



EMPLOYMENT TRIBUNALS

Claimant: Erin Hengel

Respondent: University of Liverpool

Heard at: Liverpool

On: 4 5 6 7 8 11 and 12 13 (in chambers) September and 27 November (in chambers) 2023.

Before Members: Employment Judge Benson
Ms F Crane
Mr S Hussain

REPRESENTATION:

Claimant: Mr D Tinkler - Counsel
Respondent: Mr P Harthan - Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.
2. The complaint of indirect sex discrimination is not well-founded and is dismissed.
3. The complaint of direct sex discrimination is not well-founded and is dismissed.
4. The complaint of harassment related to sex is not well-founded and is dismissed.
5. A hearing will be listed for one day to determine remedy.

REASONS

Claims and Issues

1. The claimant was a Lecturer at the University of Liverpool and was employed between 1 December 2016 and 31 March 2021. She brings claims of unfair dismissal, direct sex discrimination, indirect sex discrimination and harassment. In summary, she was employed based on a three-year probationary period. That probationary period was extended by one year and the respondent says that as the claimant was unable to fulfil the requirements of her probation, particularly that she did not meet the research expectations of the university, she was dismissed. An appeal process confirmed the claimant's dismissal.
2. The respondent contends that the reason for dismissal was capability being one of the potentially fair reasons set out in Section 98 of the Employment Rights Act 1996. Further, that the dismissal was otherwise fair and in the band of reasonable responses. The claimant's claims of sex discrimination/harassment relate to the way she says her research papers were treated by the respondent in that they refused to read and assess them or refer them to the Review Excellence Framework ("REF"), and further refused to consider them for the purposes of her confirmation and appointment. This together with comments made by managers within the respondent, which are recorded within emails, she says amounted to direct discrimination and harassment. The indirect discrimination claim relates to two policies/practices which the claimant says the respondent had in place, relating to the requirements for confirmation in appointment. The respondent defends all claims and in respect of the indirect discrimination in the alternative pleads that it had a legitimate aim which it achieved by proportionate means.
3. A list of issues had initially been prepared and attached to the Case Management Order of 13 January 2021. This was later amended by the parties, who were both legally represented, and an agreed list presented to the final hearing. That list was approved by the Tribunal, and subject to the claimant's clarification in relation to points 17 and 18(b) below regarding the submission to the REF, those issues were agreed. This is set out below:

Unfair dismissal

4. Was the Claimant unfairly dismissed?
5. Was the reason for the Claimant's dismissal a potentially fair reason, namely capability?
6. Did the Respondent act fairly and reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the Claimant?
7. If the Claimant was unfairly dismissed should any compensation awarded be reduced by a Polkey deduction?

8. If the Claimant was unfairly dismissed should any compensation awarded be reduced to reflect the Claimant's contributory conduct?
9. If the Claimant was unfairly dismissed, would it be reasonably practicable or just for the Respondent to be ordered to reinstate the Claimant?

Indirect discrimination (s.19 Equality Act 2010 ("EqA"))

10. The Respondent accepts that it applied a PCP of requiring conditional acceptance of at least two papers in academic journals to be assessed as 3-star quality or higher, as rated by the University of Liverpool Management School's REF reading group.
11. What PCP was applied?
 - a. The claimant says: the Respondent applied a PCP of requiring conditional acceptance of at least two papers in academic journals rated as 3-star or higher in the Chartered Association of Business School's Academic Journal Guide (AJG) list
 - b. The respondent contends that it applied a PCP of requiring conditional acceptance of at least two papers in academic journals to be assessed as 3-star quality or higher, as rated by the University of Liverpool Management School's REF reading group.
12. It is admitted that the PCPs applied or would apply to persons who do not share the Claimant's sex.
13. Did the PCPs put those who share the Claimant's sex at a particular disadvantage when compared with those who do not share the Claimant's sex?
14. Did the PCPs put the Claimant to an actual disadvantage?
15. Can the Respondent show that the PCPs are a proportionate means of achieving an aim?
16. Was the Respondent's aim legitimate?

Direct sex discrimination (s.13 EqA 2010)

17. Regarding the Claimant's paper "Publishing while female" that had received a revise and resubmit (R&R) decision at the (4-star AJG-rated) The Economic Journal, (hereafter "EJ R&R"):
 - a. The Respondent accepts that the Claimant's managers refused to consider her EJ R&R as evidence that she satisfied the confirmation in appointment criteria.
 - b. Did the Respondent refuse to (i) read and assess; and (ii) submit to the REF, the claimant's EJ R&R?
 - c. Were any of these refusals because of the Claimant's sex?

- d. It is alleged that this approach contrasts with the approach taken regarding a paper by Dr Lu Han that had received a R&R decision at the (4-starAJG-rated) American Economic Review, which the respondent (i) read and assessed; (ii) submitted to the REF; and (iii) gave consideration to in the confirmation in appointment decision for Dr Lu Han. The Claimant relies on Dr Lu Han as a direct comparator for these allegations.
18. Regarding the Claimant's paper "Diversity in economics seminars" that had been accepted for publication in the American Economic Association: Papers and Proceedings journal (hereafter "accepted AEA P&P"):
 - a. The Respondent accepts that the dismissing panel refused to read and assess the Claimant's accepted AEA P&P.
 - b. Did the Respondent refuse to (i) submit to the REF; and (ii) consider as evidence that the Claimant satisfied the confirmation in appointment criteria, the claimant's accepted AEA P&P?
 - c. Were any of these refusals on the grounds of the Claimant's sex?
 - d. It is alleged that this approach contrasts with the approach taken regarding:
 - e. a paper by Dr Lu Han that was accepted in the AEA P&P, which the respondent (i) read and assessed (as 3-starquality); and (ii) gave consideration to in the confirmation in appointment decision for Dr Lu Han. The Claimant relies on Dr Lu Han as a direct comparator for these allegations.
 - f. a paper by Dr Ian Burn that was accepted in the American Economic Review: Papers and Proceedings (the title of the AEA P&P before 2018), which the respondent (i) read and assessed (as 4-starquality); and (ii) submitted to the REF. The Claimant relies on Dr Ian Burn as a direct comparator for these allegations.
19. The Respondent accepts that the following communications were made by its members of staff:
 - a. Email dated 16 September 2020 in which Professor Jozef Konings wrote: "The rather aggressive email I have received from Olga, Erin and Co" and Professor Julia Balogun replied: "They are unhappy people working with the unions to be difficult."
 - b. Separate email of 16 September 2020 in which Professor Konings wrote: "Just to keep you in the loop about Erin's militant actions."
 - c. In an assessment of the Claimant's paper "Gender issues in fundamental physics" on 24 June 2020 Professor Konings concluded: "This paper is written in a rather aggressive style and is published in a journal which is not ranked."

d. In an email of 16th December, Professor Mike Zundel wrote the following about the Claimant: "I felt that both the tone of the demands and the public nature of the all staff forum in which you were pressured were entirely inadequate [...] The episode made me feel extremely uncomfortable." Professor Zundel forwarded the email to Peter Brewer and Professor Balogun, saying: "I found the whole tone of the demands, as well as the way this was done in front of all staff very uncomfortable to witness and I felt the exchange was bordering on intimidation, which prompted me to write to Rachael as I was not sure she would be feeling fine after this. I am forwarding my email to you as I strongly feel that this is not how we should communicate with our colleagues, especially with professional services, and as I do not want this to happen again. Can you please let me know what we can do to ensure this." Professor Balogun then followed up on this email with the following: "this is a repeating pattern of behaviour in which the individual can be very aggressive and disrespectful to others." During the course of the hearing, this allegation was withdrawn by the claimant.

20. Were these comments made because of the Claimant's sex? The Claimant relies on a hypothetical comparator and alleges that a male employee in the same situations as the Claimant would instead have been described as "confident" or "assertive".

Harassment related to sex (s.26 EqA 2010)

21. Paragraphs [19 (a) to (c)] above are repeated.
22. Were any of the comments unwanted?
23. If so, were any of the unwanted comments related to the Claimant's sex?
24. If so, did they have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant and was it reasonable for the Claimant to regard the comments as having had that effect?

Evidence and Submissions

25. We heard evidence from the claimant, together with witnesses on her behalf, Olga Gorelkina, a fellow Lecturer and Professor Gary Cook who was the claimant's Head of Department and Line Manager when she commenced working in the department at the University in December 2016 until he left on 30 June 2017. The respondent called six witnesses, Professor Julia Balogun, the Dean of the Management School at the respondent, Professor Anthony Hollander who chaired the appeal panel, Professor Rory Donnelly who led the peer review for the REF at the management school, Professor Oliver De Groot, Subject Head for Economics, Professor M Zundel who made one the comments in the emails the claimant complains about, and Professor Fiona Beverage Executive Pro-Vice Chancellor who chaired the panel dismissing the claimant. The claimant's statement was 64 pages in length.

26. The Tribunal was supplied with a bundle of documents comprising some 3,125 pages together with an agreed chronology and key documents and an agreed cast list. That bundle included the research papers referred to of the claimant and others which we were asked to consider. Submissions were made by both parties orally and in writing for which we were grateful. We have had regard to the authorities we were referred to.

Findings of Fact

27. The claimant commenced her employment as a Lecturer in Economics at the respondent on 1 December 2016. She worked within the University of Liverpool Management School in the Economics, Finance and Accounting subject group ("Economics Subject group"). She had previously completed her PhD study at the University of Cambridge with her official PhD graduation in January 2017. The role was offered as a permanent position however it was the practice of the university (which was not out of the ordinary in universities) to offer the position on a long probationary period. In the claimant's case this was until September 2019 a three-year period. For her employment to continue after the end of the probationary period, the claimant would need to be confirmed in appointment ("CIA").

The University's Confirmation in Appointment Process

28. The University had overarching criteria for confirmation in appointment for academic staff. These covered the headings of research, knowledge exchange, learning and teaching, contribution, engagement and development. In respect of research, the requirement was that the probationer demonstrate that they have fulfilled the agreed plans and priorities of their research to an internationally excellent standard, or which demonstrates that their research is progressing towards an internationally excellent standard.
29. The university is a research-intensive institution. It derives a proportion of its funding for research from quality related research funding which is distributed by Research England. For these purposes, the quality of an institution's research is assessed according to the Research Excellence Framework ("REF"). Since the REF 2008 no quality related funding was awarded to universities for research assessed at 2-star or below, whereas 3-star and 4-star outputs attract quality related funding at a ratio of 4:1 respectively. REF outcomes also drive the reputation and league table positions of UK universities, overall and subject level, which in turn impacts upon staff and student recruitment. The respondent relies upon seeking improvement in the REF outcome as a legitimate aim.
30. From the evidence before us, we find that the criteria which the Economic subject group within the Management School applied for the probationer to demonstrate that they had reached the required research standard was to have at least two papers conditionally accepted for publication in academic journals rated 3-star or more in the Academic Journal Guide list of publications. (the "AJG")
31. Although the respondent contends that the criteria was that the probationer must have had two of those papers published in any publication, and then

assessed as being of at least three--starquality (which is commensurate with research of "internationally excellent" standard) in the University's Management School REF reading group, this is not what we find was the criteria applied to the claimant and her colleagues in the Economics Subject group to whom we have been referred. Our reasons for this conclusion are explained later in our judgment.

32. The University's Code of Practice for annual assessment of individual research performance sets out the University's expectation of individual research outputs (not necessarily for probationers), but states "the requirements are based on the average of one publication per 1.5 years as taken from REF 2014".
33. The process for a probationary member of staff to be CIA was set out in a document which we were referred to at page 129 of the bundle and which was titled "Process for Confirmation in Appointment", which although dated 2016 it was accepted that later processes were in the same terms.
34. The CIA process required the HOD to produce an annual report upon the probationer. If the probationer was in his or her last year, that report could recommend confirming the appointment, lapsing the appointment or extending the probationary period. The Faculty Annual Review Committee would meet and give their recommendation based upon the report and if the recommendation was non confirmation in appointment, a Stage 2 Probationary meeting would be set up such that the employee could attend a meeting with the Pro Vice Chancellor and the Dean and make representations. At that meeting the decision would be made whether to follow the Faculty Annual Review Committee's recommendation or take other action. Stage 3 is an appeal process against dismissal. The CIA Stage 1 and 2 meetings within the university took place in the summer of each year, to tie in with the academic year.
35. The Management school (and other faculties and schools within the university) were permitted to notify probationers of expectations specific to the subject area.
36. It is noted within the CIA process that:
 - a. The criteria for CIA included: Research: that the probationer: "demonstrate that they have fulfilled the agreed plans and priorities of their research to an internationally excellent standard, or which demonstrates that their research is progressing to an internationally excellent standard."
 - b. The criteria in respect of learning and teaching included that: the probationer must "demonstrate that they have fulfilled the agreed teaching expectations assigned to them from a standard expected in their subject area and demonstrate that they have completed or be near to completing within a finite deadline the Certificate of Professional Studies".
 - c. ..."probationary periods are normally only extended where mitigating circumstances such as maternity leave, serious illness or other events

have affected progress, or where the head of department believes that the broadest aspects of criteria have been satisfied to a certain degree but not fully and probation should therefore be extended”.

- d. “...the manager responsible for making the assessment could base it on all factual information available, including expectations specific to the subject area communicated to individual during the period of probation.”

37. All lecturers appointed on a Teaching and Research (“T&R”) contract were reviewed by their HOD each year by way of a professional development review (“PDR”) which the employee would contribute to. For probationers, the HOD would thereafter complete a Progress Report which would be considered at Stage 1 of the CIA process.

The Claimant’s Assessments

38. The claimant had PDRs with her HODs in 2017, 2018 and 2019. On each occasion the HOD also provided a Progress Report to the faculty, and to the Faculty Annual Review Committee providing a recommendation on whether she should be confirmed in appointment. Her HODs changed over the period of her probation.
39. In her PDR on 21 April 2017 within which she reported on the progress of her research and her teaching, Professor Cook noted that she had made a very good start to her career. At that stage the claimant was working on three papers including “Publishing While Female: Evidence of Gender Bias in Peer Review”.
40. Within the claimant’s Progress Report to the Head of Faculty dated 4 May 2017 Professor Cook confirmed that the claimant’s progress was satisfactory.
41. In her 2018 Progress Report dated 30 May 2018, Professor Ormrod commented that “Erin does not have any CABS rated publications and so is behind the expected progress for probation. We have not been able to successfully arrange a meeting with Erin when the other probation and RAP meetings were being held however a meeting is planned as a matter of urgency to discuss progress and put in place support mechanisms.”
42. The claimant later had a research action plan meeting with Professor Ormrod in June 2018 and a PDR on 16 July 2018.
43. Professor Ormrod confirmed in an email to the claimant of 15 July that the “normal minimum expectation by the panel is that two 3-star quality papers will have been accepted by that date. 3-star quality (internationally excellent) is established initially on the basis of the CABS academic journal guide ranking, followed by internal and external readings of papers as required.” CABS was an earlier name for AJG, being the Academic Journals Guide.
44. Professor Ormrod’s PDR was positive and commented that “Erin has excellent research papers in her portfolio”. It stated that he was “pretty confident she can hit a top five or a 4-star journal” and that “These are big shots and may take some time though. It is important for her to work on smaller projects as well that target 3-star journals like the Energy Economics project.”

45. By this time the claimant had been invited to submit her paper “Publishing While Female” to Management Science Journal which was a 4-star rated journal.
46. In the action research plan meeting with Professor Ormrod in June 2018 it was noted there was a discussion that Management Science had solicited the claimant to submit her paper “Publishing While Female” for publication. Although she was advised by Professor Ormrod this may be an appropriate strategy for her, that being to follow up that lead and submit to that publication, she indicated she didn’t want to submit to Management Science at the time as she preferred to submit to another publication the Review of Economic Studies (“Restud”). She had received advice from others outside the university that publishing in an economics paper would be better for her research and for her.
47. In September 2018 Professor Konings became the claimant’s line manager and HOD.
48. In October 2018 Professor Konings set out a strategic vision for the Economics Subject group and within that he confirmed that top ten research in economics was measured by the ADS (AJG) list of journals ranking and that this meant a focus on publications in the top tier journals (categories 3, 4 and 4 star).
49. In October 2018 there was an exchange of emails between the claimant and Professor Konings during which the need for the claimant to have a paper conditionally accepted in a 3-star or better publication to pass probation was discussed. Professor Konings asked the claimant why she wasn’t regularly going to be in Liverpool and asked if she was on sabbatical. The claimant explained that she was told by Professor Ormrod at her PDR that she needed to get her paper provisionally accepted somewhere before the end of the year or she wouldn’t pass probation, so she had requested time away to be as productive as possible. She indicated that she was travelling a lot that semester and would be teaching more in the second semester.
50. By this stage the “Publishing While Female” paper had been submitted to another journal, Econometrica. The claimant advised Professor Konings in October 2018 that she planned to submit the paper to Restud next (ie if it was rejected by Econometrica) and she would probably send it to Management Science after that as had she been invited to do so by them. On 23 October the claimant emailed Professor Konings to say that “Publishing While Female” had been rejected by Econometrica and that the claimant would now try Restud. At that stage Professor Konings suggested she try resubmitting the paper to the Journal of Political Economy (“JPE”) first.
51. In February 2019 “Publishing While Female” was also rejected by JPE. There was an exchange of emails between the claimant and Professor Konings between 12 and 15 February in which Professor Konings sought to reassure the claimant that others had been rejected including him, he suggested presenting it internally, or asking Oliver DeGroot to read it, however the claimant indicated that she would like to continue to keep submitting it to publications.
52. She asked Professor Konings that as she has been explicitly invited by Management Science to submit it there, should she do that before sending it to

Restud. Professor Konings agreed and advised her to do so and to remind the Editor of the invitation.

53. The claimant responded that she had asked him about this in September and “he told her not to...” Professor Konings, having also said that she might want to try submitting it to Restud clarified that he had not advised against submitting the paper to Management Science in September and that if he recalled correctly the claimant wanted to try some of the top five economic journals and although he mentioned it was good to be ambitious it was a risky strategy given that she was up for probation. He indicated he was happy to talk about work or strategy and that he would schedule the meeting in April and if she wanted to do it earlier they could do it then. In the meantime, he encouraged her to submit it to Management Science given that she had been solicited for this.

54. In her response, the claimant backtracked and said she hadn’t suggested that Professor Konings had advised against submitting to Management Science. She says she was just confused about the response. Within that email dated 13 February 2019 in relation to her approach, she says:

“for the record I very much value your advice otherwise I wouldn’t ask you for it! And I do not in any way blame you for offering it, I take full responsibility for my actions. If those actions mean I do not pass probation then that is my fault and my fault alone”.

55. Further, she says:

“Now about probation. I have always understood that the only way to pass is to publish two “3-star” publications or higher before my probation period is up”.

56. She refers to it being a better strategy for her to try first with Restud and thereafter Management Science if there is a rejection. Professor Konings indicated that they could continue to have this discussion when he was back from his research trip. There is no record thereafter about the claimant asking to discuss this issue or seeking further advice from Professor Konings about this issue, though there was ongoing contact between them including discussions about the length of the claimant’s probationary period, and preparations for the progress review.

2019 CIA Process

57. On 19 June 2019 the claimant attended a Stage 1 CIA meeting. Professor Konings had recommended an extension of probation based upon the report which he had been prepared. That concluded that the claimant should be provided with an additional year to provide the extra time needed to deliver the required publications to be CIA. Professor Konings set out certain mitigating factors and the Annual Faculty Review Panel which included Professors Balogun and Beverage recommended a one-year extension of the probationary period. It was agreed that a second meeting would take place so there could be further discussion about the case and clear objectives could be set and a support plan developed.

58. Within the 2019 progress report, Professor Konings commented:
- “ that while the claimant had produced “a lot of good working papers on highly relevant and important topics she has not yet been able to publish them in 3- or 4-star journals (ABS list). This has been discussed with her at various occasions and a plan of action has been agreed upon. She has received an additional year probationary period to show that policy principles can be met.”
59. A second meeting took place with the claimant and the CIA panel, including Professor Konings, Professor Beveridge and Professor Balogun on 19 August. The claimant’s probationary period was extended to 30 November 2020, rather than the probationary period ending 30 September 2020. The claimant was offered support and it was agreed that Professor Konings would arrange a research action plan meeting and would arrange to meet with the claimant every two months to discuss progress. The letter confirmed that in order to be confirmed in appointment at the end of the probationary period, the respondent would expect the claimant to deliver a good teaching/student experience and to have a conditional acceptance for two papers of a 3-star level. It confirmed that the confirmation appointment panel would review her progress when it met the following summer.
60. At that meeting the claimant challenged the respondent’s refusal to accept that she had achieved the policy principles of producing internationally excellent and world leading research already. Essentially, she disagreed with the respondent’s method of measuring whether her research was internationally excellent and world leading.
61. After that meeting, the claimant had correspondence with Professor Konings in which she was unwilling to sign off her PDR. This was because of her disagreement with the respondent that she believed she had already produced internationally excellent and world leading research. Professor Konings explained that the department measured that research using publication in the ABS (AJG) journal list. He made it clear that because she had not published in these 3 and 4-star journals that was why she hadn’t been confirmed in appointment and had been given an extra year. The claimant challenged that this was in line with the Respondent’s overarching principles and there continued to be ongoing disagreement between Professor Konings and the claimant. As such it seemed that there were no progress meetings which took place as intended by Professor Beveridge and the panel.
62. In September 2019, the claimant received an “Revise & Resubmit” from the Economic Journal for her paper “Publishing While Female”.
63. In January 2020 Professor Konings sought to arrange a meeting with the claimant to discuss both student feedback in respect of her teaching, and also to discuss her research progress and strategy. In the exchanges of emails during this period the claimant’s interactions with Professor Konings are challenging and she questions the need for meetings, particularly in relation to her teaching. For instance, in an email of 24 January the claimant asks,

“is there an official document you could send me which explains the policy change from 3.5 to 3.7? My lawyer has advised me to record precisely when and where this particular change was made in order to see how it applies to me in the context of my probation”.

64. Dr Konings responded explaining that things had changed since Professor Cook's time, he stated:

“if there are examples where initiatives from me or Stephan have not been constructive, I would be happy to hear so I can pay more attention to it and adjust my style according. I want to strive for better performance from all of us”.

65. The claimant indicated that she could not meet at the time suggested by Professor Konings and commented:

“in my experience, nothing at this University is meant to be constructive”.

66. Eventually the claimant and Professor Konings agreed to meet on 7 February 2020 and a summary is contained in an email from Professor Konings on 7 February. That summarised where the claimant's various research papers were up to, that there was discussion about the interpretation of the policy principles and whether or not it was appropriate to use the AJG in economics as guidance, they also discussed time lags in publishing and that there was some heterogeneity between journals. Professor Konings indicated that he would plan another follow up meeting in two months' time. At that meeting the claimant also indicated that she was considering postponing her PGCap qualification to focus on research. This was the teaching qualification she was required to achieve during her probationary period. Professor Konings did not raise any objection.

67. Following that meeting the claimant requested an extension to the PGCap assessment and it was suggested that she transfer the assessment to the Spring of 2020.

68. In March 2020 the Covid pandemic commenced. The claimant resubmitted her “Publishing While Female” to the Economic Journal, but there was a delay of two months which may have been down to the Covid pandemic.

69. On 25 March 2020 the claimant's paper “Gender Issues in Fundamental Physics”, was accepted for publication in Quantitative Science (which was an unrated journal). At this time the University was preparing its submissions for the Research Excellence Framework (“REF”) in which all research academics were required to submit work. A REF Reading group within the school existed to read published papers for the purposes of the REF. This was an ongoing process. As the claimant's paper was a published paper, it was read by the reading group. The normal process was for it to be read by two readers, it was read and assessed by Ian Burn as a 3H, and by Professor Konings as a 1H. As there was such a discrepancy in the assessment, a third Professor, was asked to read it, and he assessed it as a 2L.

70. In April 2020 the claimant was asked to lead a Steering Group of the Royal Economic Society Women's Committee. This was a prestigious invitation. She advised Professor Konings about it and having had no response to her email, she accepted the position in the interim.
71. On 16 July 2020 the claimant forwarded her email again to Professor Konings to ask if this appointment could be taken into account in the following year's workload model as she would need time for this commitment. On 16 July Professor Konings forwarded the email to Professor Balogun saying:
- "I am forwarding this email from Erin as she is still not realising that her contract is likely to expire. She refers to the Ethenis 1 document and she will want to get some kind of compensation in the workload. I guess I should say that I will look into this when there is more clarity on the delivery of modules next year, in terms of class sizes etc?"
72. Professor Balogun's response was that working committees can be recognised when agreed in advance and if it is appropriate for time to be doing it, which she comments it isn't. She makes the comment that it isn't for an individual to dictate their own workload and demanding workload time for it. She comments that as far as the particular committee is concerned, given Erin's stage of development i.e. no publications, this is where she needs to focus and this is not something she should be taking on. She states:
- "Giving her that advice might fit with the case we are making? Thus, had she asked you, as she should have done the answer would have been no. As far as the school is concerned and the workload demands on the school on Econ next year this does not seem like an appropriate activity to be taking on now."
73. Professor Konings did not explain to Professor Balogun that she had asked him previously, but he had not responded to the claimant's email. It would have been embarrassing for the claimant having already accepted the role, to step down.

2020 CIA process

74. On 12 June 2020 the claimant and Professor Konings had a further PDR meeting. The claimant reiterated that she considered she had achieved 3 and 4-star research during her time at Liverpool, she had published one high quality paper and had another seven high quality working papers which were under review. Professor Konings noted that she had not yet been able to publish in 3 or 4-star journals and that this had been discussed with her on various occasions. The claimant again noted that she disagreed that publications in 3 or 4-star journals was the appropriate form of assessment for CIA as it ignored the body of work in working paper form. She suggested that an independent assessment would rate most of her working papers at 3 or 4 star. She asked that the respondent get independent assessments of her work. She also noted that Covid had slowed down some of her peer reviews.
75. Professor Konings produced the 2020 Progress Report. Within that report it confirmed that during various discussions it had been stressed to the claimant

that it was important to submit papers to 3-star journals according to the AJG; that it had also been pointed out that the claimant should not submit her work in journals which are ranked below a 3 star. Further, that she was advised not to submit her work in the top 5 Econ journals as it is very hard to get into these journals as junior researchers and is often a time-consuming process. It commented that it was only recently that the claimant had started to adjust her strategy reluctantly, currently the claimant had two papers under review in 3-star journals and one in a 4-star journal. It commented that the claimant continued to invest time in lower rated journals with the argument that these are important contributions in her field, which allowed her to gain visibility with important peers who are also controlling better journals. That in terms of publications the claimant had one accepted paper for publication in Quantitative Social Studies a journal not ranked in the AJG list nor in other commonly used journal rankings. He commented that given the progress that the claimant had been making in terms of research, there was not much evidence at the moment that she would be able to fulfil the criteria used to assess whether her research was progressing towards an internally excellent standard. Professor Konings also commented that the module which the claimant was teaching during the current academic year raised a number of concerns relating to teaching quality albeit the teaching evaluations for this model were reasonable, yet below that which they would expect. Further that the claimant had still not obtained her PGCert accreditation for which probationers and had obtained extra time which was not a good signal. He commented that since the claimant's contract expired on 30 November there was a window of a few months to receive some reassuring news about her submissions however it remained highly uncertain that she would be able to reach the policy principles before the end of her contract.

76. In June 2020 the claimant wrote to Professor Konings setting out what she believed to be inaccuracies in his Progress Report. She reiterated her ongoing challenge of the use of the AJG list, and she said that the concerns raised about teaching were not about her teaching, but about the course. She also confirmed that she was deferring the PGCap and that Professor Konings had neither challenged nor advised the claimant against this. She noted that the errors she had identified were not corrected in the final report.
77. There was an exchange of correspondence between Professor Konings and Professor Balogun in which the claimant's correspondence was copied to her. Professor Balogun's emails included comments that:
- “the claimant will fight this, but we will remain firm”;
- “That the respondent's criteria were generally like that to allow the different faculties to apply appropriate conditions for their discipline” and that
- “the irritating thing will be needing to put all these things in writing come September”.
78. On 30 June 2020 the claimant emailed Professor Konings to respond to his report reiterating the points she had made and providing an analysis and evidence to support her points. A later email from another Professor within the

team raised concerns to Professor Konings that the claimant's teaching quality was to be used in the claimant's CIA assessment. That Professor confirmed that the claimant's teaching had not been criticised. It was later confirmed that the complaints about the module focussed on seminar support and not the claimant's teaching.

Doctor Gorelkina

79. At the same time that the claimant was going through the process of CIA, her colleague Doctor Gorelkina was also subject to the same reviews. Professor Konings was also her HOD and her report confirmed that she would need to achieve conditional acceptance of two papers at 3-star level (by the AJG) if her contract was not to be terminated. As an alternative she may be moved to a Teaching and Scholarship contract. On 16 July 2020, Dr Gorelkina's CIA document prepared by Professor Konings was submitted. The report noted that although she had published 3 papers in 2-star journals in the AJG list, one of which had been assessed at a 3-star and one at a 2-star she had not met the criteria of publication in at least two 3-star journals from the AJG list or above.
80. On 11 September Dr Gorelkina was confirmed in appointment, as she had received a conditional acceptance of publication in a 3-star journal. There was no external review or reading of that paper, the respondent accepting that it was sufficient that it was published in a 3-star ranked journal. She had previously had a paper in a 2-star publication read by the REF as a 3-rating.

Claimant's CIA Meeting 1 September 2020

81. The claimant's confirmation appointment meeting was arranged to take place on 1 September 2020 by Zoom. On 26 August 2020 the claimant emailed Professor Konings with confirmation that she had been accepted as a member of the Women's Committee and asking Professor Konings to honour his commitment. Professor Konings forwarded the email to Professor Balogun suggesting that the email be ignored however Professor Balogun suggested that Professor Konings could refer to it as an example of "how the claimant doesn't follow advice."
82. The CIA meeting took place between the claimant, Professor Konings, Professors Balogun and Beveridge and Peter Brewer (HR) on 1 September 2020. The claimant prepared a detailed presentation setting out why she believed she had met the CIA criteria.
83. That confirmed that the "Gender Issues in Fundamental Physics" had been accepted for publication by Quantitative Science Studies. This was in a journal not within the AJG list. She set out details of her other research and other working papers together with referee's comments as evidence that she had satisfied the research criteria for CIA taking into account the full range of research and scholarship.
84. She suggested as an alternative to her appointment not being confirmed and her contract terminating, that she be provided with an additional extension of probation.

85. She accepted that Professor Konings had made it clear that he was not recommending confirmation in appointment because the claimant did not have two or more papers published in 3-star journals, she also raised her view that women faced challenges publishing in economics that men did not. This was not accepted as Professor Beveridge saw it as a problem across the economics field.
86. On 10 September 2020 Professor Beveridge wrote to the claimant confirming the outcome of the CIA meeting of 1 September She confirmed that progress had not been satisfactory. In particular she referred to the outcome letter in 2019 which highlighted the need to continue to have a good teaching/student experience and have at least a conditional acceptance from two papers of a 3-star quality.
87. It referred to Professor Konings's view and the claimant's in relation to various papers in the pipeline and also the claimant's views that researchers, especially women faced difficulties in economics particularly in getting published, which she said they had subsequently explored in detail. It concluded that she remained at risk of not satisfactorily completing the conditions of probation and therefore she was provided with a final written warning that if she failed to meet them it was likely to result in the termination of her employment at the end of her probation.
88. On 15 September the claimant wrote again to the panel advising that she considered she had passed the criteria for confirmation and appointment, she referred specifically to the pandemic which she advised has slowed down the already very slow peer review process in economics. She asked that that be taken into account.

Comments in emails between Professor Konings and Professor Balogun

89. In mid-September the University was arranging for the start of the new academic year. This was during a resurgence of Covid and there was concern amongst staff as to the impact of Covid and the arrangements which the University was putting in place for teaching the students and return to work.
90. On 15 September an email was sent from a group of lecturers including the claimant. It was sent from Olga Gorelkina's email address, but was signed by "Christian, Erin, Ian, Olga, Sarah-Louise, Stephen, Supriya." It was in response to an email from Professor Konings enclosing a copy of the University's guidance notice on return to the campus. The email from the staff highlighted their concern about returning to on-site work activities without knowing that all suitable risk management controls were in place.
91. That email was forwarded to Professor Balogun and others asking for advice. Professor Balogun responded enclosing a copy of the message which was to be sent out to employees who had concerns. Professor Konings responded on 16 September thanking Professor Balogun and referring to the fact that he had heard the union wanted to push for closure of the campus following examples in other organisations and other universities. He referred to:

“the rather aggressive email I have received from Olga, Erin and Co was inspired by my email in which I forwarded the return to campus details and telling that if anyone wanted to have a conversation about it they should contact me. Some thought I was luring them into a trap, i.e. if they would not explicitly react that it was assumed they implicitly agreed with everything it seems that Covid has some side effect, making people suspicious about their SGH (smiley face)”.

92. Professor Balogun responded confirming that other universities were taking a similar approach and commenting:

“they are unhappy people working with the unions to be difficult. Sorry you are having to deal with this”.

93. It is clear from correspondence around that time that this was a query which was being received from staff within many parts of the university and the queries were increasing. It was a fluid situation in which Professor Balogun and others were taking advice centrally. The central person, Stephanie Readey requested that any issues be paused to make sure everyone had a consistent approach and that they would send on advice.

94. On 15 September, one of the signatories, Christian sent an internal email referring to a meeting that had taken place that day and asking some questions about high-risk staff returning to work. One of the other signatories, Supriya (female) made some suggestions. Another signatory and colleague Stefan (male) referred to teaching by high-risk staff, and Christian responded with further commentary.

95. Professor Konings was part of this email group and on 15 September responded to Christian that if someone felt they might be at risk, given their medical condition this could be reported to him and he would follow up on it.

96. The claimant then provided a more thorough email pointing out that the university’s guidance on returning to campus in July 2020 was that people who were clinically extremely vulnerable or clinically vulnerable should continue working from home where that is possible and can be accommodated – it noted that the burden was on the university to justify how and why it was not possible to accommodate a request to work from home. She referred to the section with the definition of a vulnerable and extremely vulnerable categories and suggested that it could include some conditions that some may suffer from. She stated that if anyone has any questions, she spent an inordinate amount of her free time reading the regulations and university guidance.

97. Professor Konings emailed Professor Baglan the following day with a copy of this correspondence and commented:

“just to keep you in the loop about Erin’s militant actions”.

Progress of the claimant’s and Dr Lu Han’s papers

98. On 11 September 2020 the claimant received a conditional acceptance for publication in the AEA P&P for her paper “Diversity in Economics” Seminar.

From reading the response from AEA P&P, it can be nothing less than a conditional acceptance. That paper was not read by the REF reading group.

99. It seems to us that because Professor Balogun and Professor Konings did not see papers published in AEA P&P as having any real worth, they really gave little thought at the time as to whether it amounted to a conditional acceptance or it didn't. Professor Konings in his email to Professor Balogun on 12 November expressed the view in relation to the impact upon the claimant's CIA process that:

“as this is not a ranked journal nothing changes as all her papers are still in the R & R stage”.

100. Professor Balogun agreed that Professor Konings should add it in his report and comment on its status and adds the words :

“and may be as an additional distraction”.

101. By this we understood it to mean that Professor Balogun was suggesting that the claimant was still distracted on other matters rather than putting papers forward for publication in 3 -star and above journals. It supports our view that she did not rate this journal.

102. In October 2020 Dr Lu Han's publication in AEA P&P was read by the REF reading group as a 3-star. In November 2020 Dr Lu Han's paper “Markets and Mark Up” working paper was read in the reading group and graded as a 4-star.

103. There was real confusion amongst the witnesses as to the status of the AEA P&P journal. The AEA had been a 4- star rated journal on the AJG list for a number of years. It published a collection of ‘conference papers’ in its May edition known as “Papers and Proceedings” or P&P. In 2018 the journal separated and published a standalone publication which comprised only conference papers rather than those papers which had gone through the normal peer review process before publication. As a standalone publication, it was unrated in the AGJ list. The University viewed the AEA P&P as not thereafter having the same standing as the AEA itself. Professor Balogun didn't view it as a publication as she saw it as a conference paper which hadn't been peer reviewed. Professor Beveridge 's view was the same.

104. The readers in the REF reading group appeared to have contrasting views as to whether it was an appropriate publication for the purposes of submission to the REF. In Dr Han's reading assessments outcomes of his P&P paper, the two readers express differing views upon the status of this publication. One of the readers expressed concern as to how it would be viewed by the REF.

105. Under the Research Excellence Framework 2021 submission, there was a requirement for a university to submit at least one paper (published or unpublished) for each member of its academic staff within the applicable reference period (1 January 2014 to 31 December 2020). If an academic had a published paper, it was that which had to be put forward in the REF submission, even if there were other working papers which may be of higher level.

106. The confusion as to the status of the AEA P&P for REF purposes was in our view why Dr Han's working paper "Markets and Mark Up" was later read, even though he had already had a paper accepted in the AEA P&P.
107. When De Groot confirmed Dr Lu Han in his appointment in 2022, he accepted that there were issues with the standing of the AEA P&P but he explained that the paper had been read and assessed as a 3-star and he felt it was unfair to unpick what had already been done. By that time Dr Lu Han also had an accepted publication in a 4-star journal.
108. The REF reading group was set up for the purposes of the REF submissions.
109. On 20 September 2020 the claimant was invited to revise and resubmit "Publishing While Female" in the Economic Journal. The respondent considered this was encouraging news.

Final CIA meeting: 7 December 2020

110. On 19 November the claimant was invited to attend a meeting at which a final determination of her CIA would take place. The meeting was to be held on Monday 7 December, via Zoom. Dr Konings had completed the CIA paperwork and he did not believe she had satisfied the CIA criteria. The purpose of the meeting was stated to be to have a detailed discussion about progress against the objectives that were set and a general probationary procedure before the outcome was determined. The claimant had assistance and advice from her trade union representative.
111. It seems that the same CIA Progress Review was produced by Professor Konings as had been available for 1 September 2020 meeting. It contained a recommendation for the claimant's appointment to lapse. The report confirmed:
 - a. that the claimant had not completed the PGCert accreditation although this was a key part of appointment,
 - b. that there had been one publication ("Gender Issues in Fundamental Physics"), and one paper ("Diversity in Economic Series") which had been selected for a short paper for publication in the AEA P&P 2021 (not ranked by the AJG). It also referred to a "Quantity of History of Economic Research by Women" which had been invited for submission. Within these proceedings, neither the claimant nor the respondent appeared to suggest this amounted to a publication for the purposes of the claimant's confirmation in appointment process. It appeared to be accepted by the claimant that this was not a paper of sufficient quality, and/or didn't amount to a publication.
 - c. that none of the papers had resulted in publications of a level ranked at 3 -star or higher which is expected from staff on a "T and R contract"
 - d. that although the claimant had two papers in R & R stage in each case the Editor did not provide any guarantees of an acceptance on publication"

- e. that the claimant had been regularly advised to focus her efforts on what was needed for CIA, and for example it referred to the opportunity to send a paper to Management Science (a highly regarded journal as an invited piece in Summer 2018). It confirmed that she was advised to do this however she insisted that the paper had to go to an Economics Journal and ignored this advice.
 - f. that the claimant accepted invitations to be published in specialist field journals and more recently in AEA P&P, and whilst that was respectable it takes up time which cannot be devoted to the R & R's and publish her main papers in outlets likely to deliver 3-star work.
 - g. that the claimant had taken up external roles such as the Women's Committee which he had recommended against and advised her to focus on revising and resubmitting her papers. It referred to the claimant ignoring this advice.
 - h. that the pandemic had an impact on the way work was organised but that probationers had been sheltered from the increased workloads.
112. The claimant advised her union representative at this time that a senior lecturer in her department had told her confidentially that he had peer reviewed her "Gender Issues in Fundamental Physics" in April and had rated it as a 3-stareasily. She asked the trade union representative why she wouldn't have been told about that particularly as it might work in her favour.
113. On 7 December the CIA meeting took place with the claimant in attendance with her trade union representative. The panel consisted of Peter Brewer (HR) who was there in an advisory position together with Professors Beveridge and Balogun who would make the ultimate decision. Professor Konings presented his case as to why the claimant's employment should lapse. He identified issues in respect of the claimant's research, teaching and focus. The claimant gave a detailed presentation.
114. After the meeting, Professor Balogun emailed Professor Konings following up on some of the issues which the claimant had brought up. She commented:
- "I will have to go through everything she has sent and check we have responses to everything".
115. She asked that Professor Konings follow up some issues as she was not sure how to classify the AEA P&P paper and suggested he provide a paragraph describing the changes in policy at AEA and that the claimant was not the only person with something in AEA P&P that has not been counted. She referred to not being able to read something that hadn't been published and that it could only be counted once it has been published. She referred to Dr Lu Han's publication in AEA P&P. A further email from Professor Beveridge enquired as to the level which the reading group had assessed the published paper "Gender Issues in Fundamental Physics".
116. On 8 December Professor Balogun was advised of the comments and scores from the REF reading group on the claimant's paper "Gender Issues in

Fundamental Physics". On 9 December Professor Konings provided a response to the claimant's points to Professor Balogun. In that response he confirmed that there were no concerns about the claimant's own teaching but that the criticism was of the claimant as course leader because she should have been monitoring the performance of other teachers. In respect of the AEA P&P he confirmed that this publication could no longer be considered automatically as a 4-star publication because it was no longer the May edition of the main journal, but rather a standalone publication. He referred to Professor Lu Han having also had a publication in the AEA P&P and that not being recognised by the University as a 4-star publication for a similar reason. He further indicated that as the claimant's paper hadn't been published it couldn't yet be read.

117. After the CIA meeting, Professor Balogun emailed Professor Beveridge and HR with her overview. We consider this reflects Professor Balogun's view as to the reasons in her mind as to why the claimant was dismissed. In the key points which she refers to, she confirms:
- a. that the claimant failed to deliver two 3-star level publications that she was repeatedly told she would need to complete probation.
 - b. that the claimant was given an additional year to do this.
 - c. she delayed her PGCap which had also given her more time to research than other probationers who achieved the PG Cap in three years or just over.
 - d. that she relied upon the claimant's own comment that if her publication policy didn't support her case for probation, she would take responsibility for it.
 - e. that the claimant repeatedly refused to listen to advice, primarily this appeared to be in relation to her approach towards submissions for publication, particularly her strategy.
 - f. That in relation to the publications which the claimant referred to and relied upon: The "Gender Issues and Fundamental Physics", she noted has been read but the results not yet released so that the claimant didn't know it had been assigned a moderated score of 2L. In respect of the "Diversity in Economics" seminar in AEAP&P she accepted that the short paper was accepted for publication but referred to the paper not being finished so they couldn't read it even if they wanted to. She referred to the AEA P&P not counting as a 4-star publication and that it wasn't counted as such for another individual in economics who had recently published there. We understand that is Dr Lu Han. In respect of a third paper, a "Quantitative History of Economic Research", she refers to this being level 2 journal. As mentioned, the claimant has not sought to argue that this was a publication which was relevant to the issues in these proceedings.
 - g. the other publications where the claimant claims to have minor revise and resubmit papers, she notes that Professor Konings disputed that this was the position.

Dismissal

118. On 15 December 2020 the claimant was notified that her employment would be terminated and was provided with three months' notice.
119. The letter confirmed that the respondent relied upon the Progress Report provided by Professor Konings and the presentation that the claimant had made during her meeting on 7 December. It dealt with the claimant's mitigation in respect of the impact of the current Covid 19 pandemic, and the difficulties that she said women had in publishing in economics papers. Further, that the claimant had anticipated completing the PGCap by Easter 2020, but now updated, Easter 2021. It referred to the willingness of the claimant to accept a further extension to her probationary period. The letter then concluded that the claimant still did not meet the research expectations as set out in the letter of 27 August 2019 and therefore that she had not satisfied the conditions of her probation.
120. It noted that given that a one-year extension to probation had already been granted and that a final written warning was previously issued in September 2020, warning her that continued failure to meet the conditions of probation was likely to result in termination of the employment and the panel had turned its mind to the question of dismissal, asking whether, in light of the circumstances brought to the attention of the panel by Professor Konings and by the claimant it would be fair and appropriate to move to dismissal.
121. The panel confirmed that they did not agree with the assertions made by the claimant in relation to workload or that there was any bullying and harassment by Professor Konings (which the claimant had alleged). They referred to the claimant's misunderstanding in relation to the weight placed on the AJG, and the partial information that she had in respect of other members of staff's CVs, and their publications. The letter also referred to an extension of the probationary period and the advice and support received since then, and the workload and activities over this period together with the impact of Covid 19. It concluded that dismissal was the only appropriate outcome. The letter was sent by Professor Beveridge.
122. It was confirmed that the claimant's employment would terminate on 31 March 2021.

Requests to read the claimant's papers

123. Following notification of the outcome of the hearing, the claimant uploaded four working papers for assessment onto the REF reading group system. Mr Donnelly, who was responsible for the reading programme contacted Professor Konings to find out what he should do in relation to those papers as he understood that the REF should only read published papers. Professor Balogun confirmed that the claimant should be told to deselect her papers as there was no reason that she should be treated differently from others.
124. The claimant entered into correspondence with Mr Donnelly on 13 January in which she again asked for six of her working papers which she had lodged on the system to be read and reviewed as they needed to be assessed for her CIA.

She gave her view that there was no requirement that papers submitted to REF needed to have already been published in a peer reviewed academic journal before they could be read.

125. On 20 January Mr Donnelly responded confirming that the REF reading programme covered published outputs, and the review of published papers from the most recent round of reading were available to look at. He recommended that if she wanted to take any further advice, she should contact the HOD Oliver DeGroot. In the meantime, the claimant asked colleagues to review her available research working papers including the R &R's and had good feedback from them.
126. On 1 January 2021 Professor Konings left the respondent and moved to Kazakhstan. He was replaced by Professor DeGroot as Subject Group Head.

Appeal

127. On 8 January the claimant lodged an appeal. Her grounds of appeal were:
 - a. that there had been an inadequate consideration of the progress she had made since August 2019,
 - b. that the panel's decision was based on invalid criterion and several procedural violations that the panel had failed to take seriously or make appropriate allowances for Covid,
 - c. that the panel refused to acknowledge institutional factors specific to economics which were relevant to her case including longer peer review times, low acceptance rates and the contractual nature of other revised and resubmit decision in top general interest economics journals,
 - d. that the criteria for hiring probation and promotion were inconsistently applied across the University's Management School,
 - e. that the university had provided insufficient support since August 2019, there had been a consistent refusal to acknowledge and redress workload issues in the management school and the panel had refused to provide her with data and information required to properly defend her case.
128. She provided detail of each of these grounds of appeal, and they were the basis of her presentation at the probation appeal hearing before Professor Hollander and the appeal panel on 5 February 2021.
129. She provided further grounds of appeal on 1 February including that she would publish her R &R "Publishing While Female" in the Economics Journal in 2021 and she referred to the independent assessments of the papers which she had asked senior colleagues to carry out. She made further comments in respect of the procedure. Further, that having a requirement for conditional acceptance was not a fair requirement and that it had failed to take into account Covid.
130. In preparation for the appeal hearing Peter Brewer(HR) gathered thoughts and comments highlighting some of the points that Professor Balogun, who was

presenting the university's case may wish to raise at the hearing. This included:

- a. that there was disagreement that there were minor R&R requirements in respect of the "Publishing While Female" paper;
 - b. that it would be announced on 18 February that her paper "Gender Issues and Fundamental Physics" had been moderated as a 2L.
 - c. that there was a requirement to achieve a minimum publication level and that despite being employed since 1 December 2016 this had not been achieved.
131. The appeal meeting took place on 5 February 2021 before Professor Hollander, and the panel also consisting of two other senior managers. These were Professor Liz Sheffield Associative Pro-Vice Chancellor for Education (Science and Engineering) and Dr Paul Johnson University Council representative. Professor Beveridge and Professor Balogun were in attendance to respond to the grounds for appeal and explained the reasons for the original decision. The claimant was represented.
132. The panel upheld the decision to terminate the claimant's employment and the outcome was confirmed by letter of 11 February 2021.
133. The panel dealt with the claimant's points of concern and in its reasoning concluded:
- a. The claimant had been provided with the additional year and had still not had conditional acceptance of two papers at 3-star or higher at that date which was February 2021.
 - b. The panel noted the concerns about the reading programme and assessment process but was not persuaded that there was merit to the argument that she had been unfairly treated. It explained that the university's policy in respect of R&R was not to have them assessed by the internal reading programme as they were not published papers.
 - c. He referred to the claimant's concerns that the grade assigned to some of her papers concerned her and that she questioned the process. He pointed out that the process of the reading programme provided anonymity to protect all involved so that colleagues could evaluate without fear of favour, but where there was a difference of opinion between the first two reviewers a third was sought, again all remained anonymous, and none were aware of the others gradings.
 - d. Covid had been taken into account including the impact upon it potentially causing a delay in the submission of the "Publishing While Female" paper.
 - e. In respect of her R&R for "Publishing While Female" it did not accept that the claimant's expectation that it would take two and a half months of full-time work to complete and resubmit this paper was a "minor

alteration or minor change” as alleged by the claimant and that even if the panel accepted that the paper would be accepted during 2021, it would still take her two years beyond the original three-year probation period and by no means was publication guaranteed.

- f. She had still not completed the PGCert over a year after the University standard confirmation period. Where in the past formal CIA had been provided without the completion of the teaching requirements, such confirmation was always made subject to completion of the PGCap and that employees in those cases had generally completed all other required elements of the probationary review. He pointed out that the completion of the PGCap was not the single remaining issue.

134. In June 2021 she was awarded the PGCap.
135. On 14 December 2021 the claimant had conditional acceptance for the publication of “Publishing While Female” in the Economics Journal.
136. On 5 April 2023 she was awarded a prize for Junior Academics for that paper.

Inferences

137. Mr Tinkler has asked us to draw inferences from certain facts. We address those facts here.

Professor Balogun

138. Professor Cook made a number of allegations relating to the conduct of Professor Balogun and his view of her. We found the evidence of Professor Cook generally unreliable. He left the university six years ago and he was disapproving of the changes in the university which came about with Professor Balogun’s arrival and her drive for improvements in research quality. This impacted upon his view of Professor Balogun and her actions and we generally do not accept his evidence as helpful to us. Where there is a dispute, we accept the evidence of Professor Balogun.
139. We do accept that Professor Balogun made a comment to Professor Cook about women on maternity leave and that they needing to toughen up. Professor Balogun accepted that she may have made some comment at the time, though not exactly as recalled by Professor Cook. He also expressed the view that Professor Balogun had a bullying manner in the way she spoke to most staff, and he was not sure that she singled out females and it was more characteristic of the Professor’s general approach to staff. The claimant was not on maternity leave, and she did not have children.
140. The claimant asks that we draw an inference from that comment that Professor Balogun was discriminatory towards women. We find that the Professor expected all lecturers to perform to a certain standard and that she gave little leeway for women in the field on maternity leave. She had an unsympathetic approach to anyone who couldn’t work at the pace she required of her staff. We do not consider that we can or indeed should draw inferences from this that Professor Balogun’s decision making was motivated by the claimant’s sex.

During Professor Balogun's time as Dean, she increased the number of female appointments to the school and 24 of the 49 staff who passed probation were female. Two of the subject heads, both Deputy Deans and the Dean are all female.

Absence of Professor Konings.

141. The claimant asks us to draw an inference from the absence of Professor Konings in these proceedings. We decline to do so. It is a matter for the respondent as to who they call as witnesses. This case is one in which almost all exchanges were by email, or documented meetings. Professor Konings was only one of many individuals involved in the claimant's management and the CIA process and we have heard evidence from the others involved. We have not found it necessary to draw inferences as we have direct or other evidence upon which we can rely. We have that evidence both written and oral form.

Collective bullying and harassment Grievance within the Management School

142. On 4 December there was a collective bullying and harassment grievance raised against senior managers. Fourteen staff members contributed. The claimant asks that we draw an inference from this report that there was embedded sex discrimination within the department, but we note that although there is reference to sex discrimination within part of the report, it is vague in nature without specifics and is of little assistance to us in the motivations of those we need to consider. We decline to draw such inferences.

The Law

Unfair Dismissal

143. Section 98 of the Employment Rights Act 1996 reads as follows:

.....(1) In determining for the purposes of this Part whether the dismissal of an
..... employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this sub-section if it ... relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do ...

(3) In subsection (2)(a) – “capability” , in relation to an employee means his capability assessed by reference to skill, aptitude, health, or other physical or mental quality.....

(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case".
144. The reason or principal reason is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, Cairns LJ said, at p. 330 B-C:
- "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."
145. There is no burden on either party to prove fairness or unfairness respectively.
146. Lord Justice Geoffrey Lane in Alidair Ltd v Taylor 1978 ICR 445, CA, reminded us that the test of a fair capability dismissal (aside from procedure) has two elements: does the employer honestly believe this employee is incompetent or unsuitable for the job and are the grounds for that belief reasonable? This means that an employer has to produce evidence of poor performance and show that this was its real reason for dismissing the employee.
147. Once the reason for dismissal has been established, the question of whether the dismissal was fair or unfair in the particular circumstances of the case will be judged according to the 'reasonableness' test set out in S.98(4) of the Employment Rights Act 1996 (ERA).
148. In accordance with that test, in the context of capability dismissals the tribunal will consider not only what steps a reasonable employer would have taken when faced with an employee who does not come up to scratch, but also what steps the employer should have taken at the very start to minimise the risk of poor performance and to create the conditions that allow an employee to carry out his or her duties satisfactorily.
149. It is important that the Tribunal must not substitute its own decision for that of the employer.
150. Employees on probation are a special case because tribunals and courts consider it particularly important that reasonable steps are taken to maintain appraisal of probationers throughout the probationary period. This was stressed by the EAT in Post Office v Mughal 1977 ICR 763, EAT,
151. Employers should follow a fair procedure before dismissing an employee for incapability. In Lewis Shops Group v Wiggins 1973 ICR 335, NIR, the National Industrial Relations Court (the predecessor to the EAT) commented that 'the general concept of fair play inherent in the disciplinary procedures should also guide management in considering a dismissal for inefficiency'. This means that, in general, an employer should be slow to dismiss an employee for incapability 'without first telling the employee of the respects in which he is failing to do his

job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity of improving his performance' — James v Waltham Holy Cross UDC 1973 ICR 398, NIRC

152. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.
153. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.
154. The appeal is to be treated as part and parcel of the dismissal process: Taylor v OCS Group Ltd [2006] IRLR 613

Direct Discrimination

155. Section 13 of the EQA provides that:

(1) a person (A) discriminated against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

156. Section 23 (1) provides that:

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

Harassment

157. Section 26 of the EqA so far as material reads as follows:

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B...

(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

158. Chapter 7 of the EHRC Code deals with harassment.

Indirect discrimination

159. Section 19 of the Equality Act 2010 provides that:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

....

sex;

Burden of proof

160. Section 136 of EqA 2010 applies to any proceedings relating to a contravention of EqA. Section 136(2) and (3) provide that:

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

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

161. The issue of why an alleged discriminator acted as s/he did is not to be approached as a question of causation - and certainly not as an issue of 'but for' causation. In Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830 at [29], Lord Nicholls said:

“Contrary to views sometimes stated, the third ingredient (“by reason that”) does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial

happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the “operative” or the “effective” cause. Sometimes it may apply a “but for” approach. For the reasons I sought to explain in *Nagarajan ...*, a causation exercise of this type is not required either by s.1(1)(a) or s.2. The phrases “on racial grounds” and “by reason that” denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.”

162. If a decision is made for more than one reason, provided the protected characteristic had a significant influence on the outcome, discrimination is made out. (*Nagarajan v London Regional Transport* [1999] IRLR 572, HL).
163. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.
164. Assuming that ‘the reason why’ cannot be clearly determined on the evidence, the initial burden is on the Claimant to prove, on a balance of probabilities, a prima facie case of discrimination. *Royal Mail Group Ltd v Efobi* [2021]
165. The Court of Appeal, in *Madarassy v Nomura International Plc* [2007] EWCA Civ 33, LJ Mummery at paragraph 56

‘The court in *Igen v Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent ‘could have’ committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
166. It is relatively straightforward to conclude that there is “something more” if there is an appropriate comparator, direct evidence in admissions, emails, text messages, recordings etc. However, cases where there is such evidence are rare. Therefore the ‘something more’ may be found from indirect evidence and inference.
167. Therefore, even if a Tribunal believes that the Respondent’s conduct requires explanation, before the burden of proof can shift there must be something to suggest that the treatment was due to the Claimant’s sex in the first place.
168. If there is something more to suggest sex discrimination the burden shifts to the Respondent to establish that sex played no part whatsoever in the act or omission. A failure by the Respondent to discharge the burden should result in a finding of unlawful discrimination.

Decision and conclusions.

Unfair dismissal

169. Has the respondent shown the reason for dismissal? It says that the claimant was dismissed for capability reasons, which is a potentially fair reason under section 98 ERA.
170. The claimant alleges that the dismissal was predetermined and that the criteria which the respondent applied which resulted in her being dismissed because she was not confirmed her in appointment, were discriminatory and unfair.
171. We note the test set down in *Alidair Ltd v Taylor* 1978 ICR 445, CA: does the employer honestly believe the employee is incompetent or unsuitable for the job, and are the grounds for that belief reasonable. As such an employer has to produce evidence of poor performance and show that this was its real reason for dismissing the employee.
172. The individuals who made the decision to dismiss the claimant were Professor Balogun and Professor Beveridge. Their decision was confirmed on appeal by a panel which was chaired by Professor Holland.
173. The Tribunal finds that the respondent has shown that the claimant's failure to meet the respondent's criteria for CIA was the reason or principal reason for her dismissal. Further we find that there are reasonable grounds for that belief. That decision was focussed on the failure by the claimant to reach the standard of research required by the respondent.
174. Mr Tinkler in his submissions relied upon a number of factors as to why the dismissal was unfair. These were:
 - a. that the respondent's assessed the claimant's performance against a measure which was different to that set out in their published criteria for CIA;
 - b. that the criteria said to apply for CIA changed over the course of the claimant's probationary period;
 - c. that in deciding to dismiss the claimant the respondent took matters into account which had not been conveyed to the claimant;
 - d. that the criteria that was applied to determine that the claimant should be dismissed on grounds of capability was discriminatory and/or unfair;
 - e. that the respondent failed to provide reasonable support to the claimant to enable her to improve her performance;
 - f. that the respondent failed to fairly consider the claimant's representations as to why it was unreasonable to dismiss on grounds of capability;

- g. that the decision to dismiss the claimant had been made before the claimant was given an opportunity to present her case and/or the procedure adopted by the respondent was unfair;
 - h. that the respondent failed to consider offering alternative employment (specifically a Teaching and Scholarship contract)
175. We agree that these are matters which are relevant in our considerations and we must also consider more generally whether the decision to dismiss was within a band of reasonable responses open to a reasonable employer.

That the respondent's assessed the claimant's performance against a measure which was different to that set out in their published criteria for CIA;

That the criteria said to apply for CIA changed over the course of the claimant's probationary period;

176. In respect of research, the university's requirement for CIA for academic staff was that the probationer demonstrate that they have fulfilled the agreed plans and priorities of their research to an internationally excellent standard, or which demonstrates that their research is progressing towards an internationally excellent standard.
177. As may be expected and as provided for in the 2016 CIA Process, the Management School provided further detail as to how its probationers could show they had achieved this requirement. The respondent in its policies and guidance confirms that it would not rely only upon publication in particular journals such as in the AJG list to assess its employee's research and would assess their work against the generic criteria as more specifically set out within the specific schools.
178. That may have been the intention but, in reality in the cases we were referred to within the Economics Subject group, unless there was publication in 3-star or 4-star journals, the research wasn't seen as having reached the international level required. The reliance upon the level of the publication was apparent from the evidence of Professor Beveridge and Professor Holland in that they explained that the process of having their work published was an exercise which involved an academic having papers commented upon and challenged by peers in their field when they submitted papers to journals and those comments would assist the writer in improving and refining their research such that its academic quality would improve. The peer feedback when papers were submitted to 3 and 4-star journals would be of a more rigorous quality such that by the time the paper was finally accepted by a 3 or 4-star publication, a higher quality paper had been achieved.
179. We conclude therefore that the requirement operated in practice was that for an employee to be confirmed in appointment he or she needed to have conditional acceptance of at least two papers in academic journals rated as 3-star or higher in the AJG list and the claimant was measured against this criterion. We come to this conclusion for these reasons:

- a. When Professors Balogun and Beveridge attended the CIA meeting on 7 December, they had not thought to find out at what level the REF reader group has assessed the claimant's published paper "Gender Issues in Fundamental Physics". Further they did not seek to find out what level the Reader Group might assess the AEA P&P even though that was also a conditionally accepted paper (all be it that they did not consider it to be a peer reviewed publication). The respondent says that was because the paper hadn't been written but they did not make that enquiry and we accept that the claimant did have a draft available. That lack of interest may also be indicative of their approach to other matters, but we find it shows a particular lack of interest by two senior members of the Management school as to the level which might have been attached to the papers by internal reading. Essentially, they dismissed these publications because they were not published or conditionally accepted for publication in 3 or 4-star rated journals.
 - b. The use of the REF reader group to assess published papers for the purposes of CIA does not accord with the timescales and process operated by that group. The REF Reading Group was set up to independently assess published papers for the purposes of submission to the REF. In doing so published papers were uploaded and two members of the Reading Group would consider and rate them. That rating was not passed to the individual nor as in the claimant's case was it passed to those assessing whether she had met the standard required to confirm her in post. There was no proactive engagement between the group and those considering the CIA. Indeed, the respondent says that they are two independent processes. Although we accept that it would undoubtably put pressure on any readers if they knew that the purpose of the assessment was to decide whether a colleague was to be dismissed or confirmed in post, it showed that it had little importance in the CIA process. The key for the respondent was the level of the publication as rated by the AJG in which the paper was accepted or conditionally accepted for publication.
 - c. Professor Konings himself advised the claimant and others of these requirements.
180. In any fair dismissal, however, the employee must know how their performance is being measured and what standard they must meet.
181. The claimant was aware from the outset that she needed to meet the respondent's criteria for CIA. During her employment she was advised that she needed to have two papers published or conditionally accepted for publication in at least 3-star journals as one of the requirements of being CIA. She confirmed her understanding in her email of 19 February 2019 that: "Now about probation. I have always understood that the only way to pass is to publish two "3-star" publications or higher before my probation period is up". Prior to Professor Balogun's appointment, it appears that there may have been a more relaxed approach to completion of probation and CIA. That was the message that the claimant was initially given by Professor Cook and indeed in initial discussions with her colleagues. She expresses similar views in the email correspondence in July 2018. However, throughout the remainder of her

probationary period she is advised by her managers of the importance of having published papers in 3-star or above journals. For example in her PDR in 2018 her line manager records the importance of her working on smaller projects that target 3-star journals; on 22 October 2029, Professor Konings stresses that “as you know 3-star and 4-star research output is typically measured using the AJG list”; and in her Progress Report with Professor Konings dated 17 June 2020, he comments that “during various discussions with Erin, it has been stressed it is important to submit papers to 3-star journals, according to the AJG”

That the criteria that was applied to determine that the claimant should be dismissed on grounds of capability was discriminatory and/or unfair;

182. The claimant’s issue and that which she expressed at the dismissal meeting was that she disagreed with the respondent’s method of assessing whether she had met the research criterion and referred to the overarching requirement set out in the University’s CIA policy. That may have been her view but that was not what she was being told by her employer to do.
183. Professor Balogun’s focus from when she joined the Management School was to improve the research outputs. The school needed 3 and 4-star research to improve its standing in the university tables but crucially to access government funds through the REF programme. The targets set by the Management school were in place to achieve this.
184. It was clear as the submission date for the REF evidence was approaching in November 2020 that the claimant had not produced a published paper of international standard. Her only published paper had been in a journal not rated by the AJG and was in the process of being read. As such this was what had to be submitted to the REF as the output from the claimant, unless she had another published paper which could be assessed.
185. The claimant was of the view that her other working papers, particularly the R&R she had for “Publishing Whilst Female”, should have been considered in the assessment of whether she had met the criteria. A R&R is not a conditional acceptance of publication. As such there was no published work which met the respondent’s criteria (or their needs). Their assessment was based upon the criteria of publication in two 3-star or higher journals. Although the claimant’s “Publishing While Female” was a paper which was having very good feedback, an employer is entitled to set its own targets and apply them. The respondent was of the view that there was no guarantee that this paper would be published and even if it was, it was likely to be some considerable time before that might happen. The claimant herself was of the opinion that the paper required at least another 2 and a half months full time attention to be in a state that she could resubmit it, and this particularly weighed upon Professor Holland’s assessment that the changes required were not minor as the claimant suggested. There were reasonable grounds for that conclusion. The key was publication.
186. The respondent considered the claimant’s argument that it may take longer for women to be published in the economic field. The conclusion of the appeal panel was that the claimant had been given an extra year and that she had still not had conditional acceptance of two papers at 3-star or higher at that date

which was February 2021. The claimant's failure to engage with the advice she was given and to follow her own approach, which although no doubt correct for her own academic and research reputation and career, caused real difficulties for the respondent who needed her to publish at an international level. The claimant was aware of the risks in aiming high and its consequences as she says so herself in the email of 13 February 2019.

187. We find that the respondent both at dismissal and appeal stage had reasonable grounds to conclude that the claimant knew what criteria she had to meet and that the criteria used was fair and not discriminatory. Further that there were reasonable grounds to conclude that the claimant had not met the published criteria.

In coming to the decision to dismiss the claimant says that the respondent did not raise with her that lack of focus was something which upon which they relied.

188. Although the claimant's failure to obtain the PGCap qualification, the criticisms of her teaching and her lack of focus were referred to in the outcome letter, we accept that the respondent has shown these were 'aggravating factors' as described by Professor Holland and not the principal reason she was dismissed.

That the respondent failed to provide reasonable support to the claimant to enable her to improve her performance.

189. The respondent had reasonable grounds to conclude that support appropriate for the claimant in her position as a probationary employee was provided. Although Professor Konings was only proactive with his meetings when he had PDRs to complete or he was concerned that the claimant was not going to meet the publishing criteria, the claimant was not proactive either, particularly in relation to requesting review meetings or seeking advice. She was an independent minded academic who did not feel the need to take advice and when she was given it, still decided to follow her own views or those of others outside the university whose views she valued. Professor Konings was concerned about her having published material of an international standard both because that would assist the university in the REF but also so that she would pass her probationary period. The claimant's focus was her academic career and reputation. She referred to it in evidence as 'her currency'. Although the claimant suggests that she was confused by Professor Konings' advice about seeking publication in Management Science, the change in Professor Konings' views is accounted for by the fact that by February 2019, the time which the claimant had left to publish was diminishing. He was concerned that having tried out her strategy, she had a 4-star publication that was interested in her paper and yet she was not willing to take it to them.

That the respondent failed to fairly consider the claimant's representations as to why it was unreasonable to dismiss on grounds of capability

That the decision to dismiss the claimant had been made before the claimant was given an opportunity to present her case and/or the procedure adopted by the respondent was unfair;

190. The CIA process had a separation of responsibilities at Stage 1 and Stage 2. Professor Balogun was involved at the stage when the claimant's HOD Professor Konings was producing his Progress Report for the first Stage 1 meeting in a situation where she knew she would be a decision maker at the Stage 2 meeting. The ACAS Code of Practice applies to a dismissal for capability. However, where the reason is the performance of an individual, it is not unusual for there to be some overlap of roles of line management and decision maker, and it does not necessarily result in the process being outside the band of reasonableness.
191. The respondent's CIA process however provides that the probationer has the opportunity to make representations at the Stage 2 meetings, and those representations be considered prior to a decision being made. The outcome of that meeting should not be predetermined.
192. We find that that in July 2020 Professor Balogun had already decided that the claimant would be dismissed unless she met the criterion of two publications in 3-star journals. She and Professor Konings were aware of what research she had in the pipeline, and that it would not result in the outcome they required. This was against the background that the REF submissions needed to be submitted at the end of that year. As such, Professor Balogun's mind was made up that no matter what explanations or mitigation which the claimant might put forward at her stage 2 meeting in December 2020, if she had not by that date had two papers published or conditionally accepted in a 3-star or above, her appointment would not be confirmed.
193. This conclusion is supported by Professor Balogun's email correspondence with Professor Konings highlighting issues which could be added to his report in support of his recommendation, for instance the Women's Committee and her lack of focus/failure to take advice. This is apparent from the emails we were referred to by Mr Tinkler including that dated 27 June 2020:
- “..she was told what she had to do last summer. She hasn't met the criteria. She can fight it, and she will with the union, but we will remain firm...”
194. Also that dated 16 July:
- “Giving her that advice might fit with the case we are making’.
195. Where one of the decision makers at the Stage 2 meeting on 7 December 2020 had already made their mind up as to the outcome of that meeting, this takes the decision to dismiss outside the band of reasonableness. It was both outside the respondent's own procedures, but also outside the ACAS Code. The claimant made extension submissions at the Stage 2 meeting (and at the appeal). Although Professor Beveridge was also on the panel, we consider that her decision was influenced by Professor Balogun, who was more closely involved with the claimant. Further Professor Konings' report, which was relied upon by Professor Beveridge, included matters which Professor Balogun had suggested were included.

196. Although an appeal can correct unfairness at an earlier stage, in this case, we find that Professor Balogun and Professor Konings were so involved and invested in the CIA process through to appeal, as evidenced in the correspondence we have referred to, and although Professor Hollander sought to act independently, the appeal panel's decision was tainted by the involvement of Professor Balogun and the appeal process could not correct the earlier unfairness.

That the respondent failed to consider offering alternative employment (specifically a Teaching and Scholarship contract)

197. It is accepted that the respondent did not consider or offer the claimant an alternative role under a Teaching & Scholarship contract. This had not occurred to either party. The claimant's focus was upon retaining her Teaching and Research position. It was not mentioned by her at all during the CIA process nor in her pleadings before the Tribunal. There is no obligation upon an employer to offer an alternative role in a capability dismissal. In not considering this alternative role for the claimant, this did not take the respondent's decision outside the band of reasonableness. They had previously offered such a position to Dr Gorelkina (in different circumstances and that had been rejected) and the claimant had shown no interest in going down such path.
198. A further extension was rarely granted in the Management school. The reasons it could be granted were set out in the CIA document. There was no guarantee that even if the claimant was given an additional year to achieve the publications, that she would meet them. She had already had four years. It's failure to provide the claimant with another extension did not take the respondent's decision outside a band of reasonableness.

Conclusion

199. We find that the dismissal of the claimant was unfair. Although she was clear upon the performance targets she had to meet and had the necessary support, Professor Balogun had predetermined the outcome of the Stage 2 meeting which was contrary to the respondent's own process and the ACAS Code and that was not remedied on appeal.

Indirect discrimination: (this includes further findings of fact in respect of the claimant's research)

200. There are four conditions in section 19(2) of the Equality Act 2010 which must be met. The first is that there must be a provision criterion or practice ("PCP") which the respondent applies also to men. The second is that the PCP must put women at a particular disadvantage when compared with men. Thirdly the claimant must experience the particular disadvantage herself and the fourth condition, the defence of objective justification, is that the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim. The burden is on the claimant to establish the first second and third conditions and it is only when the claimant has established these does the burden shift to the respondent to establish the objective justification.

201. Section 19(2) requires a comparative exercise to be carried out. The EHRC Employment Code endorses the method of constructing a pool for comparison as one way of undertaking this exercise. In doing so, we start by identifying those who are affected by the PCP including those who are advantaged by it and those who are disadvantaged. We have chosen pool of the Economics Subject group which we believe tests the allegation before us. A wider pool would not assist us.

Which PCP did the Respondent apply?

202. We have found that the PCP of requiring conditional acceptance of at least two papers in academic journals to be assessed as 3-star quality or higher, as rated by the University of Liverpool Management School's REF reading group was not a practice applied in the Economic Subject group or to the claimant. It may well have been applied elsewhere in the Management School but not in the Economic Subject group.
203. We have found that that the respondent did apply a PCP of requiring conditional acceptance of at least two papers in academic journals rated as 3-star or higher in the Academic Journal Guide (AJG) list within the Economics Subject group and to the claimant.
204. The respondent admits that the PCP applied or would apply also to men.

Did the PCP put those who share the Claimant's sex at a particular disadvantage when compared with those who do not share the Claimant's sex?

205. There must be no material difference in circumstances of those in the pool other than their sex. The Economics Subject group within the Liverpool School of Management comprised men and women academics who were seeking to have their papers published in similar journals.
206. The particular disadvantage which the claimant relies upon and must show is that it takes longer for females within the group to have their papers published or conditionally accepted for publication in Academic journals of 3-star or above. The evidence she relies upon is referred to in the Appendices to her witness statement, which detail papers produced or published by her alone or together with colleagues which she says prove this proposition, together with additional novel research which she asks us to accept. We have given consideration to each of these:
- a. "Publishing While Female": Hengel (2022) uses data concerning publication in 4-star AJG rated journals. The conclusion reflects that female authors spend 3-6 months longer in review for those journals than men.
 - b. "Gender and the time cost of peer review": Alexander, Gorelkina, Hengel & Tol (2023) this used data from Energy Economics which the authors describe as a "top field journal" and "secondary data" from 32 economic and finance journals. It is not clear where these journals are rated in the AJG lists or indeed if they are. Their conclusions are that there is 29-60 days cumulative time gap in Energy Economics and 18 to 29 days in the

other 32 journals between the time for a man to publish in these journals and a woman.

c. "Publishing Economics": Hadavand, Hamermesh & Wilson: Again this relies upon data for publishing in a 4-star rated AJG journal.

207. The claimant also refers to other published papers as evidence that support that women are less likely to be published. All of these rely upon data gathered from 4-star AJG rated journals.
208. The publication of Grossbard, Yilmazer & Zhang (2021) relies upon data from a 3-star and a 2-star AJG rated journal from the period 2003 to 2014. Their conclusions are that female authored papers are more successful in attaining citations in those two journals. We are unclear how this assists the claimant's case.
209. We find that the claimant has been unable to show on the balance of probabilities that the PCP puts females within the pool at particular disadvantage compared with men based upon this evidence. The evidence upon which the claimant relies is from data collected from 4-star AJG rated journals, (or is research which we find doesn't support her case) and shows the difficulties in being published or conditionally accepted in the highest rated journals, which is not what this PCP requires. The PCP only needs a publication or conditional acceptance in a 3-star AJG journal for it to meet the respondent's requirements.
210. The claimant has also put forward additional research in respect of this PCP which we have also considered which she says shows a particular disadvantage to women within the group. She says that there are three components to this PCP: (i) a requirement that there are two papers (ii) that they are conditionally accepted and (iii) both are accepted by a 3-star or higher journal. The evidence she relies upon in respect of (i) and (ii) we have already considered above and do not accept is sufficient. In respect of (iii), the claimant has carried out her own analysis of data from the 32 journals referred to above and the top five journals in the Hengel and Hengel & Moon publications. She refers to a number of assumptions she makes such as the sex of submitting authors for the top five journals. In conclusion, she asks us to accept her analysis that there is a clear negative relationship between female authorship and the ranking on the AJG list.
211. The respondent says that this paper is unpublished and papers such as this are properly understood as contentions and matters of academic opinion. As such it has limited value until others in the author's discipline have considered the claims and offered alternative readings of the data, conclusions, or explanations. Until this process of academic debate and challenge is complete it says that it is unsafe to draw any conclusions. We accept this is correct. Much of this case has been about the importance of peer reviews in improving, challenging and refining research such that it is eventually, after some considerable consideration and redrafting, accepted for publication. We cannot accept this evidence as showing, even on the balance of probabilities that there was a particular disadvantage to women at the time that the claimant was dismissed. It is the claimant's untested opinion.

212. In any event, we note the claimant's conclusions are that a paper with a female submitting author is, on average 5.1% less likely to be published in a 3-star or higher ranked journal on the AGJ list than a male author. In the absence of information showing the proportions of persons submitting papers who were men and women, the Tribunal could not conclude that the claimant's untested contention that a lower proportion of published papers in 3-star or above journals were authored by women, supported the contention that it was a discriminatory process.
213. We further note that much of the data relied upon does not relate to the time that the claimant was dismissed. Much of it relates to earlier periods. For example, the data used for the claimant's paper "Publishing While Female" is stated to "include every English-language article published with an abstract in AER, ECA, JPE and QJE between January 1950 and December 2015 (inclusive)", though for some purposes is broken down by decade. The data from the 32 Economic and Finance journals was from the period 2005 to 2019. The claimant must show that the particular disadvantage to women was at the time that the PCP was applied, which was in December 2020. This is an additional challenge.

Did the PCPs put the Claimant to an actual disadvantage?

214. In any event we would not have found that the claimant has shown that the PCP put her to a particular disadvantage. There was an expectation that employees employed on a Teaching and Research contract would on average publish one and a half papers each year. The claimant was employed for over four years (her three-year probationary period with an extension of one year). She published one paper, and it was not at an internationally recognised standard. Others in the Economic Subject group could achieve the required level of publications and did so. Her colleague Professor Gorelkina was one of those who did. The claimant was given every opportunity to achieve the required target but regrettably did not do so.

Was there a legitimate aim which was achieved by proportionate means.

215. In any event, if the claimant had done enough to shift the burden to the respondent, we would have found that they had shown that their aim, summarised as: to improve research quality and to seek improvement in the REF outcome, was a legitimate one. As a research-intensive establishment, the university requires its academic staff to produce internationally recognised and world leading research for enhancing its reputation, attracting research funding and improving its position in university league tables. This was particularly important during the REF period. Standards and targets need to be set.
216. We have carried out the balancing exercise of assessing both the needs of the respondent and the discriminatory effect relied upon by the claimant upon women and the claimant. Having done that we would also have found that the means used to achieve the respondent's aim were proportionate.
217. The discriminatory effect relied upon by the claimant was that as the respondent would only consider conditionally accepted or published papers in 3-star or

above journals in the assessment of whether she should be confirmed in her appointment, as a woman it took her longer to be published than it took men and having not met the criterion, she was not confirmed in her role at the conclusion of her probationary period and her employment was terminated. She further considered that the respondent should have used her working papers in assessing whether she had met the necessary overarching criterion of her research being of an internationally excellent standard.

218. The respondent's CIA process was set out formally and gave clear guidance to the probationary member of staff. Annual assessments and meetings took place to assist and support them and if required the probationary period could be extended. The claimant was clear on what she needed to do to be confirmed in her appointment. She had a lengthy period to achieve the targets set by the respondent. She was given support and assistance. The time to achieve it was extended by more than one year. It was a realistic target and had been achieved by others. Although the respondent could have given her more time to revise and resubmit her "Publishing While Female" paper, there was no guarantee how long that would take or that the journal would publish it. The respondent could have permitted the REF reading group to consider the claimant's working papers, but that would not achieve its aim. It needed publications for submission. There was no guarantee that even if she was given more time, that she would achieve publication in a 3-star or above journal. She had decided upon her own strategy to follow and appreciated the risks.

219. This claim fails.

Direct discrimination

The claimant says that the respondent refused to read and assess the Claimant's paper "Publishing While Female" that had received a revise and resubmit (R&R) decision at the (4-star AJG-rated) The Economic Journal, as evidence that she satisfied the confirmation in appointment criteria.

220. It was clarified with Mr Tinkler during the hearing that the claimant's case in relation to the failure by the respondent to read the R&R paper was as set out in the list of issues, that being that it failed to read it for the purposes of the CIA. Although the witness statements deal with each of the claimant's attempts to have it her R&R paper read by the reading group during the period starting with her dismissal hearing and concluding with the appeal, Mr Tinkler confirmed that the specific dates had been removed from the original list of issues and his submissions focussed upon the process taken as a whole and we approach this issue in that way.

221. The claimant relies upon a named comparator Dr Lu Han. For him to be a comparator, there must be no material differences between his circumstances and that of the claimant. We must therefore look at both the claimant and Dr Lu Han at the time they were being assessed for confirmation in appointment.

222. The claimant's probationary period ended in November 2020. At that time, she had not met the respondent's requirements for CIA, that being to have had two papers published or had a conditional acceptance to be published in a 3-star

journal. Her R&R paper had not been conditionally accepted for publication. It was still a working paper.

223. Dr Lu Han's ended in September 2022. By the time Dr Lu Han was at the same stage in the CIA process as the claimant, he had achieved acceptance for publication of his R&R paper in a 4-star journal. There were also other differences in his performance compared with that of the claimant. He was not therefore an appropriate comparator as his circumstances were materially different.
224. Although the claimant does not seek to rely upon a hypothetical comparator, there is nothing in any event that she has shown that would shift the burden under section 136 of the Equality Act 2010 to show that the failure to read her R&R paper for the purposes of the CIA was because she was a woman. Although the claimant points to the comments of Professor Balogun to Professor Cook as indicating her discriminatory bias, and to the absence of Professor Konings, for the reasons set out above, we decline to draw inferences from that evidence. The claimant has not shown us anything from which we could conclude that Professors Konings' or Balogun's motives or those of the respondent generally in their approach to the claimant in the CIA process was her sex. There were other reasons put forward by the respondent as to why they did not read the paper which had nothing to do with her sex. A revise and resubmit did not amount to a conditional acceptance of publication. It was not part of the respondent's policy to read non-published papers for that purpose.

Regarding the Claimant's paper "Diversity in economics seminars" that had been accepted for publication in the American Economic Association: Papers and Proceedings journal (hereafter "accepted AEA P&P"):

225. The less favourable treatment which the claimant relies upon is that the respondent did not read and assess the Claimant's accepted AEA P&P for the purposes of her CIA.
226. The claimant relies upon two comparators: (i) Dr Lu Han and (ii) Dr Ian Burns.
227. (i) Dr Lu Han was also subject to a probationary period. His expired on 1 September 2022. He had same requirement to have 2 papers published or conditionally accepted for publication in 3-star journals. At the time of his CIA, he had already secured one paper published in a 4-star journal. He needed a second and Professor De Groot, who completed his assessment relied upon the publication in AEA P&P. That had already been assessed in 2020 as a 3-star. At that time, it had not been read for the purposes of the CIA but for the purposes of the REF submission and there was as we have said confusion as to the standing of the AEA P&P. Dr Lu Han was not therefore an appropriate comparator as he was not in materially the same circumstances as the claimant.
228. In any event the claimant must show something more than just a difference in treatment between her and Dr Lu Han to shift the burden to the respondent. Again, the claimant relied upon the comments of Professor Balogun to Professor Cook, and Professor Konings' absence. We find that she has not done enough.

229. Even if she had shifted the burden to the respondent to show a non-discriminatory reason for any difference in treatment between Dr Lu Han and the claimant, the respondent has shown to our satisfaction that Dr Lu Han had also had a publication in a 4-star journal and the AEA P&P was the additional publication at the time he was confirmed in appointment. His AEA P&P paper had already been read and assessed as part of the REF programme. When Professor De Groot confirmed Dr Lu Han in appointment, he explained he felt it was unfair to unpick what had already been done. It had already been assessed as 3-star.
230. (ii) Dr Ian Burns was not an appropriate comparator. At the time of his confirmation in appointment his paper had been published in the AEA which was a 4-star rated journal. That was a different publication than the AEA P&P.
231. Claim fails.

Comments Professor Konings and Professor Balogun

232. The Claimant says that comments made by Professor Konings and Professor Balogun in exchanges of emails and by Professor Kongings in his assessment of her paper were unfavourable and made because she was a woman. She relies on a hypothetical comparator and alleges that a male employee in the same situations as the Claimant would instead have been described as “confident” or “assertive. The comments she relies upon are:
- a. An email dated 16 September 2020 in which Professor Jozef Konings wrote: “The rather aggressive email I have received from Olga, Erin and Co” and Professor Julia Balogun replied, “They are unhappy people working with the unions to be difficult.” Within this paper she relies upon Professor Konings referring to Olga, Erin &Co rather than the other members of the mixed sex group who had emailed him.
 - b. A separate email of 16 September 2020 in which Professor Konings wrote: “Just to keep you in the loop about Erin’s militant actions.”
 - c. In an assessment of the Claimant’s paper “Gender issues in Fundamental Physics” on 24 June 2020, Professor Konings concluded: “This paper is written in a rather aggressive style and is published in a journal which is not ranked.”
233. The claimant says that the less favourable treatment in (a) is that Professor Konings used names of Olga and the claimant even though the email was sent by a mixed sex group. We do not accept that premise. Professor Konings refers to “Olga, Erin and Co” That is a summary of those who signed their names at the bottom of the email. There was another woman in the list who was not addressed by name, as there were men. Factually we do not accept that there was a singling out as the claimant alleges.
234. Any comparator in a direct discrimination claim must be in no materially different circumstances than the claimant. The claimant would have to show facts from which we could conclude that a man who was also being taken through a CIA process at the time in which both Professors were heavily involved and/or who

had previously entered into challenging exchanges by email with the respondent would not also have had his name used specifically. She has not done so.

235. This claim fails.

236. In respect of allegations (b) and (c), again we find that the claimant has not discharged her burden. We do not accept that the use of the word “militant” or referring to her style as “aggressive” is sufficient to show that Professor Koning’s motive was the claimant’s sex. The claimant says that a man would have been described as “confident” or “assertive”. There is no evidence to support that contention or that Professor Konings’ words were because of the claimant’s gender. There are no inferences which we are able to draw which would assist the claimant.

237. These claims fail.

Harassment

238. The claimant relies upon the same comments as her claim of direct discrimination. She became aware of them during the SAR process, which was we understand after her employment ended. Section 108 (2) of the Equality Act 2010 is effective in that the claim exists if harassment arises out of and is closely connected to a relationship which used to exist between them. We turn then to the questions we must address.

239. Firstly, whether any of the comments unwanted? We accept that the references to the claimant and others made in the emails were not what the claimant wished to hear and so were unwanted.

240. We do not find that the claimant has discharged the burden of showing any facts from which we could conclude that the comments were related to sex. As in the claim of direct discrimination, the claimant asks us to conclude that the reference to the claimant and her colleague Olga and that the words “aggressive” and “militant” are sufficient for the burden to shift and the respondent to have to satisfy us that sex played no part in Professor Konings or Professor Balogun’s motivation. Again, we are asked to draw an inference from Professor Konings not attending to give evidence and Professor Balogun’s comment. We decline to draw such inferences for the reasons given and find that there is nothing from which we can conclude that sex played a part in their comments in the emails and report set out above.

241. As such these claims fail.

242. A remedy hearing shall be listed in respect of the successful claim of unfair dismissal. Any submissions in respect of Polkey v AE Dayton Services Ltd [1987] UKHL 8 will be considered at that time.

243. The Tribunal apologises for the delay in providing its judgment in this claim.

Employment Judge Benson
26 February 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
29 February 2024

FOR THE TRIBUNAL OFFICE

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