial.*
>
> *Schedule 1 paragraph 2(1):*
> *(1) – The effect of an impairment is long-term if-*
> *(a) It has lasted for at least 12 months,*
> *(b) It is likely to last for at least 12 months, or*
> *(c) It is likely to last for the rest of the life of the person affected.*
>
> 96. As well as the statutory definition of disability, the Tribunal also took account of the guidance on matters to be taken into account in determining questions relating to the definition of disability issued by the Secretary of

State in 2011, in particular the following:

> B1 - Meaning of substantial adverse effect - The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.
>
> D3 – Meaning of normal day-to-day activities – In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents and keeping to a timetable or a shift pattern.

97. The disability relied upon by the Claimant is Transient Ischaemic Attack (TIA).

98. The complaint of Failure to Make Reasonable Adjustments under section 20 Equality Act 2010 was set out at paragraph 8 of the List of Issues. This claim was limited to the period of suspension from 18 May 2016 to 12 April 2017. In order that this claim could succeed, the Claimant would have to show, and the Tribunal would have to find, that the Claimant was a disabled person during this period.

99. The Claimant provided a disability impact statement on 29 April 2019 (pages 1801-1802).

100. The Claimant also described his TIA condition and Ischaemic Heart Disease (IHD) at paragraphs 120-124 of his witness statement.

101. The Claimant confirmed in his witness statement that he suffered a TIA on 14 February 2012 but he has not suffered any subsequent TIA.

102. In the disability impact statement at pages 1081-1082 there is no reference to day-to-day activities. The Claimant's medical records are set out in the bundle at pages 1801-1828.

103. The Claimant describes on-going symptoms from his original TIA as facial numbness in the left cheek, dizziness, visual disturbances and blindness. However, there is no reference to these on-going symptoms in the medical records he has provided.

104. In the medical report dated 15 February 2012 (one day after the TIA on 14 February 2012) it is recorded as follows:

> "While he was still having the symptoms he was brave enough to drive home. Half way through he had to stop driving because he could not see the lines of the road clearly. About an hour later his visual symptoms started to resolve. He managed to get home and parked his car and went to bed at 3.45am. He was still ataxic when he went to bed. When he woke up in the morning at about 8 o'clock his symptoms had almost resolved. He attended the A&E department on the same day. He had had a CT scan of the brain which did not show an acute infarct or bleed… On examination he is well there is no evidence of dysarthria or dysphasia. His blood pressure was 150/90 mmhg and the heart rate was 60 beats per minute and regular. He did not have any focal neurology. The heart sounds were normal and there is a soft ejection systolic murmur. The rest of the examination was unremarkable."

105. In a medical report dated 5 April 2012 it was reported:

> "Thank you for attending your TIA assessment for secondary prevention advice. I note that you have been symptom free since your first event."

106. In a medical report 3 December 2018 it was reported that he had:

> "Ocular migraine in both eyes, no alarming sounds. Had TIA in the past. Might be basilar arteries constricted. Plan – if comes back refer to neurologist."

107. After 2012 there is no evidence of any substantial adverse effect resulting from the TIA in February 2012

or his ability to perform normal day-to-day activities.

108. In January 2017 the Claimant was diagnosed with ischaemic heart disease but the medical records do not state that this heart condition was caused by the previous TIA. The Claimant had operations on 19 January and 1 March 2017 when two stents were inserted.

109. In an occupational health report dated 20 May 2016 it was reported:

> "There is no formal report as such but with Oleg Iourin's consent I am writing to confirm that I saw him yesterday and we have spoken in depth about his health and well-being. I have given him advice about sources of support and he can contact the occupational health service again directly if he requires our further support."

110. In a further occupational health report dated 17 May 2017 it was reported:

> "What led him to be absent from work in May 2016 was an investigation relating to him which took some time to conclude but reportedly led to his being cleared of any wrong-doing. He was, however, profoundly uncomfortable with the whole situation and as these matters take time this was a key issue for him. Then during his absence from work he developed an acute and potentially very serious form of ill-health which happily was recognised and medically managed promptly with benefit. This condition requires on-going treatment and he is receiving a supportive rehabilitation program which is undoubtedly going to prove helpful. Happily his health seems largely recovered from this although he considers that this is not quite as it was. I understand that he has been in the department for 17-18 years, undertaking post-doctoral research working in both a lab and an office. In general he feels well supported by the leading people in the department and by colleagues."

111. So far as adjustments were concerned it was stated:

> "He therefore would currently appear to have no reason for any longer term or permanent work-related adjustments."

112. There was an absence of any medical evidence connecting the TIA in February 2012 with the heart operations in January and March 2017. In May 2017 the Claimant's health is recorded as having largely recovered.

113. There was no evidence that the Claimant's condition of TIA had any substantial adverse effect or that any effect was long-term. There was no evidence that the effect of the TIA had lasted for at least 12 months or was at least likely to last 12 months or was likely to last for the rest of the Claimant's life.

114. The Tribunal found that the physical impairment of TIA did not amount to a disability within the meaning of section 6 and Schedule 1 of the Equality Act 2010 during the period of suspension from 18 May 2016 to 12 April 2017.

115. It follows that the complaint of failure to make reasonable adjustments during this period set out in paragraph 8.1 of the List of Issues must fail."

29. I should at this point refer to what the non-legal members of the Employment Tribunal said in their response to His Honour Judge James Tayler's request for a statement to be made under the **Burns/Barke** procedure. That request was in relation to whether the Employment Tribunal had considered the position in relation to the effects of the Claimant's condition absent medication that he had been prescribed. The non-legal members' statement of 11 August 2022 was to the effect that the Employment Tribunal had, when accepting the Respondent's submission that the Claimant was

not a disabled person, considered the evidence that was before it regarding the Claimant's medical condition, including medical records, taking account of "*the absence of evidence from the claimant relating to medication and its effect*" and that there was "*no evidence*" before the Employment Tribunal of the effect of the medication that the Claimant was taking or the risks of not taking it.

30. As to the issue of time limits, in view of its substantive findings the Employment Tribunal made no determination either way as to whether any of the matters complained of had been raised outside the statutory time limit in the Equality Act. At paragraph 116 of the written reasons, the Employment Tribunal said, in the briefest of terms, that it would "*likely*" have found that it was just and equitable to extend time, had it been necessary so to do.

The Grounds of Appeal

31. Before I turn to the merits of the grounds of appeal, it is apparent that the Claimant has been particularly concerned by the Employment Tribunal's statement at paragraph 75 of the written reasons that the Respondent's grievance committee had found that he had committed one or more acts of harassment towards Ms A. Ms Beale accepted, on behalf of the Respondent, that no such finding was made by the grievance committee. I will address the consequences of that erroneous statement by the Employment Tribunal in more detail later in this judgment.

32. The Claimant has eight grounds of appeal. These amount to three broad types of criticism of the Employment Tribunal's decision. I will refer to the numbering of the grounds as they are set out in the Notice of Appeal.

a. Grounds 3 and 7 of the appeal allege that the Employment Tribunal incorrectly applied the law in relation to direct discrimination and victimisation.
b. Grounds 1, 2, 4, 5, and 6 raise alleged errors within the Employment Tribunal's decision in relation to the individual allegations of direct discrimination and victimisation.

c. Ground 8 is a challenge to the finding that the Claimant was not a disabled person as defined by section 6 of the Equality Act, raising the issue of whether the Employment Tribunal sufficiently considered the question of "deduced effect".

33. Although His Honour Judge James Tayler's summary of his reasons for permitting the appeal to proceed to a full hearing specifically addresses why, in particular, he considered Grounds 1, 3 and 8 of the pleaded grounds of appeal to be sufficiently arguable, it is clear that he permitted all the grounds to be argued.

34. An appeal to the Employment Appeal Tribunal is not a rehearing of the case. The Employment Tribunal hears the evidence, makes findings of fact and reaches conclusions on the claims brought to it based upon those findings of fact. It is the tribunal of first instance. This Appeal Tribunal's jurisdiction is set out in section 21 of the Employment Tribunals Act 1996 as arising in relation to questions of law. In **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, [2021] IRLR 1016, the Court of Appeal gave guidance on the approach that this Appeal Tribunal should adopt when considering whether there is an error of law in an Employment Tribunal's decision, including the following at paragraph 57(1) of the judgment of Popplewell LJ (with whom Lewison and Lewis LJJ agreed):

> "The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. In *Brent v Fuller* [2011] ICR 806, Mummery LJ said at p. 813:
>
> > "The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid".
>
> This reflects a similar approach to arbitration awards under challenge: see the cases summarised by Teare J in *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The "PACE")* [2010] 1 Lloyds' Reports 183 at paragraph 15, including the oft-cited dictum of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration". This approach has been referred to as the benevolent reading of awards, and applies equally to the benevolent reading of employment tribunal decisions."

35. At paragraph 58 of his judgment, Popplewell LJ stated:

> "Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload."

Grounds 3 and 7 – The Burden of Proof

36. It is convenient to address, first of all, the Claimant's contention that the Employment Tribunal failed to apply the statutory provisions relating to the burden of proof correctly. Mr Roberts submits that this is an error that vitiates the entire decision on the sex discrimination and victimisation claims. He firstly submits (ground 3) that the Employment Tribunal incorrectly approached the issue of the burden of proof under section 136 of the Equality Act. The basis of this argument is what the Employment Tribunal stated in its summary of the law, at paragraph 31 of the written reasons:

> "The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment."

37. Mr Roberts submits that this was an incorrect statement of the law and that what the Claimant needed to prove was facts from which, in the absence of an adequate explanation from the Respondent, the Employment Tribunal could conclude that the differential treatment was because of his sex. By stating that the Claimant was required to "*show… the reason for the differential treatment*", it is said that the Employment Tribunal imposed too high a threshold on the Claimant.

38. For the Respondent, Ms Beale submits that there was, on analysis, no error of law in paragraph 31 and that, in any event, it needs to be read in context and that the written reasons need to be read as a whole. She submits that on a reading of the whole of the Employment Tribunal's judgment, it did correctly understand and apply the law on the burden of proof.

39. I agree with Ms Beale that the question is not whether the Employment Tribunal made, in the

relevant paragraph when read on its own, an erroneous reference to the position as a matter of law, but whether (read as a whole) the judgment and written reasons demonstrate that the Employment Tribunal did proceed to decide the case on such a basis. To put matters another way, an incorrect statement of the law in one part of the decision may well indicate that a tribunal has misapplied the law, but it is not decisive – because the Tribunal's reasoning may well be unaffected by the error. Conversely (as the Court of Appeal recognised in **DPP Law Ltd v Greenberg**), it is possible for a tribunal to make statements directing itself properly as a matter of legal principle, but then fail to apply the law correctly in the operative part of its reasoning.

40. In any event, however, I accept both of Ms Beale's submissions on this issue. Although Ms Beale – rightly, in my judgment – accepted that paragraph 31 of the written reasons might have been more clearly worded, I do not consider that it contains the error of law alleged by the Claimant whether on its own or when read with the other paragraphs of the written reasons. At paragraph 31, the Employment Tribunal was purporting to summarise the effect of the decision of the Court of Appeal in **Madarassy v Nomura International Plc** [2007] EWCA Civ 33, [2007] ICR 867. In paragraph 29 of its judgment in **Igen v Wong** [2005] EWCA Civ 142, [2005] ICR 931, which was endorsed as correct by the Court of Appeal in **Madarassy** at paragraph 55 of the judgment in the latter case, the Court of Appeal stated:

> "The relevant act is, in a race discrimination case… that (a) in circumstances relevant for the purposes of any provision of the RRA (for example in relation to employment in the circumstances specified in s. 4 of the RRA), (b) the alleged discriminator treats another person less favourably and (c) does so on racial grounds. All those facts are facts which the complainant, in our judgment, needs to prove on the balance of probabilities…"

In this paragraph of the judgment in **Igen v Wong**, the Court of Appeal went on to note that the burden of proof did not, however, remain with a claimant at all times: if a claimant established facts from which a tribunal could conclude that an act of discrimination had taken place, the burden of proof would shift to the respondent.

41. In my judgment, the Employment Tribunal's reference in paragraph 31 of the written reasons

to a claimant having to "*show… the reason for the differential treatment*" is not inconsistent with what is set out in the authorities of **Igen v Wong** and **Madarassy**. As Ms Beale submitted, it appears to paraphrase part of paragraph 29 of the judgment in **Igen v Wong**, which was expressly approved in **Madarassy**. The key question, in my judgment, is whether the Employment Tribunal proceeded on the erroneous basis that the burden of proof had to remain on the Claimant at all times. In my judgment, the Employment Tribunal did not do so. At paragraphs 32-33 of the written reasons, immediately after the passage about which complaint is now made on appeal, the Employment Tribunal expressly recognised the potential for the burden of proof to shift to the Respondent in accordance with the authorities to which I have already referred.

42. I also do not consider that the operative parts of the Employment Tribunal's reasoning in which it addressed the particular complaints made by the Claimant were affected by any legal error in relation to the burden of proof. The Employment Tribunal correctly addressed the questions before it, which were at the first stage whether the factual basis for the allegation had been established, the question of comparison either with Ms A or with a hypothetical comparator, and the question of whether there was material from which an inference of discrimination could be drawn. The Employment Tribunal asked itself those questions at each stage of its analysis and answered them. The Claimant's allegations of discrimination largely failed either because the relevant factual basis for them had not been established on the evidence, or because the Employment Tribunal did not consider that the evidence before it could have resulted in a finding of discrimination.

43. In any event, paragraphs 80 and 81 of the written reasons demonstrate that the Employment Tribunal accepted that, if the burden of proof had shifted to the Respondent, it would have been discharged. In my judgment, in the context of Employment Tribunal's directions on law at paragraphs 32-34 of the written reasons, the Employment Tribunal's use of the phrase "*the Respondent has shown*" in paragraph 80 can only be interpreted as referring to the burden of proof having been discharged in any event by the explanations given by the Respondent's witnesses. It is inconsistent

with the Claimant's argument about the alleged error of law in relation to this ground for the Employment Tribunal to have required the Respondent (as opposed to the Claimant) to "*show*" anything.

44. It is therefore unnecessary to address the subsidiary question of to what extent, if the Employment Tribunal had fallen into such an error as is alleged in ground 3, the outcome of the claim was affected by any such error. Given that the Employment Tribunal found that the factual basis for several of the Claimant's allegations was not established by the evidence, it is by no means clear that they would all have had to be redetermined.

45. Ground 7 of the appeal challenges the Employment Tribunal's decision on the basis that it failed to appreciate the nature of the burden on a respondent when called on to provide an explanation for its actions. The Claimant's argument on this ground is based on the Employment Tribunal's reference at paragraph 93 of the written reasons, in the passage specifically addressing the victimisation claim, to the Respondent having shown that there was "*a plausible non-discriminatory reason and explanation for the treatment of the Claimant at each step*" (a similar phrase also appears in paragraph 80 of the written reasons). Mr Roberts submits that this demonstrates that the Employment Tribunal set the bar far too low for the Respondent: the question being, insofar as the Respondent's conduct called for an explanation, whether the Respondent's treatment of the Claimant was "*in no sense whatsoever*" on the prohibited ground (see e.g. **Igen v Wong** at paragraph 76).

46. Ms Beale submits that the Claimant's focus on the Employment Tribunal's use of the word "*plausible*" in relation to the Respondent's explanations is taken entirely out of context – and that, read as a whole, the Employment Tribunal did appreciate the nature of the burden on the Respondent in these circumstances.

47. I accept Ms Beale's submissions on this ground of appeal. The Employment Tribunal's decision must be read as a whole. At paragraph 32 of the written reasons, when setting out the law,

the Employment Tribunal correctly identified that once the burden of proof had shifted, it was for the Respondent to demonstrate that the impugned treatment "*was in no sense whatsoever on the prohibited ground*". Similarly, once the operative paragraphs of the reasoning are read as a whole, it is clear that the Tribunal both understood and applied the correct legal test. At paragraph 92 of the written reasons, the Tribunal twice found that there was "*no evidence whatsoever*" that the impugned treatment, insofar as it post-dated the protected acts, was linked to those acts. In my judgment, the use of the word "*plausible*" in relation to the explanations given by the Respondent is, when put in its proper context, no more than infelicitous phrasing on the part of the Employment Tribunal rather than a demonstration that an incorrect legal test was applied.

48. It is also therefore unnecessary to go on to consider the further question of whether, if the Tribunal had erred in its application of the burden of proof provisions in this respect, any difference to the outcome would have resulted given the other factual findings that were made.

49. For these reasons, grounds 3 and 7 of the appeal fail. The Employment Tribunal did not err in law in in the respects alleged in these grounds in its understanding and application of the burden of proof provisions applicable to the direct discrimination and victimisation claims.

Grounds 1 and 2: Error of Fact

50. Ground 1 of the appeal relates to the Employment Tribunal's findings on the allegations of direct discrimination at items 1.10 and 1.11 of the list of issues, which are set out at paragraphs 72-79 of the written reasons. The Respondent's grievance committee's conclusion on appeal was that although Ms A's version of events was upheld "*to a degree, we do not make a finding that these actions amount to harassment or sexual harassment*". The Claimant contends that at paragraphs 74-75 of the written reasons, the Employment Tribunal made an error when it referred (at paragraph 74) to his conduct not amounting to "*sexual harassment*" (the inference being that there had been a finding

of harassment falling short of sexual harassment) and then a further error (at paragraph 75) when the Employment Tribunal said expressly that the grievance committee *"had found that there was harassment, though not amounting to sexual harassment*".

51. Mr Roberts submits that this was a clear misstatement of the conclusions of the grievance committee and that it results in the Employment Tribunal's decision being perverse or that there has been a failure by the Employment Tribunal to apply the burden of proof provisions properly. Mr Roberts points out that the true situation was that the Claimant was required to undergo harassment training by the Respondent when the grievance committee had expressly concluded that his actions had not amounted to harassment. The Claimant contends that the Employment Tribunal should have approached the evidence of Professor Conlon as to why the Claimant was required to undergo the training from that perspective, but that it failed to do so because it erroneously concluded that the grievance committee "*had found that there was harassment*". Mr Roberts submits that requiring the Claimant to undergo training specifically to address conduct of which he had been acquitted by the grievance committee was capable of amounting to 'something more' for the purpose of the shifting the burden of proof, and that the Employment Tribunal failed to consider the explanation advanced by the Respondent for requiring the Claimant to undergo this training in its proper context.

52. For the Respondent, Ms Beale accepts that the Employment Tribunal did make an error in stating that the grievance committee had made a finding that the Claimant's actions amounted to harassment. She submits, however, that this is an isolated error and that elsewhere in the Employment Tribunal's written reasons, the conclusions of the committee were correctly set out. Ms Beale also submits that the operative paragraphs of the Employment Tribunal's reasons in relation to the issues it was considering in this part of the claim were unaffected by this factual error, on the basis that the Employment Tribunal went on to accept the Respondent's explanation for its actions as being non-discriminatory.

53. In my judgment, contrary to the submissions made by Ms Beale, this was a material error of law by the Employment Tribunal going well beyond what might be considered acceptable in the light of the approach set out by the Court of Appeal in **DPP Law Ltd v Greenberg**. It was a clear and obvious mistake about an uncontroverted matter – namely, whether or not the grievance committee had concluded that the Claimant had committed any act of harassment towards Ms A. The committee's conclusion was (contrary to the basis upon which the Employment Tribunal determined these allegations) that he had not. I do not regard the fact that, elsewhere in the written reasons, the Employment Tribunal may have quoted the grievance committee's decision correctly as meaning that there was no error in the operative paragraphs. A factual error of this nature is capable of amounting to an error of law. As Mummery LJ stated in **Yeboah v Crofton** [2002] EWCA Civ 794, [2002] IRLR 635, at paragraph 95 of his judgment:

> "Inevitably there will from time to time be cases in which h an Employment Tribunal has unfortunately erred by misunderstanding the evidence, leading it to make a crucial finding of fact unsupported by evidence or contrary to uncontradicted evidence. In such cases the appeal will usually succeed…"

54. The error made by the Employment Tribunal led it to conclude at paragraph 75 of the written reasons that it was unremarkable that the Claimant should have been required to undergo harassment training. The Claimant's case, however, was that was indeed remarkable that he had been required to undertake such training – in particular, because he had been acquitted of harassment by the grievance committee. That the Claimant had been required to do this training despite having been found not to have harassed Ms A was – as I understand it – the very matter which he contended ought to have resulted in the burden of proof shifting in relation to this allegation and to a finding of direct sex discrimination being made. The Employment Tribunal however appears to have considered that what it described as the "*plausible non-discriminatory reason*" for the Claimant have been required to undergo harassment training was that he had been found to have committed an act of harassment – when, as the Respondent accepts, that was not the case.

55. I reject Ms Beale's submission that, in relation to these allegations, the Employment

Tribunal's subsequent findings at paragraphs 76 and 79 of the written reasons mean that its error in paragraph 75 was not material to the conclusion that it reached. The Employment Tribunal would have needed to consider the application of the burden of proof provisions to these allegations and undertake its analysis of the Respondent's evidence on the issue of the requirement to undergo the training in its proper context. For the reasons which I have given, it failed to do this because it proceeded on a clearly mistaken factual premise. What occurred here was that the Employment Tribunal made a fundamental factual error which, in my judgment, vitiates the entirety of its subsequent analysis in relation to these allegations.

56. I also do not accept Ms Beale's submission that it is incumbent on the Claimant, having established the factual error to which I have referred, then to demonstrate that the ultimate conclusion reached by the Employment Tribunal to dismiss these allegations was also perverse. It is sufficient that a factual error of the sort referred to in paragraph 95 of **Yeboah v Crofton** has been made. The question as to the outcome of the appeal must then be addressed on the basis of the approach set out by the Court of Appeal in **Jafri v Lincoln College** [2014] EWCA Civ 449, [2014] ICR 920.

57. Whilst I accept that there is some force in Ms Beale's argument that the requirement to undergo training of this nature could be said to be – as she submitted – an entirely legitimate response to the grievance committee's actual findings, this is a situation in which it is not possible for me to say, as Ms Beale invited me to, that the Employment Tribunal would have come to the same conclusion in relation to these allegations had the error not been made. Nor is it possible for me to substitute a decision in the Claimant's favour, either. See, in those respects, **Jafri v Lincoln College** at paragraph 21. This is, in my judgment, properly a question for the tribunal of first instance and not one for this Appeal Tribunal to determine in these circumstances.

58. I will therefore allow the appeal and remit the matters raised at paragraphs 1.10 and 1.11 of the list of issues to the Employment Tribunal for re-determination. Given that both these matters post-

date the raising of the protected acts by the Claimant, that re-determination should encompass both the claims of direct sex discrimination and of victimisation (on the basis of the protected acts established by the Claimant, as set out at paragraphs 86 and 89 of the Employment Tribunal's written reasons).

59. Mr Roberts invites me to go further than remitting only those two allegations, which is the wider remedy requested through ground 2 of the appeal. He submits that the error made by the Employment Tribunal vitiates its decision on the entirety of the claim for direct discrimination, or at the very least its decisions on the allegations at paragraphs 1.1 and 1.6 of the list of issues, where Professor Conlon was also the decision-maker. In particular, Mr Roberts submits that the error made by the Employment Tribunal must result in it having adopted an incorrect formulation in its construction of the hypothetical comparator because the Employment Tribunal would have proceeded on the basis that the Claimant had been found guilty of harassment when undertaking the necessary comparison in relation to the other allegations.

60. I do not accept these submissions, for the reasons advanced by Ms Beale. The error made by the Employment Tribunal was a factual one in relation to its analysis of these two of the 11 allegations. They were, in terms of timing, the final allegations in the list of issues. Other allegations in relation to earlier matters failed because they had not been established on the facts, or because there was no less favourable treatment, or because the Respondent's explanation for its treatment of the Claimant in relation to those matters was accepted. Nor was the Employment Tribunal's error in relation to the finding of the grievance committee relevant to the construction of the hypothetical comparator in relation to the other allegations, which concerned matters pre-dating the grievance committee's decision of 20 June 2018 and the subsequent requirement for the Claimant to undergo training. As Ms Beale correctly submitted, the Employment Tribunal's error in relation to these allegations cannot be extrapolated in the way contended for by the Claimant because the other allegations of discrimination concerned the situation as it stood before the grievance committee had

reached the conclusion which the Employment Tribunal misstated; the mere fact that Professor Conlon was also involved in these incidents is insufficient.

Grounds 4, 5 and 6 – errors in relation to other allegations

61. By these grounds, the Claimant alleges errors of law in the Employment Tribunal's determination of the allegations at paragraphs 1.4 (ground 4), 1.7 (ground 5) and 1.5 (ground 6) of the list of issues. These grounds did not feature significantly in the oral argument, but as they were expressly not abandoned by Mr Roberts and were addressed in the parties' written submissions, I will deal with them in the order in which they appear in the Notice of Appeal.

62. In ground 4 of the appeal, the Claimant alleges that the Employment Tribunal failed to adjudicate properly on the allegation that the Respondent directly discriminated against the Claimant on the ground of his sex by failing to provide him with proper updates on the investigation of Ms A's grievance. At paragraphs 49-52 of the written reasons, the Employment Tribunal found that updates to the Claimant were adequate during the period May-June 2016, but (although the Employment Tribunal did not say so expressly, it seems to have accepted the finding of the Respondent's grievance committee on the point) not thereafter. The Claimant and Ms A were both informed on 11 October 2016 that the investigation had been completed.

63. The Employment Tribunal's finding was that there was no difference in treatment between the Claimant and Ms A in the relevant respect, i.e. updates on the investigation. The Claimant contends that this finding is unsound because on 21 October 2016, Mr Parish informed Ms A (but not the Claimant) that the investigation report had been signed and was ready for Professor Conlon's decision and also because on 28 October 2016, Miss McNish sent an email to Ms A (but not to the Claimant) that the matter had been escalated to the divisional panel.

64. Ms Beale submits that the Claimant's references to evidence showing Ms A allegedly being

treated differently in this regard are inapposite because they relate to a period of time after the completion of the investigation and so are outside the scope of the allegation.

65. I accept Ms Beale's submissions on this ground of appeal. The issue raised in the Notice of Appeal concerns events during the period after the completion of the investigation into Ms A's grievance. It is clear from the written reasons that the Employment Tribunal understood the allegation of discriminatory treatment that was being made as relating to the period prior to the completion of the investigation on 11 October 2016. It was clearly entitled to do so; this interpretation is not inconsistent with the pleaded case and, on this basis, the matters raised by the Claimant are outside the scope of the allegation in the list of issues.

66. In ground 5 of the appeal, the Claimant alleges that the Employment Tribunal's consideration of the allegation at paragraph 1.7 of the list of issues was perverse. This allegation was that the Respondent directly discriminated against C on the ground of his sex by hearing Ms A's grievances in breach of its procedures. The Claimant contends that the Employment Tribunal's construction of the Respondent's policies, at paragraph 57 of the written reasons, was perverse and that a correct application of those procedures would have shortened the investigation period, reducing the significant disadvantage he suffered by being required to stay away from workplace. The relevant provision of the Respondent's harassment policy is recorded by the Employment Tribunal as stating:

> "If a complaint falls across more than one university procedure, the university will deal with the matter as flexibly fairly and proportionately as possible".

67. I do not, however, consider that there is any error of law here on part of Employment Tribunal. In my judgment, the Employment Tribunal's conclusion that the substance of the complaints being raised fell under more than one of the Respondent's policies, and that therefore the Respondent was entitled to adopt the course that it did in considering all matters together and referring them to the divisional panel (and then to the grievance committee), which the Tribunal found at paragraph 61 of

the written reasons did not contain "*any element of unreasonableness or discrimination*" and was "*entirely pragmatic to avoid a further grievance and further delay*", was one which it was entitled to reach. It was not perverse.

68. Ground 6 of the appeal also alleges that the Employment Tribunal did not determine the allegation being made to it, this time in respect of the Claimant being discriminated against by not being given an explanation for the delay in completing the investigation. The Claimant contends that Ms A was given an explanation for delay, whereas he was not – because on 28 October 2016, Miss McNish informed Ms A that the case had been escalated to the divisional panel.

69. There is, in my judgment, more than one difficulty with this argument. Firstly, the Employment Tribunal found as a fact at paragraph 54 of the written reasons that the Claimant and Ms A were informed of the outcome of the investigation at the same time, and in materially identical terms which did not explain the delay, in letters sent separately to the Claimant and to Ms A by Professor Shepperd which were dated 28 November 2016. Secondly, the allegation made by the Claimant was that he was informed of the outcome of the investigation, without being given an explanation for the delay, on 29 November 2016. The evidence before the Employment Tribunal, to which Ms Beale referred me in her written submissions, was that the Claimant had already been informed by Professor Conlon in a letter dated 25 November 2016 that the delay was due to the matter being referred to the divisional panel. Even if there had been any error in the finding of fact made by the Employment Tribunal at paragraph 54 of the written reasons, therefore, the Claimant had already been informed by Professor Conlon, prior to receiving Professor Shepperd's letter, that the case was being referred to the divisional panel.

70. Although the point was not specifically pleaded in the Grounds of Appeal, during oral argument Mr Roberts criticised the Employment Tribunal's analysis in more general terms, for failing

to take into account what he termed the "*shocking*" and "*stark*" period of more than 300 days during which the Claimant was required to remain away from the workplace; Mr Roberts submitted that this was contrary to the basis upon which this sort of measure ought to be adopted (see e.g., page 11 of the ACAS guidance on bullying and harassment at work which refers to the possibility of "*a short period of suspension…. while the case is being investigated*"). Mr Roberts submitted that the Employment Tribunal ought to have been on "*high alert"* that something had gone fundamentally wrong in the Respondent's treatment of the Claimant. He further criticised the Employment Tribunal for failing to adequately identify the characteristics of the hypothetical comparator, where relevant to the determination of particular allegations.

71. I do not accept Mr Roberts' criticism of the Employment Tribunal for failing to have sufficient regard to the significant period of time when the Claimant was required to work from home and the delays that occurred in this case. The Employment Tribunal referred to the Respondent's processes as being "*cumbersome, lengthy and delayed*" (paragraph 44 of the written reasons) and had well in mind the fact that there was what it described as an "*extensive*" delay and requirement to work from home (paragraph 43 of the written reasons), something which it considered was not connected to the Claimant's sex. I do not accept that the Employment Tribunal can properly be criticised for failing to have regard to the lengthy period of time when the Claimant was required to remain away from the workplace. The Tribunal's decision is not inconsistent with the approach of the Court of Appeal to the drawing of inferences in **Anya v University of Oxford** [2001] EWCA Civ 405, [2001] ICR 847: the Tribunal clearly considered that the process adopted by the Respondent was flawed in this regard; but the Tribunal was, however, entitled to reach the conclusion on the evidence before it that, in the circumstances of this case, the Respondent's conduct was not discriminatory.

72. As to Mr Roberts' further criticism of the Employment Tribunal for undertaking an insufficient analysis of the characteristics of the hypothetical comparator, and for taking what he criticised as a "*superficial*" approach to the construction of such a comparator, I do not consider that

this is justified. As Ms Beale submitted, it is not necessary to set out the details of the hypothetical comparator at every point in the decision, and in my judgment the Employment Tribunal's analysis of the hypothetical comparator was sufficient in the circumstances where it analysed the situation separately and in detail in relation to each of the 11 specific allegations of direct sex discrimination. The Employment Tribunal did not fall into the error identified in **Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting** [2001] EWCA Civ 2097, [2002] ICR 646 of failing to address the question of the treatment of a hypothetical comparator. Mr Roberts' central complaint regarding the construction of the hypothetical comparator was that the Tribunal should (given the misstatement of the grievance committee's conclusion in relation to harassment at paragraph 75 of the written reasons) be taken to have proceeded on the basis that, in relation to all the 11 allegations, that the comparator was someone who had been found to have committed an act of harassment. However, as Ms Beale submitted (and as I have already set out, above, in my analysis of ground 2 of the appeal), the first nine of the 11 allegations all preceded the outcome of the grievance committee: the error that was made by the Employment Tribunal cannot, in my judgment, be extrapolated so as to undermine the Tribunal's approach to the hypothetical comparator in relation to those allegations.

73. Nor, to the extent that Mr Roberts advanced criticism of it, was the Tribunal's reference in paragraph 80 of the written reasons to unfair conduct "*without more*" not being capable of amounting to discrimination inconsistent with the authorities – see in particular, paragraph 101 of the judgment in **Bahl v Law Society** [2004] EWCA Civ 1070, [2006] ICR 1519 where the Court of Appeal said that the inference of unlawful discrimination does not come "*from unreasonable treatment itself but from the absence of any explanation for it*".

Ground 8: Disability Discrimination and "deduced effect"

74. This part of the appeal raises a discrete issue regarding the Employment Tribunal's decision that the Claimant was not, at the material times, a disabled person within the meaning of section 6 of the Equality Act. That requires a claimant to show that they have a physical or mental impairment

which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. The issue in this appeal arises under the supplementary provision in paragraph 5 of Schedule 1 to the Equality Act which provides, materially:

> "(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
>
> (a) measures are being taken to treat or correct it, and
> (b) but for that, it would be likely to have that effect.
>
> (2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid."

75. In **Woodrup v London Borough of Southwark** [2002] EWCA Civ 1716, [2003] IRLR 67, the Court of Appeal held that the question was whether, if treatment had been stopped at the relevant date, the person would (despite the benefit obtained from prior treatment) have an impairment which had the relevant adverse effect. At paragraph 13 of his judgment, Simon Brown LJ (with whom Clarke LJ agreed) stated:

> "I would just add this. In any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this particularly benign doctrine… should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary."

I also bear in mind that as Singh J said in this Appeal Tribunal in **Fathers v Pets at Home Ltd** (UKEAT/0424/13/DM) at paragraph 39 of the judgment, "*relatively little evidence may in fact be required to raise this issue*" – although in that case there were medical reports dealing with the effect of the treatment that the claimant had been receiving (see at paragraphs 44-49 of the judgment).

76. Mr Roberts submits that the Employment Tribunal failed to analyse the Claimant's case on disability properly in relation to the issue of "deduced effect". He submits that the Employment Tribunal ought to have considered what the effect on the Claimant would have been, at the relevant times, if he had not been taking medication. Mr Roberts contends that the Employment Tribunal's written reasons and the statement by the non-legal members demonstrate an error of law because the Tribunal proceeded on the basis that the Claimant was not taking medication and so did not consider

the question arising under paragraph 5(1) of Schedule 1 to the Equality Act. Mr Roberts submits that there was evidence before the Employment Tribunal that the Claimant was taking medication, and that the Tribunal failed to consider the issue of "deduced effect". He submits that there are two elements to the "deduced effect" question which the Employment Tribunal did not consider: firstly, whether had the Claimant not been taking the medication there would have been the required effect on day-to-day activities; and, secondly, the extent to which the medication was preventing a recurrence of the Claimant's TIA or a stroke. Mr Roberts submits that the Claimant's evidence to the Employment Tribunal that he was taking "*life time medication*" was sufficient for an inference to be drawn that he did, on this basis, satisfy the requirement in section 6 of the Equality Act and that specific medical evidence dealing with the effect of the medication being taken by the Claimant was unnecessary.

77. Ms Beale submits that there was, in this case, an absence of the necessary medical evidence to support a claim based on "deduced effect". She submits that the Claimant's statement in his evidence to the Employment Tribunal regarding the medication that he was taking was insufficient. There was no evidence from either a treating clinician or an independent medical expert regarding the effect of taking this medication or of the Claimant's likely condition had he not been taking them, and the burden was on the Claimant to adduce such evidence. She also notes that the disability relied on by the Claimant was TIA, and not heart disease.

78. On this issue, I accept the submissions made by Ms Beale. In my judgment, the Employment Tribunal did consider the question of "deduced effect" and was entitled to reach a conclusion adverse to the Claimant on this issue, on the evidence that was put before it. Although the Employment Tribunal's written reasons do not expressly refer to "deduced effect", it is clear from the statement provided by the non-legal members under the **Burns / Barke** procedure that the Employment Tribunal did consider the question. That the Employment Tribunal did so is unsurprising, given the submissions that were made to it. The Employment Tribunal had before it Ms Beale's written closing

submissions in which the law on "deduced effect" was set out, reference was made to the Court of Appeal's decision in the case of **Woodrup v London Borough of Southwark** and the submission was advanced by Ms Beale that although the Claimant had provided evidence that he was taking medication "*he has provided no medical evidence as to the effect of these drugs, nor as to his likely condition were he to stop taking them as required by Woodrup.*"

79. The Employment Tribunal, in the words of the statement made by the non-legal members, "*considered the absence of evidence from the claimant relating to medication and its effect and took into account evidence in the bundle of documents that was available at the time*". It noted that there was no "*substantive evidence from the claimant about the effect of the medication*", and that the Tribunal had been "*told that the Claimant was taking Aspirin, Bisoprolol and Atorvastatin but there was no evidence of their effects, the risks of taking the medication or the risks of not taking the medication (Woodrup).*" It is clear, therefore, that although the point was not expressly addressed, it was one that was considered by the Employment Tribunal when it came to the conclusion, at paragraphs 113 and 114 of the written reasons, that the Claimant was not disabled within the meaning of the Equality Act at the material times because he was not suffering from an impairment which had the required level of adverse effect. In my judgment, this was a permissible conclusion for the Employment Tribunal to reach, in the circumstances of this case and having regard to the lack of medical evidence about the effect of the treatment that the Claimant was receiving. The Employment Tribunal was aware of the content of the Claimant's statement as to disability (citing it in both the written reasons and the statement provided by the non-legal members), and that the Claimant was taking medication, but was entitled to conclude that the evidence put before it was insufficient to support a finding in the Claimant's favour.

80. Although that conclusion by the Employment Tribunal is sufficient to result in this part of the appeal being dismissed, I also note that the conclusion of this Appeal Tribunal in **Vyas v London Borough of Camden** (EAT/1153/01/RN), an authority relied on by Ms Beale, was that it had been

open to the Employment Tribunal in that case to find that the claimant (who was taking medication for a heart condition) was not a disabled person for the purposes of the statutory definition where the expert medical evidence which it accepted was that the effect of the medication was to "*postpone a heart attack only*" rather than having any impact on the Claimant's day-to-day symptoms (see paragraphs 23-25 of the judgment). Although the point does not strictly arise for decision – because there is no such medical evidence in this case – it appears to be doubtful, based on the analysis of the Appeal Tribunal in that case, whether taking medication which is designed to prevent the possibility of some adverse effect occurring in the future is sufficient to bring a case within what Ms Beale described as the "*deduced effect umbrella*". That case also suggests that, insofar as heart disease might be relied on by the Claimant, the insertion of stents (which happened in the Claimant's case in early 2017) could be regarded as effecting a permanent improvement (see at paragraph 15(ii) of the judgment).

81. Mr Roberts also submitted that the Employment Tribunal had erred by failing to consider the issue of a link between TIA (the pleaded disability) and the Claimant's heart disease. He submits that the Employment Tribunal failed to deal with the link between the two conditions and this was relevant to any consideration of the "deduced effect" point because of the need to consider the consequences of not taking the medication. Mr Roberts accepted that the Claimant had not, in his Notice of Appeal, raised a freestanding argument regarding the link between the two conditions and the likelihood of recurrence.

82. As Ms Beale submits, however, this was a point which the Employment Tribunal did address in its decision. At paragraph 112 of the written reasons, the Employment Tribunal found that there was "*an absence of any medical evidence*" connecting the TIA that had occurred in 2012 with the Claimant's heart condition which required surgery in 2017.

83. I therefore dismiss ground 8 of the appeal, which challenges the Employment Tribunal's

decision to dismiss the claim of disability discrimination.

Conclusion

84. For the reasons that I have given, this appeal succeeds in part. I will set aside the judgment of the Employment Tribunal insofar as it dismissed the allegations of direct sex discrimination and of victimisation at paragraphs 1.10 and 1.11 of the list of issues. Those allegations will be remitted to the Employment Tribunal. The appeal is otherwise dismissed.

85. In the circumstances of this case, the allegations should be remitted to a differently constituted Employment Tribunal for rehearing. It is now impossible for the same panel to be reconvened, because of the death of the Employment Judge; and once the case returns to the Employment Tribunal it will almost certainly be more than three years since the original hearing. In my judgment, the evidence on these matters will need to be heard again and having regard to the nature of the error made and the guidance given in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, the appropriate course appears to me to be to remit to a fresh panel.

86. Before concluding my judgment, I reiterate what His Honour Judge James Tayler said to the parties when permitting this appeal to proceed: given the ongoing employment relationship between them, they should give serious consideration to whether it is possible to resolve their outstanding differences – which are now much less extensive than those which existed prior to the hearing before the Employment Tribunal in November 2020 – without recourse to further litigation.