EMPLOYMENT TRIBUNALS

Claimant: Mr E Komeng

Respondent: National Highways Ltd

Heard at: Birmingham

On: 2, 3, 4, 5 October 2023 and 6 October 2023 for tribunal deliberations

Before: Employment Judge Meichen, Mrs. D Hill, Mr T Liburd

Appearances

For the claimant: in person

For the respondents: Mr E Beever, barrister

UNANIMOUS RESERVED JUDGMENT

(1) The claimant was not unfairly dismissed.

(2) The claimant was not subjected to direct race or sex discrimination.

(3) The claimant was not subjected to less favourable treatment on the ground that he was a fixed term employee.

(4) The claims therefore fail.

(5) The claim under the Fixed-Term Employees (Prevention of Less favourable Treatment) Regulations 2002 and allegations of discrimination 3.1.1 and 3.1.2 in the list of issues set out below fail for the further reason that they were presented out of time and the Tribunal has no jurisdiction to consider them.

(6) Accordingly, the proceedings are dismissed

REASONS

The issues

1. The issues in this case were agreed at the preliminary hearing on 8 December 2022 before Employment Judge Battisby. The parties both agreed at the start of this hearing that this was a complete and accurate list of all the allegations we had to determine.

2. Therefore the agreed issues for us to determine are as follows:

1. Time limits

1.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010?

1.2 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.3 If not, was there conduct extending over a period?

1.4 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.5 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.5.1 Why were the complaints not made to the Tribunal in time?

1.5.2 In any event, is it just and equitable in all the circumstances to extend time?

1.6 Were any complaints arising under the Fixed-Term Employees (Prevention of Less favourable Treatment) Regulations 2002 made within the time limit in regulation 7 of those Regulations?

1.7 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of the less favourable treatment or detriment to which the complaint relates (or the last of a series of similar acts or failures)?

1.8 If not, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

2.1 Was the claimant dismissed?

2.2 Did the respondent do the following things:

2.2.1 Fail to advance the Claimant's career development needs as referred to under paragraph 3.1 below and, also, to give an assurance that those would be met when the Claimant asked his line manager in March 2022.

2.2.2 Subject the Claimant to excessive workload

2.2.3 Assign most contentious cases to the Claimant

2.2.4 Fail to implement OH recommendations, namely stress risk assessments from January 2022 and line manager to review workloads

2.2.5 ~~Fail to adequately investigate the Claimant's grievance~~

2.2.6 Question the Claimant at the grievance meeting on 23 February 2022 in such a way as to suggest a pre-ordained decision [the original list of issues referred to the grievance meeting on 1 March but it was agreed this was an error].

2.2.7 Delay in communicating the grievance outcome

2.3 Did that breach the implied term of trust and confidence ("the implied term")? The Tribunal will need to decide whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and whether it had reasonable and proper cause for doing so.

2.4 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.5 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

2.6 If the claimant was dismissed, what was the reason or principal reason for dismissal, i.e., what was the reason for the breach of contract?

2.7 Was it a potentially fair reason?

2.8 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

2.9 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.10 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply? If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

2.11 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

3. Direct race/sex discrimination (Equality Act 2010 section 13)

3.1 Did the respondent do the following things:

3.1.1 Fail to offer/arrange for the claimant to undertake a HRBP development course (as undertaken by Tara Green, Tania de Piano, Angela Symonds, Rachel Davis – all of them are white British females)?

3.1.2 Fail to afford the claimant opportunities in terms of his career development, specifically CIPD in comparison to other colleagues (Rachael Lee, Sarah Hobster – both white British females).

3.1.3 Undertake the claimant's grievance by favouring the claimant's line manager in that the decision maker did not require supporting documents nor cross examine the line manager's statements.

3.1.4 Assigning excessive workload and more contentious cases to the Claimant in comparison to other members of the team, namely Tara Green, Tania de Piano, Angela Symonds as above.

3.1.5 Favoured the Claimant's line manager by interviewing her witnesses but declined to interview a witness advanced by the Claimant.

3.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The comparators named by the claimant are in the allegations above.

3.3 If so, was it because of sex and/or race?

3.4 Did the respondent's treatment amount to a detriment?

4. Less favourable Treatment or Detriment of Fixed Term Employees (FTE Regulations 2002)

4.1 Did the respondent do the following things:

4.1.1 Contract the claimant to the lower end of the pay band of his role when taking on the permanent role on 5 July 2021

4.1.2 Fail to inform the Claimant of the HRBP training programme

4.2 Was that less favourable treatment than a comparable permanent employee? The comparable permanent employee relied on by the claimant is Chijioke Achionye (pay band). In terms of the training programme, same comparators as listed at paragraph 3.1.1.

4.3 Did the respondent infringe a right conferred on the claimant by regulation 3?

4.4 If so, is the treatment objectively justified by the respondent?

3. Allegation 2.2.5 has been struck through because the claimant made it clear in his closing submissions, he no longer wished to rely on it and he wanted to withdraw it. The reason why the claimant said that was because he realised that he had only received the grievance outcome and investigation on 22 March which was after he had resigned (on 14 March). Therefore any concerns the claimant had about the adequacy of the grievance investigation only came to light after he had resigned and they could not have formed any part of the reasons for his resignation. Accordingly we do not need to consider Allegation 2.2.5.

The law

Time limits

4. Section 123 EqA states:

> *123 Time limits*
> *(1) Subject to sections 140A and 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.*
> *. . .*
> *(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.*

5. If any allegation made under the EqA is out of time and not part of conduct extending over a period bringing it in time then we only have jurisdiction to hear it if it was brought within such other period as we think just and equitable. We should remind ourselves that the just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. We should take into account any relevant factor. We should consider the balance of prejudice. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit. The tribunal has a wide discretion but there is no presumption that the Tribunal should exercise that discretion in favour of the

claimant. It is the exception rather than the rule - see Robertson v Bexley Community Centre 2003 IRLR 434. There is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings - see Abertawe Bro Morgannwa University Local Health Board v Morgan [2018] IRLR 1050 CA.

6. Relevant factors which may be taken into account are set out in British Coal Corporation v Keeble [1997] IRLR 336 derived from section 33(3) of the Limitation Act 1980, which deals with discretionary exclusion of the time limit for actions in respect of personal injuries or death. Those factors are: the length and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by it; the extent to which the respondent had cooperated with requests for information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

7. Having referred to Keeble however the important point to bear in mind is that the Tribunal has a very broad general discretion and therefore we should assess all the factors which are relevant to whether it is just and equitable to extend time without necessarily rigidly adhering to a checklist. The factors which are almost always likely to be relevant are the length of and reasons for the delay and whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh). This was explained by Lord Justice Underhill in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

8. In Miller v Ministry of Justice UKEAT/0003/15 (15 March 2016, unreported), Laing J observed that there are two types of prejudice which a respondent may suffer if the limitation period is extended: firstly, the obvious prejudice of having to defend the claim which would otherwise have been defeated by a limitation period; and secondly the “forensic prejudice” caused by fading memories, loss of documents, and losing touch with witnesses. Forensic prejudice is “crucially relevant” in the exercise of discretion and may well be decisive. However, the converse does not follow: if there is no forensic prejudice to the respondent that is not decisive in favour of an extension.

9. The EAT has recently explained the extent to which the potential merits of a proposed complaint can be taken into account when considering whether it is just and equitable to extend time, in Kumari v Greater Manchester Mental Health NHS Foundation Trust 2022 EAT 132. The EAT held that the potential merits are not necessarily an irrelevant consideration even if the proposed complaint is not plainly so weak that it would fall to be struck out. However, the EAT advocated a careful approach. It said:

> *“It is permissible, in an appropriate case, to take account of its assessment of the merits at large, provided that it [the tribunal] does so with appropriate care, and that it identifies sound particular reasons or features that properly support its assessment, based on the information and material that is before it. It must always keep in mind that it does not have all the evidence,*

particularly where the claim is of discrimination. The points relied upon by the tribunal should also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn in to a complex analysis which it is not equipped to perform.

So, the tribunal needs to consider the matter with care, identify if there are readily apparent features that point to potential weakness or obstacles, and consider whether it can safely regard them as having some bearing on the merits. If the tribunal is not in a position to do that, then it should not count an assessment of the merits as weighing against the claimant. But if it is, and even though it may not be a position to say there is no reasonable prospect of success, it may put its assessment of the merits in the scales. In such a case the appellate court will not interfere unless the tribunal's approach to assessing the merits, or to the weight attached to them, is, in the legal sense, perverse."

The burden of proof

10. Section 136 EqA sets out the burden of proof provisions which apply to any of the claims under the EqA which we have jurisdiction to hear. Section 136(2) states: "*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".* Section 136(3) then states: *"but subsection (2) does not apply if A shows that A did not contravene the provision".*

11. These provisions enable the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant to prove facts from which the tribunal could conclude that the respondent has committed an unlawful act of discrimination.

12. The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit the unlawful act. That approach has been settled since the case of Igen Ltd v Wong [2005] IRLR 258 and it was reaffirmed in Efobi v Royal Mail Group Limited [2019] IRLR 352

13. It is well established that 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 facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. This principle is most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.

14. The Supreme Court has emphasised that it is for the Claimant to prove the prima facie case. In Hewage v Grampian Health Board [2012] IRLR 87 Lord Hope summarised the first stage as follows: "The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be *proved*, and

it is for the claimant to discharge that burden". The claimant must prove facts from which it could be decided not simply that discrimination is a possibility but that it has in fact occurred (see South Wales Police Authority v Johnson [2014] EWCA Civ 73 at paragraph 23).

15. Before the burden can shift there must be something to suggest that the treatment was discriminatory (see B and C v A [2010] IRLR 400). Mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular Bahl v The Law Society and others [2004] IRLR 799). Therefore inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status and/or incompetence is not sufficient to infer unlawful discrimination (Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen, Madarassy).

16. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16 it was held that an employment tribunal had impermissibly inferred direct race discrimination solely from evidence of procedural failings in dealing with the claimant's grievances and internal appeal against the rejection of those grievances. The EAT memorably observed: *'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.'*

17. The statutory burden of proof provisions only have a role to play where there is doubt as to the facts necessary to establish discrimination. Where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against they have no relevance. This was confirmed by Lord Hope in Hewage and is consistent with the views expressed in Laing v Manchester City Council and anor 2006 ICR 1519, EAT.

Direct discrimination

18. Section 13 EqA provides that: *"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".* Section 23 EqA provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

19. In Nagarajan v London Regional Transport [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, *'why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?'.*

20. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 Lord Nicholls said *'… employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she*

was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others. The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant …'.

21. As was confirmed in Martin v Devonshire's Solicitors [2011] ICR 352 since Shamoon, the recommended approach from the higher courts has generally been to address both stages of the statutory test by considering the single 'reason why' question: was the treatment on the proscribed ground, or was it for some other reason? Considering the hypothetical or actual treatment of comparators may be of evidential value in that exercise.

Less favourable treatment of fixed term employees

22. Regulation 3 of The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 provides as follows:

3.—*(1) A fixed-term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee—*
(a)as regards the terms of his contract; or
(b)by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.
(2) Subject to paragraphs (3) and (4), the right conferred by paragraph (1) includes in particular the right of the fixed-term employee in question not to be treated less favourably than the employer treats a comparable permanent employee in relation to—
(a)any period of service qualification relating to any particular condition of service,
(b)the opportunity to receive training, or
(c)the opportunity to secure any permanent position in the establishment.
(3) The right conferred by paragraph (1) applies only if—
(a)the treatment is on the ground that the employee is a fixed-term employee, and
(b)the treatment is not justified on objective grounds.
(4) Paragraph (3)(b) is subject to regulation 4.
(5) In determining whether a fixed-term employee has been treated less favourably than a comparable permanent employee, the pro rata principle shall be applied unless it is inappropriate.
(6) In order to ensure that an employee is able to exercise the right conferred by paragraph (1) as described in paragraph (2)(c) the employee has the right to be informed by his employer of available vacancies in the establishment.
(7) For the purposes of paragraph (6) an employee is "informed by his employer" only if the vacancy is contained in an advertisement which the employee has a

reasonable opportunity of reading in the course of his employment or the employee is given reasonable notification of the vacancy in some other way.

23. In order to determine whether a fixed-term employee has been treated less favourably, it is necessary to compare the way in which he or she has been treated with the treatment accorded to a 'comparable permanent employee' — Reg 3(1). The term 'permanent employee' is defined in Reg 1(2) as any 'employee who is not employed under a fixed-term contract'.

24. 'Comparable employees' are dealt with in Reg 2, which sets out three criteria to be applied when determining the appropriate comparator. These require that — at the time the allegedly discriminatory treatment takes place — both employees must be:

    a. employed by the same employer,
    b. engaged in the same or broadly similar work, and
    c. work at the same establishment.

25. It is not sufficient for a fixed-term employee simply to show that he or she has been treated less favourably than a comparable permanent employee. Under Reg 3(3)(a) the claimant will only succeed where the less favourable treatment was 'on the ground that the employee is a fixed-term employee'. The claimant's claim will therefore fail where the employer can show that the reason for treating the employee less favourably was some other factor.

26. The burden of proof is on the employer to identify the ground for the less favourable treatment or detriment — Reg 7(6). This means that there is an inference that the treatment in question is on the ground of an employee's fixed-term status, which can be displaced if the employer provides satisfactory evidence of some other reason.

27. Even if the reason for the less favourable treatment is that the employee is on a fixed-term contract, the treatment will not be unlawful if it is 'justified on objective grounds' — Reg 3(3)(b).

28. The meaning of objective justification in this context was considered by the ECJ in Del Cerro Alonso v Osakidetza (Servicio Vasco de Salud) 2008 ICR 145, ECJ. The Court held that the unequal treatment must be justified by 'precise and concrete factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria'. Therefore, a difference in treatment between fixed-term and permanent workers could not be justified on the basis of a 'general abstract national norm, such as a law or collective agreement'. Moreover, the ECJ held that in order for objective justification to be made out the unequal treatment must '[respond] to a genuine need, [be] appropriate for achieving the objective pursued and [be] necessary for that purpose'. This is comparable to the test for justification in the context of indirect discrimination, which provides that a provision, criterion or practice will be indirectly discriminatory unless it 'is objectively justified by a legitimate aim and the means of achieving that aim are

appropriate and necessary'. The test under Reg 3(3)(b) essentially reflects this test for objective justification,

29. The ECJ case law makes it clear that the mere temporary nature of an employment relationship is not capable of constituting an 'objective ground' (Valenza and ors v Autorità Garante della Concorrenza e del Mercato 2013 ICR 373, ECJ, and De Diego Porras v Ministerio de Defensa 2016 ICR 1184, ECJ).

30. Regulation 4 states that where a fixed-term employee is treated less favourably as regards any term of his or her contract, that treatment will be regarded as justified on objective grounds if the terms of the fixed-term employee's contract, taken as a whole, are at least as favourable as the terms of the comparable employee's contract. This means that where the less favourable treatment in question relates to a contractual term, there are two key ways in which an employer can objectively justify the treatment under the Regulations:

(i) first, by showing that there is an objective reason for not giving the fixed-term employee a particular benefit or for giving him or her the benefit on inferior terms — Reg 3(3)(b). In considering whether such an objective reason exists, we should adopt the approach set out in Del Cerro, or

(ii) secondly, by showing that the value of the fixed-term employee's total package of terms and conditions is at least equal to the value of the comparable permanent employee's total package of terms and conditions. This second form of objective justification is only available to the employer if the less favourable treatment in question relates to a contractual term. Where the benefit at issue is non contractual, the employer cannot rely upon the fact that an employee's total package of terms and conditions may be more beneficial — Reg 4.

31. In his submissions for the respondent Mr. Beever made it clear that the respondent did not seek to rely on the second route to objective justification provided by Reg 4.

Findings

32. On 27 January 2020 the claimant commenced employment with the respondent on an 18 month fixed term contract working for 30 hours a week. The role the claimant was employed to do was Senior Caseworker - Employee Relations.

33. The fundamental nature of the claimant's role was to manage complex HR cases which required careful advice and resolutions. This was made clear in the job description where the very first line referred to the role's purpose as supporting managers with complex HR cases and providing advice and guidance to resolve difficult situations.

34. The claimant was well suited and well qualified for this work. He has a number of academic qualifications in HR including a Masters. He has worked in HR

since 2015 including gaining experience as a case manager. In addition the claimant has worked for an employment law charity and a law centre and he has supported people with bringing Employment Tribunal claims including drafting claim forms and representing claimants as advocate.

35. The claimant has also brought Employment Tribunal proceedings before where he has represented himself successfully in the Tribunal and at the Employment Appeal Tribunal. We mention this in particular because Mrs. Hill had sat on a previous case which the claimant brought and he had successfully appealed against part of the remedy judgment in that case. We raised this during the hearing and both parties said they had no objection to Mrs. Hill continuing to sit on this case.

36. Our impression of the claimant was that he is somebody who appears to relish being involved in challenging HR and Tribunal cases. This is exemplified by the fact that the claimant continued to support people bringing Tribunal claims and provide them with advice and representation even during his employment with the respondent. A particularly noteworthy example of this occurred in June 2021. The claimant represented somebody in a three-day case in the Scottish Employment Tribunal. The hearing was heard over CVP and the claimant took three days annual leave in order to act as advocate. The claimant explained to us that he had prepared for this hearing around working for the respondent and his personal commitments. The claimant estimated he had spent about 10 hours preparing for the hearing.

37. This is all the more remarkable when one takes into account the scale of the claimant's personal commitments and the personal difficulties that he was going through in and around 2021. The claimant has four young children (although we understand the youngest child does not live with him full-time) and his partner was at the relevant time working part-time and was also studying at university. In 2021 the country was still experiencing the covid pandemic and lockdown and the claimant's children were at various times not attending school for this reason. This meant the claimant had childcare and home schooling responsibilities. The claimant also had a number of health concerns including that he contracted covid on two separate occasions, that he had an adverse reaction to the covid jab and that he was experiencing the early onset of diabetes. On top of that the claimant had been through a number of family bereavements and perhaps most pertinently of all his marriage was in the process of breaking down. This culminated in the claimant leaving the marital home in around June or July 2021. It is striking that the claimant took on the Scottish Tribunal case at a time when he was working for the respondent, he had all these personal commitments and difficulties and he now claims to have been overworked by the respondent.

38. The initial phase of the claimant's employment was very busy. The pandemic began in around March 2020 and the associated lockdown brought a number of challenges for those working in HR. In addition the claimant's team had a number of absences which meant that the claimant and the other caseworkers were extremely busy. The claimant began picking up more complex cases from around March 2020 after an initial period of settling in. The claimant also began

working from home at this point. Therefore the claimant's natural progression onto more complex cases came at exactly the same time as the pandemic and the move to remote working. The tribunal considers that that this made the claimant's progression to more complex cases more challenging than it may otherwise have been.

39. In around September 2020 there was a department restructure. This restructure led to the claimant's job being retitled as HR Manager - Employee Relations. The fundamental nature of the claimant's role did not change – it was to manage complex HR cases The very first sentence of the job description for the new role again described that the claimant was responsible for managing complex HR cases and providing advice and resolutions to potentially difficult situations. There was no great difference between the claimant's role pre-and post-restructure.

40. In addition to the relabeling of the claimant's role the restructure also led to the expansion of his team. This meant that the claimant and his colleagues were not as busy and as stretched as they had been previously. In addition a number of staff who had been absent returned to the team. Obviously, it took a while for the benefit of the new recruits to be felt but the tribunal finds that within a few months of the restructure the claimant's workload was eased along with his colleagues who had been similarly busy.

41. The claimant's line manager was Fay Judge. Fay Judge became the ER lead for the respondent in January 2020 around the same time as the claimant joined the organisation. Her role involved leading the ER team of which the claimant was part. During the challenging and busy period which we have described between March and around October 2020 Mrs. Judge was extremely flexible and supportive of the staff in her team. She recognised the pressures that arose due to the pandemic and the particular challenges that her staff were facing - for example the fact that the claimant was juggling childcare and work.

42. Mrs. Judge was happy for the claimant and the rest of her team to flex their working hours to fit around homeschooling or other personal issues. She took the approach that the team should work as much as they could when they could. During this period the claimant mentioned to Mrs. Judge that he was frequently working past his normal working hours i.e. past 3 PM. The claimant did not suggest that he was working additional hours but that there was a particular problem with people asking for meetings outside his contractual hours which the claimant felt obliged to agree to. Mrs. Judge advised the claimant to block out his diary to show his non-working hours and to decline meetings when they fell outside his working hours. She made it clear that the claimant should simply explain to others that he did not work during that time.

43. Mrs. Judge firmly encouraged the claimant to stop working when he was supposed to finish work. She was aware that the claimant often rested in the day and worked of an evening and that he was working on employment tribunal claims which were outside of his role with the respondent. As we have alluded to the claimant had a lot going on and Mrs. Judge was conscious of that. Mrs. Judge made it clear to the claimant that he was not expected to work excess

hours but that when it did happen, he was entitled to take time off in lieu ("TOIL"). Mrs. Judge was content for the claimant to take TOIL on an informal basis and on a number of occasions the claimant simply put TOIL into his diary. The claimant was trusted by Mrs. Judge to manage his own workload diary in this way. It was an example of Mrs. Judge being flexible with the claimant.

44. We found that Mrs. Judge's management of the claimant was conspicuously supportive. We will give an example of her approach. On 25 January 2021 the claimant emailed Mrs. Judge to say that he was having to look after the four children as his partner had been unwell and the local childminder was not working. The claimant explained that he had had to ask for meetings to be rescheduled and he would just have to be in and out of his inbox as much as he could. Mrs. Judge's response was as follows:

"Don't worry Eugene do what you can honestly there is no pressure at all.

Clear all meetings and things will have to wait. Anything urgent you need doing please do let me know.

Family first! You haven't been 100% yourself so please take it easy. Don't join the team call or just nip on if there is anything any of the team can help you with.

Hope you all feel better soon!"

45. Mrs. Judge's support was obviously appreciated by the claimant. On 26 January 2021 he wrote to her as follows:

"Goes without saying we also appreciate how amazing you have been especially during this COVID period and all your support and encouragement.

We will ride these waves and come out the other end a much stronger team"

46. As we have already referred to 2021 was a particularly difficult year for the claimant with a series of challenging personal and health issues which he had to deal with. Mrs. Judge noticed that these issues were impacting upon the claimant. She perceived the claimant (we think accurately) to be in a bad place mentally for much of 2021 principally because of the breakdown of his relationship. As a result Mrs. Judge took steps to reduce the claimant's workload and give him fewer cases. This was the situation from around March to September 2021. In that period the claimant had fewer cases than his colleagues in the same role. The claimant's caseload reached as low as around 5 cases compared to a typical caseload of around 15 to 25 cases. Consistent with the nature of the role all of the cases the claimant and his colleagues worked on could be described as complex or contentious. The claimant's case work was no more or less complex or contentious than the other HR Managers – they all had to deal with difficult cases because that was the nature of their job.

47. In around December 2020 Nicky Welch (who was Mrs. Judge's manager) organised a Human Resources Business Partner ("HRBP") development masterclass course. This was due to take place in May 2021. It was a one-off training opportunity to prepare employees who may wish to become a HRBP. A HRBP is a different and more senior role within HR than the HR Manager role which the claimant was doing. It is a potential route of progression from the HR Manager role. There are of course other routes of progression.

48. Consistent with the fact that Mrs. Judge was a supportive and encouraging manager she spoke regularly to her team including the claimant about how they wished to develop and progress. In her discussions with the claimant he never expressed any interest in the HRBP route. The claimant was instead focused on doing his CIPD training. This is a valuable qualification which could pave the way for the claimant to progress to more senior strategic roles in HR. Mrs. Judge supported the claimant's ambition to undertake CIPD training. She obviously thought highly of the claimant and she wanted him to become a permanent employee. She made it clear that as soon as the claimant was made permanent his CIPD training could be arranged and paid for.

49. The claimant wanted to complete CIPD level 7 which is the advanced level of CIPD equivalent to a postgraduate qualification. Mrs. Judge agreed this was relevant for the claimant and it would support his future development possibly into more strategic HR roles in the future. Equally Mrs. Judge made it clear that it was not something that the respondent could support before the claimant was a permanent employee. The CIPD course required a significant financial and time investment. If the respondent agrees to pay for the course the employee enters into a training contract which involves the repayment of the training fees if the employee leaves the business within three years. Mrs. Judge considered it would not be appropriate to use public funds to make a significant investment like CIPD Level 7 in a fixed term worker who was only contracted to work for the respondent for 18 months.

50. Nicky Welch asked Mrs. Judge to put forward candidates for the HRBP development masterclass course. It was made clear that the candidates should not only be those who had the potential to be a HRBP but who had expressed an interest in taking that path. Mrs. Judge put forward a number of candidates from her team who fulfilled those criteria. She did not put forward the claimant because although she considered that he had the potential to become an HRBP he had not expressed any interest in doing so. In addition Mrs. Judge considered that it was not appropriate to put the claimant forward because he was at that stage still on a fixed term contract which was due to end in July 2021. There was a cost associated with employees attending the HRBP course (amounting to about £600 per employee) as well as the time that would be involved in doing the course. Mrs. Judge did not consider that it was appropriate to make that sort of investment in the claimant and use public funds to pay for his training when he was due to leave shortly after the course. Furthermore Mrs. Judge was aware of the difficulties which the claimant was experiencing during lockdown and she considered that was a further factor that meant it was not appropriate to put him forward.

51. The claimant has pointed out that Mrs. Judge had shared with him she wished him to become a permanent employee and she would support him in that endeavour. However, the fact remains that at the time Mrs. Judge was putting forward candidates for the HRBP course the claimant's permanent position had not been confirmed and he was due to leave upon the expiry of his fixed term contract in July 2021. Mrs. Judge also did not offer a place to Tracey Potter who was another member of her team on a fixed term contract at the time. She accepted that the fact that both the claimant and Tracey Potter were on fixed term contracts was a factor in her decision not to put them forward for the HRBP course.

52. The claimant's fixed term contract was due to expire on 23 July 2021. Mrs. Judge had repeatedly told the claimant that he was doing a good job and that she would like to make him permanent if possible. She encouraged the claimant to apply for permanent opportunities and also identified possible opportunities herself. She asked the business if the claimant's role could become permanent. She made a business case to achieve that. The business case was rejected on two occasions before it was finally approved and this was communicated to the claimant on 17 May 2021. At that stage the respondent still had to go through a process of advertising a vacancy. The claimant was interviewed and on 25 June 2021 he was informed he had been successful. The claimant was provided with a job offer for a permanent position as Senior HR Manager in the ER team, which he accepted. Mrs. Judge's support had been vital to the claimant successfully obtaining this permanent position.

53. The permanent role had been advertised as a full-time position but when the offer of employment was made to the claimant it was for 30 hours which was a continuation of the claimant's hours of work under his fixed term contract. The claimant queried that and he made it clear he wished to work full time hours. Mrs. Judge progressed that point for the claimant as well. She went directly to her superiors asking for the claimant's contract to be put up to 37 hours. She referred to the claimant's personal circumstances. On 5 July the claimant was moved from a fixed term contract on 30 hours per week to a permanent contract on full-time hours. Once again Mrs. Judge's support was vital in the claimant securing the full time hours he wanted.

54. The claimant's role and rate of pay remained the same after he moved to a permanent position. The only differences were the change to a permanent contract and the increase in his hours.

55. On 14 July 2021 the claimant wrote to Mrs. Judge raising concerns about his pay. The claimant was at the bottom of the pay range for his role. The claimant asked Mrs. Judge to consider increasing his salary given his hard work in the role to date. The prompt for the claimant's concerns in this respect appears to be that when his permanent role was advertised it identified the pay range and the claimant was at the bottom of it. However, the claimant's pay had not been reduced - he was to be paid in his permanent role on the same rate of pay that he had received when he was a fixed term worker. This is consistent with the respondent's pay policy, which the claimant must have been aware of. Mrs. Judge had correctly applied the policy and she told the claimant that she could

not agree to any pay rise. The claimant's response was: *"that's fine. Thought no harm in asking and you know I am most grateful that you have managed to get me on board in the first place. I will go ahead and accept the contract".* This therefore did not appear to be a significant issue for the claimant at the time. The tribunal considers its likely that the reason why the claimant did not raise any concerns at the time is because he knew that Mrs. Judge had acted in accordance with the respondent's pay policy.

56. At around the time he was made a permanent employee the claimant had a performance review with Mrs. Judge. The respondent's performance year runs from the end of June and so this was an end of year review. The note of this meeting makes for interesting reading. It records extremely positive messages from Mrs. Judge to the claimant praising him and his work. Equally it records extremely positive messages from the claimant about his role and his manager. The claimant spoke about how he had been able to perform his role with passion and integrity whilst also being able to seek help from management when he has been struggling. Along with the other evidence we heard and saw this paints a clear picture that while he was working under Mrs. Judge the claimant had a positive and supportive working relationship with her. The claimant did not raise any concerns about Mrs. Judge's management of him and she appears to us to have gone out of her way to support him.

57. The review notes also record that Mrs. Judge was fully aware of how the claimant's circumstances during lockdown had been "extremely challenging". We think this was an accurate comment. Furthermore, Mrs. Judge went on to say how she commended and applauded the claimant for the how he had dealt with the situation. This was another indicator of Mrs. Judge's encouraging and supportive approach. Mrs. Judge also praised the claimant for taking on additional duties to coach other members of the team in addition to his "already hectic role". In context the reference to the claimant's role being hectic was not evidence suggesting that he had an excessive workload or was given the most complex cases. It suggested the role was busy – which we accept - but not that the claimant was being singled out in any way. It also demonstrated that the claimant had been able to cope with the demands of the role as he had taken on an additional mentoring responsibility and had managed his difficult personal circumstances during lockdown.

58. As part of the review the claimant was asked about his career development and he focused on his desire to complete CIPD training. He did not mention any interest in HRBP. Mrs. Judge's response was that CIPD would be set as a goal for the next year. In context it was perfectly clear that this meant the next performance year i.e. from June 2021. This was therefore consistent with Mrs. Judge's agreement that the claimant would be supported to progress the CIPD training once he became a permanent employee. She had already signposted the claimant to engage with the respondent's learning and development department to find out what support was available and the claimant had taken advantage of that opportunity and undertaken some pre-assessment for the CIPD course.

59. Mrs. Judge's intention was for the course which the claimant would do to be reviewed in September 2021 when the relevant courses would become available. By September 2021 however the claimant was in a very difficult position. He had moved out of his marital home along with the other challenges we have mentioned and Mrs. Judge could see that the claimant was struggling. Mrs. Judge felt that the claimant's progression onto the course should be deferred until the claimant was in a better position. This did not happen because the claimant went off sick on 12 October 2021 and events progressed as we will describe below. Mrs. Judge later found out that the claimant had enrolled himself onto a CIPD course without the approval of her or the business.

60. The claimant undertook other training opportunities during his employment with the respondent. In particular in July 2021 the claimant requested and was approved to undertake a three-day training course on customer service.

61. The claimant's sickness absence began on 12 October 2021 and lasted for more than 3 months. His sick notes cited stress as the reason for the absence. Mrs. Judge had encouraged the claimant to see his GP prior to him going off sick as she observed that the pressures in his personal life were taking their toll. Immediately prior to going off sick the claimant had spoken to another member of the team – Tarah Green - and learned about the HRBP training course in May 2021.

62. During the claimant's absence Mrs. Judge was in regular contact with him. For nearly 2 months of his absence the claimant did not suggest that his difficulties may be work-related. He explained that his stress was a result of his health and the issues in his family life. On 4 December 2021 however the claimant explained to Mrs. Judge in an email some work-related concerns. He said he had been encouraged by his counsellor to bring these matters to her attention. He referred to concerns about excessive workload, lack of training opportunities and his belief that he was not being paid fairly.

63. In her witness statement Mrs. Judge described herself as being gobsmacked to read this email. We find that was a genuine and understandable reaction. The claimant had simply not mentioned concerns of this nature previously. It was a bolt out of the blue. Mrs. Judge had gone to great lengths to support the claimant through this difficult period in his life and there had been no indication that he had felt unfairly treated at work. The interactions between the claimant and Mrs. Judge up to this point had been positive and indicated a strong and supportive working relationship.

64. Mrs. Judge responded on 6 December to say that she was shocked and she felt she given the claimant a huge amount of support over the last 18 months. However she said she would try and resolve any issues or concerns and would happily discuss them.

65. In his response to Mrs. Judge the claimant said that he did appreciate the relationship that they had and the concern which she had shown with regards to his health and personal issues. He said that he was not for a minute insinuating that it was her fault but he explained he was feeling pressure in

terms of the scope and volume of cases that he had been dealing with. We find that this response is inconsistent with the case the claimant has brought to the tribunal in which he blames Mrs. Judge for a large amount of discriminatory conduct and treatment said to amount to breach of the implied term.

66. In light of these developments the claimant and Mrs. Judge resolved to discuss the claimant's concerns further. They did this in a number of one to one meetings over the next few months.

67. On 16 December 2021 the claimant emailed Elaine Billington, who was the Executive Director of HR. In his email the claimant reiterated his concerns with regards to pay and the volume and complexity of his work. In terms of his workload the claimant said he would not say it was by deliberate design but he felt he often ended up with the most challenging cases. Again this is not consistent with the suggestion the claimant now makes that he was deliberately being given the most complex cases.

68. Elaine Billington responded to the claimant's concerns on 25 January 2022. Elaine Billington had told the claimant that she would look into the points that he had raised and her detailed response indicated that she did this thoroughly. Elaine Billington explained that cases had been allocated evenly but that she could see that since April/May 2021 the claimant had been allocated less cases. Elaine Billington acknowledged that there had been a period where there had been additional work due to absence which had to be covered by the claimant and the rest of the team but that had been resolved with the additions to the team as a result of the restructure. Elaine Billington assured the claimant that allocation of cases had been reviewed to ensure the workloads were balanced. She recommended further discussions between the claimant and Mrs. Judge to reach an agreement regarding workload expectations and the support that the claimant would need.

69. As regards the claimant's concern over pay and in particular the decision not to increase his pay when his contract became permanent Elaine Billington explained that the respondent's standard approach was to appoint individuals moving to permanent contracts to the same salary level that they had been paid during their fixed term contract. She pointed out that not only was that standard practice it was also particularly pertinent in the relevant period as the respondent had been covered by the public sector pay freeze and there had been no scope for pay increases. She also pointed out however that there was a salary review on 1 August which followed the conclusion of pay negotiations with the trade unions. Elaine Billington did not respond to the claimant's concern over the HRBP course as he had earlier indicated that he was going to raise a separate grievance about that.

70. In the period between December 2021 and January 2022 Mrs. Judge was in very regular contact with claimant. They had weekly one-to-one sessions which were noted by Mrs. Judge. Mrs. Judge was also in contact with the claimant by phone, email and text. In the tribunal's view it was clear that Mrs. Judge was doing her level best to support the claimant.

71. Mrs. Judge arranged for the claimant to be assessed by Occupational Health ("OH"). The first OH report was dated 14 December 2021 and that included a recommendation that a stress risk assessment be conducted to identify work stressors and that following that a meeting should be arranged to discuss any actions required. Mrs. Judge did not undertake a formal stress risk assessment but instead she took the view that all of her conversations with the claimant in the one-to-one meetings were focused on trying to identify the causes of his stress and how this could be addressed. For instance the issues about his working hours, the complexity of his work, the perceived unfairness in training and the contract and pay issues were all discussed. As a result Mrs. Judge took the view that she was essentially doing an ongoing stress risk assessment which was a more helpful and supportive approach than formally filling in a stress risk assessment form.

72. Mrs. Judge arranged for the claimant's sick pay to be extended throughout his period of absence. This was a discretion which was exercised in the claimant's favour.

73. The claimant returned to work on 31 January 2022 on reduced hours. The claimant continued to meet regularly with Mrs. Judge and she continued to offer her support for example by offering him a course to help him sleep better as she knew this was something he was still struggling with. Mrs. Judge also made a second OH referral. OH produced a further report on 18 February 2022.

74. On 31 January 2022 the claimant raised a grievance. The claimant again set out his concerns with regard to workload, training opportunities and pay. He also indicated that he believed he had been disadvantaged because he had joined the business on a fixed term contract. The claimant also made reference to the fact that colleagues who had attended the HRBP training course were white British.

75. Liz Herridge was appointed as investigation and decision officer in respect of the claimant's grievance. Mrs. Herridge met with the claimant on 23 February 2022. In advance of the meeting the claimant had been given the opportunity to send any supporting evidence or to put forward any witnesses. The meeting between the claimant and Mrs. Herridge was minuted and the tribunal has read the minutes. In our view the minutes show that Mrs. Herridge had taken the time to understand the nature of the claimant's complaint and she asked him appropriate questions to try and elicit more about his side of the story. Mrs. Herridge also sought to understand the resolution which the claimant was seeking.

76. During the meeting Mrs. Herridge asked the claimant if he felt he had been discriminated against due to his gender and race. The claimant's answer was equivocal and gives the impression that he may not really believe he had been subject to discrimination. He said:

"There may be an innocent explanation. Not saying that its HR discrimination. There's minor male representation in HR so it's difficult not to look at that.

Maybe because I was an FTC? What is the explanation for me not to be given the same opportunity?"

77. Reflecting on the key part of his complaint about not being offered the HRBP training the claimant said this:

"Just want a response on the training and why I was not part of it. Am I not performing? I'm working hard and deserve the same opportunities. Same work, same standard. Not sure when they did the course whether it was when I was FTC or permanent? If it was when I was FTC, then I would understand. If September or October when I was permanent, then why?"

78. These comments appear to suggest that the claimant could understand why he would not be offered HRBP training if he was on a fixed term contract when it took place. It has now been established that the claimant was on a fixed term contract when the training took place. Yet the claimant has pursued his complaint that the failure to offer HRBP training was discriminatory on the ground of race or sex. Again this gives the impression that the claimant may not really believe in this part of his complaint.

79. Mrs. Herridge asked the claimant at the end of the meeting if there was anyone else, other than Mrs. Judge, who she should speak to. The claimant said no, and then he mentioned Sarah Hobster.

80. The question and answer about witnesses is recorded in the grievance meeting minutes (as amended by the claimant) as follows:

"LH: Is there anything else or anyone else I should speak to other than Fay Judge?

EK: No, unless pay dispute. It's hectic since Sarah Hobbs [Hobster] buddied up with me. I'm supporting with cases and aware of how busy I was. I have complex cases, drawn the short straw."

81. The tribunal agrees with Mrs. Herridge's interpretation of that exchange which was that the claimant's response to her enquiry about whether there were any other witnesses she should speak to was no.

82. Following the meeting with the claimant Mrs. Herridge carried out further investigations and in particular she met with Mrs. Judge on 1 March 2022. The meeting with Mrs. Judge was minuted and the tribunal has read the minutes. The tribunal finds that Mrs. Herridge had properly identified the issues in the grievance and she asked Mrs. Judge appropriate questions to elicit further information and obtain her side of the story.

83. Mrs. Herridge did not uphold the claimant's grievance. She sent a copy of her investigation report to the claimant on 22 March 2022. When she wrote to the claimant with the grievance outcome Mrs. Herridge apologised that the process had taken longer than expected. She explained that her workload had been

incredibly busy over the last couple of weeks and this had impacted on the timelines.

84. The claimant appealed against the grievance outcome on 6 April 2022. Melanie Clark was appointed as the appeal officer on 27 May 2022. Mrs. Clark met with the claimant and following that she spoke to Mrs. Judge and another witness, Fiona Redmond. Mrs. Clark decided to speak to Fiona Redmond because she could provide information as to the criteria and process for candidates to be accepted onto the HRBP course. It was Mrs. Clarke's decision to interview Fiona Redmond and this idea was not suggested to her by anyone else.

85. Mrs. Clark wrote to the claimant on 21 July 2022 with the appeal decision. She upheld a part of the claimant's appeal but rejected the majority of it. The part of the appeal which Mrs. Clark upheld related to the claimant working over his contracted hours. Mrs. Clark found this was in the context of everybody in the claimant's team working under considerable pressure. However, she considered that more formal arrangements should have been put in place to monitor the number of hours that the claimant was doing and to ensure that TOIL was available.

86. The claimant has pointed out that in his appeal grounds he had identified a potential witness (Sarah Hobster) who could speak to his allegation of complex cases being given to him. Mrs. Clark considered it was not necessary to interview Sarah Hobster as she thought she had decided the appeal point relating to workload (which was the point Sarah Hobster could speak to) in the claimant's favour. However Mrs. Clark did not in fact resolve the dispute over the complexity of cases worked by the claimant in comparison to other caseworkers. In particular she said that with the passage of time she had been unable to gather any further evidence that the claimant was given more challenging cases than his peers. The claimant's complaint, which we think is valid, is that Mrs. Clark did not speak to Sarah Hobster who the claimant had identified as potentially being able to provide the relevant evidence which Mrs. Clark had been unable to gather. The tribunal considers that this was a clear shortcoming in the appeal process which we find was otherwise thorough. We consider this shortcoming was an oversight rather than anything malicious.

87. On 9 March 2022 the claimant had another one-to-one meeting with Mrs. Judge. In this meeting the claimant said he had received a job offer at a higher salary. In his evidence to the tribunal the claimant explained that he had changed his LinkedIn status to show that he was looking for a job and this had resulted in an approach from a recruiter and the claimant had then applied for and been offered a new position. Mrs. Judge was evidently disappointed to learn that the claimant may be leaving and she expressed that in the meeting. In response the claimant said "*it's not you, I appreciate you, it wasn't about you. Appreciate that.".* The claimant gave his reason for leaving as being that he wished to step up to a more senior role and build a team. Mrs. Judge subsequently offered to try and put a case forward for the claimant to get a higher salary, such was her strength of feeling that the claimant was a valuable employee who she did not want to lose. Mrs. Judge tried and failed to keep the claimant in her team.

88. The tribunal considers that Mrs. Judge's efforts to try and keep the claimant and the claimant's emphasis at the point of resignation that he did not consider Mrs. Judge to be at fault are not consistent with the case the claimant has brought to the tribunal. The claimant's case is centered around allegations that Mrs. Judge subjected the claimant to a course of discriminatory conduct and treated him in such a way as to breach the implied term. In the tribunal's view this is inconsistent with the contemporaneous evidence of how the claimant and Mrs. Judge treated one another. We consider that the claimant would not have told Mrs. Judge how much he appreciated her at the time he resigned if he really believed she was responsible for the allegations he now makes against her. Even in the hearing before us the tribunal sensed a reluctance on the claimant's part to accuse Mrs. Judge of the allegations he has made in the claim. The tribunal finds that the claimant and Mrs. Judge had a strong and supportive working relationship and the claimant has completely mischaracterised the nature of it in this claim.

89. On 14 March 2022 the claimant wrote to Mrs. Judge with his formal resignation. He said that he had accepted a position with the other company and therefore he would be leaving his role. He said he was more than grateful to have had the opportunity of working with the team. The claimant worked out his notice. He appears to have engaged positively and constructively with Mrs. Judge and the rest of the team during this period.

90. The claimant left the respondent on 14 April 2022 and he appears to have left on good terms. The claimant moved on to the higher paid role that he had found through LinkedIn.

Analysis and conclusions

Time limits

91. On 11 April 2022 the claimant contacted ACAS. An ACAS certificate was issued on 4 May 2022. On 4 June 2022 the claimant submitted his ET1 claim form.

92. The unfair dismissal claim was accepted to be in time.

93. The following discrimination complaints are out of time unless we find them to be part of conduct extending over a period or we consider they were brought within a period that we think just and equitable:

    3.1.1 Fail to offer/arrange for the claimant to undertake the HRBP development course. This took place in May 2021.

    3.1.2 Fail to afford the claimant opportunities in terms of his career development, specifically CIPD. Mrs Judge had decided not to progress the claimant onto CIPD level 7 while he was a fixed term employee and she decided to defer the claimant going on to a CIPD course in September 2021.

94. These allegations were not part of conduct extending over a period. We did not uphold any later allegations for reasons we shall explain.

95. We find it is not just and equitable to extend time. We took into account the following factors when making this decision:

    (i) The onus is on the claimant to show why it would be just and equitable to extend time and he has failed to do so. We took into account the claimants' explanations as to why the complaints had not been made in time. These included that he said he was too ill to have brought his claim in time and that he did not learn about important matters, in particular the HRBP course, until later and after he had gone off sick. We did not accept these explanations. There was no medical evidence to establish that the claimant was too ill to have brought his claim in time and the evidence indicated that throughout the relevant period the claimant had been able to communicate effectively including about his concerns. The claimant had learned about the HRBP course prior to him going off sick in October 2021 but he had still not brought any claim about that promptly.
    (ii) The claimant has not presented any cogent evidence as to why he did not bring a claim earlier.
    (iii) There is no cogent evidence that the claimant would have been unable to bring a claim earlier, or even that he would have found it difficult to do so.
    (iv) We find that there was no good reason for the claim not to have been brought in time or earlier.
    (v) There is no suggestion that the respondent failed to respond to requests for information. Rather the evidence indicates that the respondent was willing to engage with the claimant's complaints.
    (vi) The claimant is clearly intelligent and articulate. He is obviously capable of obtaining advice and/or researching how to bring a claim and in what timeframe. In fact the claimant is a savvy litigant who is familiar with employment tribunal law and procedure. He has relevant experience of managing and representing Employment Tribunal claims. We therefore consider that the claimant could and should have brought his claim within time. There was no good reason why the claim had not been brought in time and we concluded the most likely reason was oversight.
    (vii) The delay is relatively substantial – this wasn't a case of a time limit being narrowly missed,
    (viii) There is a public interest in the enforcement of time limits in employment tribunals (this was described as "unexceptionable" in Adedeji).
    (ix) There is a general prejudice against the respondent if we accept a claim against it out of time (i.e. the first type of prejudice identified in Miller).
    (x) There cannot be said to be any prejudice to the claimant in these circumstances in applying the well-known rules on time limits. Conversely we consider that there is a prejudice to the respondent in hearing a claim out of time when there is no good reason to do so and they have been deprived of investigating and responding to it while matters were still fresh.

(xi) We considered the claimant's claim in its entirety in any event and we found all of the allegations would fail for the reasons we have set out.

96. The tribunal concluded that all of these relevant factors weighed against the granting of an extension. We find that there is no basis to grant an extension on just and equitable grounds. The claim was not brought within such other period as we think just and equitable. Therefore we do not have jurisdiction to consider the above discrimination allegations. Nevertheless and for completeness we have set out our findings on those allegations in any event and our overall conclusion applies to all the allegations.

97. The claimant's complaints arising under the Fixed-Term Employees (Prevention of Less favourable Treatment) Regulations 2002 were not made within the time limit set out in Regulation 7 of those Regulations. The complaint about contracting the claimant to the lower end of the pay band of his role when taking on the permanent role dated to 5 July 2021 and the complaint about failing to inform the Claimant of the HRBP training programme dated to May 2021.

98. We find it is not just and equitable in all the circumstances to extend time for the same reasons we have already set out above. Again and for completeness we have set out our findings on these complaints in any event.

99. We therefore find that we do not have jurisdiction to consider the claimant's claim under the Fixed-Term Employees (Prevention of Less favourable Treatment) Regulations 2002 and allegations of discrimination 3.1.1 and 3.1.2 and those claims would fail for that reason in addition to the fact that they fail on their merits in any event.

Unfair dismissal

100. We consider firstly whether the respondent did the things alleged to amount to a breach of the implied term.

101. The respondent did not fail to advance the claimant's career development needs. We have found that Mrs Judge was a supportive manager who sought to assist the claimant with his career development. She took the time to understand what he wanted in terms of career development and gave appropriate and reasonable support to enable his development to take place. Mrs Judge was committed to the career development of her team, including the claimant. Her commitment was only fettered by what could be viewed from a business perspective as a sound investment. This was particularly important because the respondent runs on public funds, which should be invested wisely and for the benefit of the business as well as individual employees.

102. Mrs Judge did not put the claimant forward for the HRBP course. We found there were in summary three reasons why Mrs Judge did not put the claimant forward for the HRBP course. Firstly, because the claimant had not expressed any interest in becoming an HRBP. Secondly, because the claimant was still on a fixed term contract. Thirdly, because of the personal difficulties

which the claimant was experiencing during lockdown. The tribunal accepted these were the genuine reasons why the claimant was not put forward. In that context we do not consider that not putting the claimant for the HRBP course can be seen as demonstrating a lack of support or a failure to advance the claimant's career development needs which might go towards a breach of the implied term.

103. Regarding the claimant's interest in completing CIPD level 7 the tribunal found that Mrs Judge was supportive of that career development aim. Mrs Judge made it clear that as soon as the claimant was made permanent his CIPD training could be arranged and paid for. Mrs Judge did not put the claimant forward for CIPD level 7 when he was a fixed term employee because of the significant cost and time investment involved in that course. Mrs Judge agreed with the claimant that the CIPD training would be progressed promptly once the claimant became a permanent employee and this was confirmed in the end of year review in June 2021 where CIPD training was set as a goal for the next performance year (i.e. from June 2021). By that stage Mrs Judge had already signposted the claimant to engage with the respondent's learning and development department to find out what support was available and the claimant had taken advantage of that opportunity and undertaken some pre-assessment for the CIPD course.

104. Mrs. Judge's intention was for the course which the claimant would do to be reviewed in September 2021 when the relevant courses would become available. By September 2021 however the claimant was in a very difficult position having just moved out of his marital home along with the other challenges we have mentioned. Mrs. Judge felt that the claimant's progression onto the course be deferred until the claimant was in a better position. This did not happen because the claimant went off sick on 12 October 2021.

105. In these circumstances we do not see any evidence demonstrating a lack of support or a failure to advance the claimant's career development needs which might go towards a breach of the implied term.

106. We should specifically mention that we considered that it was understandable and reasonable that Mrs Judge did not put the claimant forward for the HRBP and CIPD courses when he was a fixed term employee. As we have mentioned these courses involved significant time and cost investments. As the claimant was a fixed term employee Mrs Judge had a reasonable and proper cause for not putting him forward for these courses – namely not to make a significant financial and time investment in an employee who was only contracted to be with the business for a short time.

107. The tribunal has found that the claimant and Mrs Judge met on 9 March shortly before the claimant submitted his resignation on 14 March. In that meeting the claimant shared with Mrs Judge that he had successfully applied for another job. He also shared that the new job had better pay and overall was a good opportunity for him. Mrs Judge was disappointed to hear that the claimant was leaving and she expressed that. But in reality the claimant had already made his mind up that he was leaving by this point; he had already

successfully applied for the new job and since it was on better pay and was a good opportunity for him to develop it was clear he was going to move on. Mrs Judge's approach to the claimant throughout his employment had been to support his career development. The claimant must have known that but at this juncture his mind was already made up. The claimant did not seek any assurance about his career development at this stage and any further assurance would have been pointless. We therefore find there was a reasonable and proper cause for Mrs Judge to act as she did on 9 March. We do not see any evidence demonstrating a lack of support or a failure to assure the claimant about his career development in March 2022 which might go towards a breach of the implied term.

108. We find that the respondent did not subject the claimant to excessive workload. The tribunal found that the initial phase of the claimant's employment was very busy, in particular because the pandemic began in around March 2020 and this brought a number of challenges for those working in HR. The claimant was busy in this period, but he was no more or less busy than the other members of his team. The claimant's workload then decreased, along with the other members of his team, as a result of the restructure and expansion of the team in September 2020. The tribunal has also found that Mrs. Judge was a supportive manager who encouraged the claimant not to work excess hours. As the claimant's personal difficulties became more apparent, we found that Mrs. Judge actively took steps to reduce the claimant workload and give him fewer cases. This was the situation from around March to September 2021 and we found that in that period the claimant had fewer cases than his colleagues in the same role. The claimant then went off sick in early October 2021 and his return in January 2022 was carefully managed; he was on a phased return, his workload was controlled so that he was not too busy and he had regular meetings with Mrs. Judge where he could raise any concerns about his workload.

109. The substance of this allegation is that the claimant had a higher workload than his peers. The tribunal finds that suggestion to be baseless. In fact the claimant's workload was lower than his peers from around March 2021.

110. In view of the findings which we have just summarised we found that the claimant was not subjected to excessive workload and we see nothing in his workload which could go towards a breach of the implied term.

111. We find that the respondent did not assign the most contentious cases to the claimant. Firstly we emphasise that the essential nature of the claimant's job was to deal with complex HR cases. Consistent with the nature of the role all of the cases the claimant and his colleagues worked on could be described as complex or contentious. The claimant's case work was no more or less complex or contentious than the other HR Managers – they all had to deal with difficult cases because that was the nature of their job. The suggestion that the claimant was given most of the more complex or consensus cases has simply not been substantiated and we find it is not true. We would also point out that the claimant was well equipped to deal with difficult and contentious HR cases. It was what his training, his experience and his work in assisting claimants in

the tribunal had all prepared him for. As we said the claimant is somebody who appears to relish being involved in difficult HR and tribunal work and this is why he has chosen the career path that he has. For these reasons we see nothing in the nature of the cases assigned to the claimant which could go towards a breach of the implied term.

112. We agree with the respondent that the fact that the claimant was assisting and representing people in tribunal cases outside of his employment up to and including appearing as an advocate at the three day hearing in Scotland in June 2020 is inconsistent with the claimant's suggestions now that he was overworked and struggling with the most complex cases. Further, it was apparent to us that the claimant did not have a real awareness of the workload of others or a specific knowledge of the comparative complexity of the cases they were undertaking. His suggestions that he was overworked compared to others and was given the most complex cases appeared to us to be based on supposition and were unsubstantiated.

113. In putting his argument that he was given an excessive workload and the most contentious cases the claimant relied very heavily on a "high five" message which he received from Mrs. Judge in June 2021. The tribunal understands that high five messages were a performance management tool to congratulate and therefore encourage employees when they had performed particularly well. The message from Mrs. Judge to the claimant read as follows:

"What an absolutely fantastic performance year you have had. I just wanted to recognise the additional hard work, support and resilience you have shown this year. In addition to all your hard work you have support the most complex cases in the team and heavily supported the legal team. You have also directly supported the new HR Managers in the team and been a coach for them all. I truly appreciate all the additional hours and effort you have done this year. Your support has been without a doubt a fundamental reason we have achieved so much since I joined the team."

114. We consider that this message cannot fairly be interpreted as supporting the claimant's case that he was subjected to excessive workload or singled out for the most complex cases. In reality it was a highly positive message from Mrs. Judge to the claimant praising him for his achievements. In our view the claimant is trying to twist something which was positive and done to congratulate him into something negative. The message indicates that the claimant had supported the whole team including on the most complex cases and he had been a coach for the new HR managers. This supports the tribunal impression of the claimant as somebody who had significant skills and experience to manage difficult HR cases and Mrs. Judge was simply praising him for his support to the team which she plainly saw as invaluable.

115. We find that there was an OH recommendation for a stress risk assessment. This was contained in the first OH report dated 14 December 2021 and that included a recommendation that a stress risk assessment be conducted to identify work stressors and that following that a meeting should be arranged to discuss any actions required. We also find that Mrs. Judge did

not undertake a formal risk assessment. Instead, she took the view that all of her conversations with the claimant in the one-to-one meetings were focused on trying to identify the causes of his stress and how this could be addressed. For instance the issues about his working hours, the complexity of his work, the perceived unfairness in training and the contract and pay issues were all discussed. As a result Mrs. Judge took the view that she was essentially doing an ongoing stress risk assessment which was more helpful and supportive approach than formally filling in a stress risk assessment form.

116. The tribunal considers that Mrs. Judge's approach was reasonable and addressed the substance of the recommendation made by OH. There was a reasonable and proper cause for Mrs. Judge to act the way she did; namely that she was following the substance of the recommendation through the one to one meetings. Through the one to one meetings the claimant was clearly aware he was in a supportive environment where he could raise any potential stressors and any necessary actions could be discussed. It is difficult to see how dealing with the same points on a stress risk assessment form would have made any meaningful difference. It is notable that in the first OH referral the proposal for a stress risk assessment actually came from Mrs. Judge and OH agreed with it. Therefore it seems clear that Mrs. Judge was aware of the need to understand any stressors for the claimant and how he could be supported. The claimant has simply picked up on the fact that she didn't formally call what she did a stress risk assessment or complete a particular form. This ignores the fact that the effect of what Mrs. Judge was doing was to identify stressors and discuss appropriate actions to address them. For these reasons we see nothing in the failure to complete a formal stress risk assessment which could go towards a breach of the implied term.

117. We find that OH did not recommend that the claimant's line manager should review his workload. In any event however we find that Mrs. Judge did review the claimant's workload as part of the one to one meetings and the carefully managed phased return to work. Mrs. Judge was plainly conscious of the need to review the claimant's workload. This could be seen in her questions to OH to the effect that she wanted to understand how she could support the claimant in managing his workload. There is therefore nothing in this point which could go towards breach of the implied term.

118. We find that the claimant was not questioned at the grievance meeting on 23 February 2022 in such a way as to suggest a pre-ordained decision. We found that Mrs. Herridge had taken the time to understand the nature of the claimant's complaint and she asked him appropriate questions to try and elicit more about his side of the story. We saw nothing in the questioning which realistically suggested a pre-ordained or pre-determined decision and nothing which could go towards a breach of the implied term.

119. On 31 January 2022 the claimant raised his grievance. Mrs. Herridge met with the claimant on 23 February 2022 and she met with Mrs. Judge on 1 March 2022. Mrs. Herridge sent the grievance outcome and a copy of her investigation report to the claimant on 22 March 2022. To that extent there was a delay in communicating the grievance outcome. When she wrote to the

claimant with the grievance outcome Mrs. Herridge apologised that the process had taken longer than expected and she explained that her workload had been incredibly busy over the last couple of weeks and this had impacted on the timelines. Whilst any delay is undesirable the tribunal considers that the delay in this case was not particularly lengthy, it did not have any particular adverse impact on the claimant and the decision maker apologised and provided a cogent and reasonable explanation. In these circumstances we find that the delay is not a matter which can go towards a breach of the implied term.

120. In light of these findings we find that the respondent did not breach the implied term. For the reasons explained above many of the factual assertions said by the claimant to amount to breaches have not been made out. In light of the findings above we find that the respondent did not behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent, and there was reasonable and proper cause for the respondent acting as it did.

121. As a result we find that the claimant was not dismissed and his unfair dismissal claim must necessarily fail.

122. We should also record that we found that the claimant did not resign in response to the alleged breach of the implied term. The claimant resigned because he had found a job on more pay which appeared to be more in line with his career aspirations. The alleged breach of contract was not a reason for the claimant's resignation. The claimant's own evidence to the tribunal was that he had speculatively changed his LinkedIn status and this had resulted in an approach from a recruiter, his application and ultimately the new job offer. The job offer was on more pay and it gave the claimant the opportunity he was looking for to step up to a more senior role and build a team. It was quite obviously too good to turn down. The claimant left for that reason.

123. Further, we observe that on the claimant's case Mrs. Judge was responsible for most of the conduct relied upon to establish breach of the implied term. Yet when he met with Mrs. Judge on 9 March and explained he was planning to resign and take up the new job the claimant said to Mrs. Judge "*it's not you, I appreciate you, it wasn't about you. Appreciate that.".* Both in the meeting and in his formal resignation letter the claimant gave his reason for leaving as the new job he had been offered and he expressed gratitude towards Mrs. Judge. In the tribunal's view this severely undermines any suggestion that the claimant was leaving because of repudiatory conduct largely committed by Mrs. Judge. It supports our finding that the claimant did not resign in response to the alleged breach; it was simply because he found a better job.

124. For the above reasons the constructive unfair dismissal claim fails and is dismissed.

Direct race/sex discrimination (Equality Act 2010 section 13)

125. We firstly consider whether the respondent did the things alleged to be discriminatory.

126. We found that Mrs Judge did fail to offer/arrange for the claimant to undertake the HRBP development course. We found there were in summary three reasons why Mrs Judge did not put the claimant forward for the HRBP course. We have already explained what those reasons were. None of the reasons had anything to do with race or sex. Mrs Judge would have made the same decision in respect of a fixed term employee of a different race or sex with no material difference between their circumstances and the claimant's.

127. The claimant relied on three comparators - Tara Green, Tania de Piano, Angela Symonds, Rachel Davis. All of the comparators are white British females. There is a clear material difference between the claimant and the comparators. This is the fact that while the comparators were all permanent employees the claimant was, at the relevant time, on a fixed term contract. There were also further material differences in that the comparators were people who were known to be interested in progressing to HRBP and none of the comparators were experiencing the personal difficulties which the claimant had been going through.

128. Mrs Judge did not offer a place on the course to the claimant or to another person who was on a fixed term contract at the relevant time, Tracy Potter. Tracy Potter is closer to being a comparator to the claimant as she was also on a fixed term contract. Mrs Judge accepted that the fact they were both on fixed term contracts was a factor in her decision making. This all supports the tribunal's finding that the decision not to offer a place to the claimant was not because of race or sex but was instead because of the reasons we have identified, including that the claimant was on a fixed term contract. The respondent has proved these non-discriminatory reasons for the conduct complained of. We therefore find that the treatment was not less favourable and it was not because of sex and/or race.

129. We have found that the respondent did not fail to afford the claimant opportunities in terms of his career development. We have found that Mrs Judge was a supportive manager who sought to assist the claimant with his career development. She took the time to understand what he wanted in terms of career development and gave appropriate and reasonable support to enable his development to take place.

130. The claimant's specific complaint here is about CIPD. We have found that the claimant had an interest in completing CIPD level 7 and that Mrs Judge was supportive of that career development aim. Mrs Judge made it clear that as soon as the claimant was made permanent his CIPD training could be arranged and paid for. Mrs Judge did not put the claimant forward for CIPD level 7 when he was a fixed term employee because of the significant financial and time investment involved in that course. It was not a sound investment to make in somebody who was due to leave the business when their contract expired. This reason has nothing to do with race or sex. Mrs Judge would have made the same decision in respect of a fixed term employee of a different race or sex with no material difference between their circumstances and the claimant's.

131. We have found Mrs Judge agreed that the CIPD training would be progressed promptly once the claimant became a permanent employee and this was confirmed in the end of year review in June 2021 where CIPD training was set as a goal for the next performance year (i.e. from June 2021). By that stage Mrs Judge had already signposted the claimant to engage with the respondent's learning and development department to find out what support was available and the claimant had taken advantage of that opportunity and undertaken some pre-assessment for the CIPD course.

132. Mrs. Judge's intention was for the course which the claimant would do to be reviewed in September 2021 when the relevant courses would become available. By September 2021 however the claimant was in a very difficult position having just moved out of his marital home along with the other challenges we have mentioned. Mrs. Judge felt that the claimant's progression onto the course should be deferred until the claimant was in a better position. This did not happen because the claimant went off sick on 12 October 2021.

133. Therefore the reasons why the claimant's CIPD training was not progressed after he became a permanent employee also had nothing to do with race or sex. Mrs Judge would have treated another permanent employee of a different race or sex with no material difference between their circumstances and the claimant's in the same way.

134. The claimant identified two comparators for this allegation - Rachael Lee and Sarah Hobster. The comparators are both white British females. There are clear material differences between the claimant and the comparators. Rachel Lee and Sarah Hobster were permanent employees who had undertaken the CIPD Level 7 as part of their graduate scheme programme. They had completed it by the time Mrs Judge joined the team and it had been part of their graduate scheme course. It was a requirement of their course that they did the training. The claimant had not come through the graduate scheme at all; he was a fixed term employee who later became permanent. Additionally, the comparators were not having significant personal difficulties at home which were affecting their work. For these reasons the tribunal finds that the treatment of the comparators does not support the suggestion that the reason for the claimant not being put on CIPD level 7 was race or sex. We find that the treatment was not less favourable and it was not because of sex and/or race.

135. We find that the respondent, specifically Mrs Herridge, did not undertake the claimant's grievance by favouring the claimant's line manager. We saw no evidence of that and our findings have been to the effect that Mrs Herridge was open minded and took the time to understand things from the claimant and Mrs Judge's point of view before making her decision. There was no cogent evidence that the grievance was pre-determined and we find that it was not pre-determined.

136. The claimant's first specific complaint here is that Mrs Herridge did not require supporting documents from Mrs Judge whereas she did from the claimant. We find that the use of the word "require" is inapt. The claimant was

not required to provide any supporting evidence. Rather he was given the opportunity to provide supporting evidence and he did so.

137. The implied comparison the claimant makes in this allegation is with Mrs Judge. However there is a clear material difference between the claimant and Mrs Judge, in that the claimant had brought a grievance and Mrs Judge had not. Mrs Judge was merely a witness who was relevant to the claimant's grievance. The reason why the claimant was asked for any supporting evidence was because he was the one who was making a complaint and so it was for him to substantiate it. This reason has nothing to do with race or sex. An employee of a different race or sex making a similar grievance would have been given the same opportunity to provide supporting evidence.

138. The tribunal does not consider that the treatment complained of here is less favourable or a detriment. The claimant was given the opportunity to provide supporting evidence as a way of enabling him to substantiate his complaint. The claimant took that opportunity up. If he didn't want to he didn't have to. The tribunal views giving the claimant the opportunity as favourable treatment. It allowed him the chance of demonstrating to the decision maker that his complaint was valid.

139. The second specific complaint in relation to this allegation is that Mrs Herridge did not cross examine Mrs Judge's statements whereas she did with the claimant. We find this allegation has not been made out on the facts. We find that Mrs Herridge did not cross examine the claimant. Our findings were that Mrs. Herridge had taken the time to understand the nature of the claimant's complaint and she asked him appropriate questions to try and elicit more about his side of the story.

140. Further, we found that Mrs Herridge adopted the same approach in her meeting with Mrs Judge. There was no less favourable treatment. We saw no evidence at all that any possible difference in approach between questioning Mrs Judge and the claimant had anything to do with race or sex. We find that the treatment was not less favourable and it was not because of sex and/or race.

141. The tribunal has found that the claimant was not assigned excessive workload and more contentious cases in comparison to other members of the team. We refer to the findings we have already made on this issue. We considered the comparators relied upon, namely Tara Green, Tania de Piano and Angela Symonds, but the claimant's suggestion that these people were give less or less contentious work has simply not been substantiated and we do not accept that suggestion.

142. We have found that Mrs Judge deliberately reduced the claimant's workload from around March 2021 as a further supportive measure in light of his personal difficulties and his workload was then much reduced and carefully managed following his phased return to work in early 2022. This was favourable treatment. Further we saw no cogent evidence that any possible difference in workload or cases between the claimant and the rest of his team had anything

to do with race or sex. An employee of a different race or sex would have had the same number and type of cases as the claimant. We therefore find that the treatment was not less favourable and it was not because of sex and/or race.

143. We find that the respondent did not favour Mrs Judge by interviewing her witnesses in the grievance process. Mrs Herridge did not interview any additional witnesses other than the claimant and Mrs Judge. Mrs Clark did interview an additional witness, Fiona Redmond. However the tribunal has found that it was Mrs. Clarke's decision to interview Fiona Redmond and this idea was not suggested to her by anyone else. In other words Fiona Redmond was not Mrs Judge's witness. Furthermore we found that Mrs. Clark decided to speak to Fiona Redmond because she could provide information as to the criteria and process for candidates to be accepted onto the HRBP course. This reason had nothing to do with race or sex. Mrs Herridge and Mrs Clark would have adopted the same approach with an employee of a different race or sex.

144. We find that Mrs Herridge did not decline to interview a witness advanced by the claimant. As we explained in our findings of fact the claimant was asked by Mrs Herridge if there was anyone else she should speak to and his direct answer to that question was no. The claimant had then gone on to mention Sarah Hobster but it was not clear that he was proposing her as a witness. Even in the minutes of the grievance meeting which the claimant amended he did not change his response to make it clear that he was advancing Sarah Hobster as a witness. We therefore find that the claimant did not in fact advance Sarah Hobster as a witness to Mrs Herridge. The reason why Mrs Herridge did not interview Sarah Hobster was because the claimant had not made it clear he wanted to request her as a witness. This had nothing to do with race or sex.

145. We find that Mrs Clark at the appeal stage of the grievance did decline to interview a witness advanced by the claimant, namely Sarah Hobster. We agree with the claimant that he had in his appeal grounds identified Sarah Hobster as a potential witness who could speak to his allegation of complex cases being given to him. We found that this was a clear shortcoming in the appeal process which we considered was otherwise thorough. We have carefully reviewed our findings as to how this shortcoming came about in order to see if this matter can give rise to any inference of discrimination.

146. Mrs. Clark upheld the part of the appeal which related to the claimant working over his contracted hours. Mrs. Clark therefore considered it was not necessary to interview Sarah Hobster as she thought she had decided the appeal point relating to workload (which was the point Sarah Hobster could speak to) in the claimant's favour. The tribunal considers this was an error. This is because Mrs. Clark did not in fact resolve the dispute over the complexity of cases worked by the claimant in comparison to other caseworkers (which formed part of his workload complaint). In particular she said that with the passage of time she had been unable to gather any further evidence that the claimant was given more challenging cases than his peers. The shortcoming was that Mrs. Clark did not speak to Sarah Hobster who the claimant had

identified as potentially being able to provide the relevant evidence which Mrs. Clark had been unable to gather.

147. We consider there is nothing in these findings which gives rise to any inference of discrimination. The claimant has not identified any comparator in relation to this allegation and we find that a comparator of a difference race or sex would have been treated the same because Mrs. Clark would have applied the same flawed thinking. In reality this was a procedural error which arose from a genuine mistake in approach and from which we cannot draw an inference of discrimination. We therefore find that the treatment was not less favourable and it was not because of sex and/or race.

148. We should mention that we considered a specific argument which was raised by the claimant which related to Mrs. Clark and which he argued could transfer the burden of proof to the respondent. This was that in her witness statement Mrs. Clark said that it had seemed to her that the claimant was indicating he should be paid more for being a black male. This was either poorly worded or demonstrated a misunderstanding of the nature of the discrimination case brought by the claimant. It is not in our view a fact from which we can infer that the claimant was subject to discrimination in any of the ways alleged.

149. In light of the above the tribunal finds that the claimant was not subjected to any less favourable treatment because of sex and/or race and accordingly the direct discrimination claim must fail and be dismissed.

Less favourable Treatment or Detriment of Fixed Term Employees (FTE Regulations 2002)

150. Regarding the first allegation of less favourable treatment under the regulations, we find that the respondent did contract the claimant to the lower end of the pay band of his role when taking on the permanent role on 5 July 2021. We have found that in making this decision Mrs Judge correctly applied the respondent's pay policy as the claimant remained on the same grade. More specifically, paragraph 8.1.4 of the respondent's Pay for Employees Policy states as follows:

"If you are a fixed-term employee and you become a permanent employee in a higher grade, your starting pay will be set in accordance with the pay on transfer arrangements.... If you become a permanent employee in your existing grade, your starting pay will be your existing basic rate of pay. If you become a permanent employee in a lower grade, your starting pay will be determined in accordance with downgrading arrangements".

151. That policy is a trade union agreed policy and we considered that given the nature of his role the claimant must have been aware of it. This is most likely why he did not raise any serious objection when Mrs Judge explained that she could not agree to any salary rise (we refer to the claimant's response of *"that's fine…"*). This was not about fixed term employees being put at the bottom of the pay band when they were made permanent. It was about staying on the

same salary, whatever that was, when they were appointed to the fixed term contract as per the respondent's policy above.

152. We accept the respondent's evidence that the same policy applies for any 'same level' internal move, i.e. whether the employee is on a fixed term contract or permanent they will not be eligible for a pay rise and will remain on their same salary if they move internally on the same grade. Mrs Judge explained, and we accept, that the same thing happened to her when she moved internally to her current role, which was at the same grade as her previous role - she had no opportunity to negotiate for a pay rise.

153. We also accept the respondent's point that the salary level which staff are recruited at reflects their market value. The claimant was recruited at the bottom of the pay band, as were a number of his colleagues performing the same role including Beth Wheeldon, Sarah Hobster and Ms Davis, who all joined on permanent contracts. The claimant could have negotiated to come in higher on the pay scale when he joined the respondent if he believed that reflected his market value. Instead he accepted the offer which was made. Once the claimant became a permanent employee he had the same right as all permanent employees to negotiate for a pay rise in the annual pay review. Mrs Judge made this clear to the claimant when he asked her about a pay rise as she said: *"I did ask when we first offered you to go perm and the answer was a no. Lets review at the end of this performance year. Is that ok? Sorry it's not what you wanted to hear".*

154. Mr Komeng compares himself, in relation to this pay issue, to another employee of National Highways, Chijioke Achionye. We find that Chijioke Achionye was an inapt comparator for the claimant to rely on because there were a number of clear material differences between the claimant and Chijioke Achionye. Chijioke Achionye does not work for Mrs Judge and in fact he did not work in the HR team at all. He worked in a completely different part of the business doing a completely different role - as a "Regional Programme Planning Manager". This is not a comparable role to that of Mr Komeng's. They are different roles with different responsibilities. Mr Achionye is also based in the Guildford and London area, whereas Mr Komeng was based in Birmingham. Location is taken into account when salaries are negotiated.

155. Mr Achionye joined the business as an external candidate rather than an internal move. He went straight in at the top of the pay band for his grade. No doubt this reflected his market value and his recruitment at that level was negotiated by him.

156. The second criterion set out in Regulation 2 - that both employees must be 'engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills' – has not been fulfilled by this choice of comparator. We recognise that we should not adopt a restrictive interpretation of the word 'broadly' as that would undermine the legislation's purpose. However, the claimant has not established any degree of broad similarity in the nature and subject matter of the work or approximate equivalence in the level of expertise and responsibility involved.

157. The claimant did not provide any cogent evidence as to the alleged similarities with the work carried out by his comparator or the qualification and skills of his comparator. We find that the claimant was not engaged in broadly similar work with his comparator and he did not have a similar level of qualifications and skills. The choice of comparator appeared random – it was just somebody who was recruited at the top of the pay scale.

158. We think there is another problem with the claimant's choice of comparator. At paragraph 69 of his witness statement the claimant made it clear that his complaint here is about his inability to negotiate for the higher end of the pay band when he became a permanent employee. However at the time that Mr. Achionye negotiated his pay and was offered a role at the top of the relevant pay band he was not an employee of the respondent (as he was an external candidate). At the relevant time, i.e. when negotiations took place, Mr. Achionye was not employed by the same employer as the claimant and therefore the first and third criteria in Regulation 2 would not be satisfied either.

159. We therefore find that the claimant was not treated less favourably than a comparable permanent employee.

160. We find that the reason why the claimant was recruited at the bottom of the pay band when he joined the organisation was because that reflected his market value and he obviously accepted that as he did not try and negotiate against the offer. It had nothing to do with the fact that he was being recruited as a fixed term rather than a permanent employee (and the fact that several of his colleagues on permanent contracts were recruited on the same level supports that). The claimant had the same option to negotiate as any employee, whether they were joining on a fixed term or permanent contract.

161. We further find that the reason why the claimant remained at the bottom of the pay scale when he became a permanent employee and did not have the opportunity to negotiate at this juncture was because it was the respondent's policy for all internal moves to be kept on the same pay if they were remaining on the same grade. The same policy would have been applied to a permanent employee moving on the same grade. The claimant was in the same boat as permanent staff in that opportunities for existing employees to negotiate pay were restricted to the annual pay review.

162. Our finding is therefore that the respondent did not infringe a right conferred on the claimant by Regulation 3 because the alleged less favourable treatment was not done on the ground that the claimant was a fixed term employee.

163. We turn to the second allegation of less favourable treatment made by the claimant under the regulations. We find that the respondent did fail to inform the claimant of the HRBP training programme. This was not disputed by the respondent and it is consistent with our findings of fact.

164. We find that the comparators relied upon by the claimant - Tara Green, Tania de Piano, Angela Symonds, Rachel Davis – are comparable permanent employees. We find that all the criteria set out in Regulation 2 are fulfilled. Again we did not understand this to be disputed by the respondent and it is consistent with our findings of fact.

165. We find that a reason why the claimant was not offered the HRBP was because he was on a fixed term contract. This was not the only reason but it was a material reason. This was not disputed by the respondent – in fact Mrs Judge asserted in her witness statement that this was a factor in her decision making.

166. We find that the respondent did not infringe a right conferred on the claimant by regulation 3, because the claimant was not treated less favourably by being subjected to a detriment. We consider it was clear that the claimant's career path was not focused on becoming an HRBP. He was instead focused on completing CIPD and the different career opportunities doing that would open up. Mrs Judge explained in her evidence, and we accepted, that she had taken the time to understand the career aspirations of her team and the comparators were those who were known to be keen to progress to HRBP. As recently as October 2020 Mrs Judge had asked the claimant (along with the rest of the team) if he had any development requests and the claimant had not mentioned anything about HRBP. It was known that the claimant was interested in CIPD and he discussed that with Mrs Judge. We do not consider that it can be said that the claimant was subject to a detriment by not being offered a course which he had no interest in doing. A reasonable employee would not consider they had been subjected to a detriment in these circumstances.

167. In any event we find that the treatment complained of has been justified by the respondent on objective grounds. This is in view of the time and cost investment required to do the HRBP course and the fact that at the time the course was taking place the claimant's fixed term contract was due to end shortly afterwards. Mr Beever submitted that the respondent had a legitimate aim of meeting individual development needs of all employees with an appropriate use of public money. This aim had not been clearly pleaded but the claimant accepted there was no prejudice to him in allowing the respondent to rely on it and so we allowed the respondent to do so. The point had been apparent at least implicitly throughout the evidence.

168. We find this was a legitimate aim. It is legitimate for the respondent to aim to meet employees' known career development aspirations in a way which reflects an appropriate use of public money. In other words the respondent had to be assured that meeting employee's career development needs was a sound investment. We think that is clearly legitimate.

169. We find the respondent acted proportionately in achieving the legitimate aim by seeking to ensure HRBP training was offered to those who were interested in it and those who were permanent employees so that the respondent could see the benefit of the time and financial investment it made in the training. We considered that not offering the claimant the HRBP training

was an appropriate and reasonably necessary way to achieve the respondent's legitimate aim. We did not consider that the legitimate aim could have been realised in a less discriminatory way. The respondent could not realistically be expected to offer the training and make the financial and time investment in a fixed term employee who was due to leave shortly after the training and therefore the respondent may well not see any benefit to its investment. This would not be a sound investment or a good use of public money. The claimant's place could have been occupied by a permanent employee who was more likely to remain in the organisation and who was actually interested in the HRBP career path and therefore the respondent would be more likely to see a benefit to its investment and would be using public money wisely.

170. We considered that overall the needs of the claimant and the respondent had been appropriately balanced because it was clear that the respondent did not neglect the claimant's development needs. On the contrary Mrs Judge supported and encouraged the claimant in his career development, including when he was a fixed term employee. The only caveat was that she was aware that she was using public funds and therefore she had to ensure any investment was sound and one which the respondent, as well as the claimant, was likely to see a return on. This was a proper and, in our view, unobjectionable balancing of the parties' needs.

171. For these reasons the claim under the regulations would fail and we would dismiss it on its merits in any event.

Result

172. The result is that the claimant's claim fails and it is dismissed.

Employment Judge Meichen

20 December 2023