EMPLOYMENT TRIBUNALS

Claimant: Mr J Duxbury

Respondent: University of Huddersfield

FINAL HEARING

Heard: BY CVP **On:** 12 – 29 April 2021

Before:
Employment Judge JM Wade
Mrs L Anderson-Coe
Mr K Smith

Appearances
For the claimant: Mrs S Sleeman (counsel)
For the respondent: Mr P Smith (counsel)

This has been a remote hearing. The form of remote hearing was CVP. The parties were content with a CVP hearing.

JUDGMENT

1 The claimant was not a disabled person at the material times and his disability related complaints are dismissed.
2 The claimant's complaint of indirect age discrimination is dismissed.
3 The claimant's complaint of unfair dismissal is well founded.

REASONS

Introduction

1. These claims arise out of the respondent's introduction of a mandatory doctoral studies requirement for its academics in 2013. The employments of the claimant and a colleague, Mr Fowler, both ended in early 2020 following disciplinary procedures for their failure to enrol in those studies.

2. Both commenced proceedings asserting indirect age discrimination, disability related discrimination, failures to make reasonable adjustments, and unfair dismissal. The cases were joined and subject to further case management orders. Shortly before its commencement, this 14 day hearing was converted to be heard remotely by video link. It was ordered to address liability only, because of the disproportionate cost of actuarial advice which was likely to be required should the complaints succeed.

3. The timetable for the hearing provided for the issue of whether the claimant was a disabled person to be addressed by this Tribunal first, as a preliminary issue. Mr Fowler's case was disposed following agreement between the parties, and before the evidence on the further issues in Mr Duxbury's case.

Evidence

4. The Tribunal heard initially from the claimant on disability – he had provided a "disability impact statement", and further addressed his health in his witness statement. After judgment on the preliminary issue we heard him again, followed by Mr Fowler and Dr Lane, the claimant's UCU representative, lecturer in law and Branch Secretary, as the further witnesses in his case.

5. The claimant provided rebuttal evidence in his oral evidence to the Tribunal relating to the respondent's assertion that international student numbers had increased as a result of the doctoral studies policy.

6. On behalf of the respondent we heard from:

   Professor Owen-Lynch - Pro Vice-Chancellor – Teaching and Learning, who was on the panel which imposed a written disciplinary warning on the claimant on 21 November 2017 recommending resumption of PhD studies by 31 December 2017;

   Professor Ball - Pro Vice-Chancellor – Research and Enterprise, who was on the panel which heard and refused the claimant's disciplinary warning appeal on 6 February 2018 (with no extension);

   Professor Donnelly - Dean of the School Computing & Engineering, who was on the panel which imposed a final written warning on the claimant on 23 April 2018, there being an investigation between February and April of his failure to comply with the first recommendation; the final written warning required resumption by 31 May 2018.

   Professor Jarvis - Pro Vice-Chancellor – Teaching and Learning, who was on the panel which heard and refused the claimant's appeal against the final written warning, extending the date for resumption to 5 December 2018.

   Ms Robinson – HR Manager who was involved in the claimant's sickness absence management;

   Professor Thornton - Deputy Vice Chancellor, who was on the panel which dismissed the claimant, giving notice on 24 October 2019 with the claimant's employment terminating on 16 January 2020;

Professor Taylor - Pro Vice Chancellor – International, who was on the panel which heard and refused the claimant's appeal against dismissal, providing its decision on 23 January 2020;

Professor Johnes - from October 2016, Acting Dean and then Dean of Huddersfield Business School, in which the claimant was employed.

The abbreviation "Prof" is used in these reasons, with no disrespect to those holding the title Professor.

7. The documentary evidence comprised an electronic hearing file of 1280 pages, of which a large part reflected the sequential management disciplinary documents. It also included research discussed during this hearing: an "Investors in People Review" report commissioned by the respondent in 2014 ("the IIP report"), two Quality of Working Life Surveys (2017 and 2019) "the QWLS surveys", which are sector wide reports incorporating the Health and Safety Executive's Work Related Stress Scale; a UCU branch survey of members at the respondent conducted in 2018; and the claimant's own survey of nine departmental colleagues in the academic year 17/18 submitted for his final written warning appeal in September 2018.

8. The Tribunal gave permission for a supplemental witness statement from Prof Taylor providing the publicly available information about international student numbers and an explanation of it. Those figures were accepted by the claimant.

9. The Tribunal also permitted a supplemental statement and appendix to be admitted from Prof Johnes. This related to late disclosure of the claimant's doctoral studies supervision record, which contained relevant information about the early stages of his doctoral studies in 2014 and 2015.

10. On the first Friday of the hearing, when the Tribunal was due to hear the last of the oral evidence in the claimant's case, the respondent sought to have admitted a spreadsheet providing age related data for its academics. This was provided to the claimant's solicitor and counsel who sought clarification and an explanation of the underlying source and how the spreadsheet had been compiled. Meanwhile the claimant's witnesses were released, with the possibility of recall should the Tribunal decide that the information should be admitted. There was no further discussion or application before the Tribunal. The claimant's case was closed. The Tribunal then heard the respondent's case. No witness addressed the age information which had been compiled in the spreadsheet – there was limited general information in the some of the respondent's witness statements. The respondent's case was closed.

11. On the second Friday of the hearing Mr Smith and Ms Sleeman exchanged written arguments which they developed orally. On service of Mr Smith's submissions it was apparent he had attached age related data in new spreadsheet format. Ms Sleeman objected to the Tribunal's consideration of that information, neither parties' witnesses having addressed it during their cases and the information giving rise to a whole series of further enquiries. The Tribunal indicated, before hearing the parties' oral submissions on the liability issue, that it would be unlikely to admit the additional information. In deliberations the Tribunal confirmed its decision that it was not in the interests of justice to admit the additional evidence attached to Mr Smith's

submissions: there had been ample opportunity for the respondent to have pleaded and adduced statistical data in advance; it was entirely unfair to admit evidence after the parties' cases had closed.

12. There was very little factual dispute about the pleaded chain of events, including the disciplinary proceedings summarised above. There was no matter on which it was suggested any witness was not being truthful with the Tribunal.

The Issues

13. These were identified in case management and appear below, subject to some modification to reflect the unusual basis of the conduct case against the claimant, the parties' final positions and those pursued in their arguments before the Tribunal. The respondent had accepted that the application of the doctoral requirement to the claimant continually from 2017 to his dismissal was, if indirectly discriminatory, conduct extending over a period, and did not take any limitation point. The unfair dismissal complaint was in time.

Preliminary Issue: Disability

14. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the material times? The Tribunal will decide:

    14.1. Did he have a mental impairment: stress?
    14.2. Did it have a substantial adverse effect on his ability to carry out day-to-day activities?
    14.3. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
    14.4. Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures [not pursued]?
    14.5. Were the effects of the impairment long-term? The Tribunal will decide:
    14.6. did they last at least 12 months, or were they likely to last at least 12 months?
    14.7. [were they likely to recur – not pursued]

Preliminary Decision on Disability

    14.8. The judgment and reasons below were announced in summary form to the parties on 13 April 2021. They are corrected for completeness and elegance of expression below.

    14.9. The material times for these purposes were clarified as being from February 2017, when a disciplinary process started in relation to the claimant's failure to re-enrol in PhD study, culminating in his dismissal, and rejection of appeal against dismissal, in January 2020. That was the material window in which the Tribunal was examining the disability question.

    14.10. We considered the claimant a witness of truth: he was frank and honest in his evidence and we largely accepted it, save for a reference to "generalised anxiety" for which there was no medical corroboration and which had not previously been mentioned as relied upon. The nature of his written evidence on disability was

lacking in specific examples of adverse effect; we heard these in oral evidence.

14.11. After the evidence, Ms Sleeman provided a skeleton argument, developed further orally, and we heard oral submissions from Mr Smith.

14.12. The claimant did not argue likelihood of recurrence as a basis on which the Tribunal should find longevity of adverse effect, nor deduced effect relying on breathing techniques as "other measures" to treat stress. His case was argued on the basis that he had continually suffered from the condition of "stress at work" from 2015 until his Disability Impact Statement in November 2020, and (implicitly) that the substantial adverse effect was present throughout and the longevity condition was satisfied.

14.13. That position included a mistaken understanding of an absence and GP visit in 2017 (which was not from stress, the claimant conceded). Mr Smith argued that a continual presence of impairment or adverse effect was not consistent with the claimant's evidence, and in contrast this was a case more aligned to reactive stress, relying on Herry v Dudley Metropolitan Council [2017] ICR 610.

Preliminary Issue findings of fact

14.14. The claimant was a senior lecturer in the accountancy, finance and economics department of the university from 2005. In 2013 the respondent introduced a requirement for academics to have PhDs. In the autumn of 2014 he enroled in that doctoral study and he undertook some preliminary work during that academic year towards a proposal for the nature of his doctoral research.

14.15. By the summer of 2015 his line manager had recommended that he visit his GP because he was showing signs of stress at work. He told his GP on 24 June 2015 that he was being overworked and that his employer's expectations were unrealistic. His GP recorded: "there is a suggestion I issue a statement that he only undertakes part of his employed duties….I have offered to provide a fit note pending occupational health assessment by his employers". There was no greater discussion recorded about matters, but the claimant was having to work Saturdays to complete everything prior to visiting his GP.

14.16. The GP advised the appropriate way forward was for an occupational health assessment, and he provided the claimant with an eight week fit note saying he may be fit for work with amended duties, altered hours and workplace adaptations.

14.17. The claimant then consulted his line manager again, and she discussed matters with occupational health, and was told that she could address whatever those necessary adjustments were herself. She secured agreement that the claimant's PhD work would be suspended for an academic year.

14.18. The claimant had continued his other duties in the summer of 2015, covered by that first fit note, and had then taken some annual leave, and then resumed perfectly well in the autumn of 2015. In the autumn of 2016 the claimant did not resume, or re-enrol onto his doctoral studies, after the year's suspension ended.

14.19. On 10 February 2017 the respondent commenced an investigation into that state of affairs. In April 2017 the claimant reported to his GP concerns about high blood pressure and that he had a stressful job. That coincided with his line manager confirming to him that there would be no additional hours allocated for him to undertake his PhD, after correspondence and meetings in connection with the investigation.

14.20. There was then a decision to progress to disciplinary proceedings. After a first written warning on 21 November 2017, matters progress in 2018 to a final written warning imposed on 17 April 2018, with an instruction to resume studies by 31 May 2018.

14.21. On 5 October 2018 the claimant's appeal against a final written warning was rejected, with a renewed direction to enrol on PhD studies by 31 December 2018. On 10 October 2018, the claimant consulted his doctor again, with what the GP described as "chronic unresolved employment issues". The claimant was diagnosed with stress at work, with the GP advising a withdrawal from work for four weeks initially, and an occupational health assessment as soon as possible. He also made a referral to the "improving access to patient therapy" ("IAPT") service. He provided subsequent fit notes diagnosing the claimant as suffering from stress at work.

14.22. The claimant took part in an Occupational Health appointment in January 2019 – our findings about that appear below.

14.23. On 2 May 2019 the GP notes recorded: employers are apparently not able to change his working environment to enable me safely to return him to work.

14.24. The GP provided fit notes continually until 30 May 2019, when a last fit note advised the claimant he may be fit for work with a phased return and altered duties and a recommendation that the return be overseen by the respondent's occupational health service. The claimant had told the GP that he felt better able to handle the pressures in the working environment.

14.25. The claimant returned to work on 5 June 2019 on a phased return. On 4 June 2019, the claimant was notified in his return to work letter that the final stage of its disciplinary process was to commence in relation to his failure to re-enrol. He was given a new deadline later in June.

14.26. The IAPT service had referred the claimant on and he received an assessment in November 2018. His scores applying the generalised depression index were between the "mild" and "moderate" indicators and after five sessions of cognitive behavioral therapy ("CBT"), carried out between December and March, those scores had reduced to "mild". The claimant learnt breathing techniques, which he found very helpful. Those techniques enabled him to control his thoughts about the stressor that was affecting him, namely the requirement to undertake a PhD (with consequent disciplinary proceedings), and his concern that there was insufficient time, without impacting on his personal time, to cover that and his teaching and related workload effectively.

14.27. Albeit the Tribunal had the counselling assessment scores, the Tribunal had no counselling notes from that service to corroborate the adverse effects that the claimant described in his impact statement as affecting his ability to undertake day-to-day activities at this time. His evidence of adverse effect related to this second phase of stress from October 2018 only.

14.28. The claimant reported chronic sleep deprivation to his GP on 10 October 2018. Common sense tells us that the claimant's ability to sleep, which is a day-to-day and necessary activity, was likely to have been adversely affected for some time before it was reported. The claimant recalled a particular episode on or around 19 September 2018, when he woke at 3am, and was unable to return to sleep. That was the morning of the final written warning appeal hearing. The degree of effect on his ability to sleep was typically that he was waking twice a week or so, at around 3am, which, for him, produced sleep deprivation.

14.29. Apart from difficulty sleeping, the claimant had difficulties with his memory on at least two occasions, from October 2018 (the first of which was remembering his doctor's name to book the October appointment, and the second was remembering the word for "christening"). He also had difficulties with irascibility: telling a family member to leave the house and never to return, from September 2018 onwards. Further, in this period he was having to galvanise himself for social interactions and was reluctant to engage in them, but did so.

14.30. By the time that the claimant returned to work in June 2019, there was nothing he was unable to do by way of day-to-day activities. That remark is largely corroborated by his consultation with his GP in May of 2019, when he described himself as being better able to handle the pressure of work.

14.31. The conclusion we reach, which entirely reflects the claimant's honest and frank evidence, is that the technique he learnt during CBT was helpful in treating the difficulties he was experiencing.

14.32. To complete our findings on the disability issue, the claimant was experiencing chest pain in the autumn of 2019. He was prescribed a statin by his GP, and a number of other medications. He was referred for treatment at hospital and he was diagnosed with angina. The medications were taken between the autumn of 2019 and May of 2020 and only the statin has continued. The claimant accepted that although frightening, the angina episode had not impacted his ability to undertake day-to-day activities.

14.33. The gist of the claimant's witness evidence was his belief in a causal link between the stress to which he was subject to at work, and the development of angina. The consultant treating him recorded that he had a stressful job, or words to that effect. His case was not advanced on the basis of "angina" as an impairment, nor statins as a treatment without which there would have been a substantial adverse effect on him.

14.34. The final paragraph of the claimant's impact statement describes his (stress)

"condition" as still ongoing, but the symptoms easing and therapy having been very helpful to him. He also describes having generalised anxiety at the date of his statement (November 2020). He did not describe an ongoing effect on his ability to undertake day-to-day activities – that had resolved by the time he returned to work in June 2019.

The law on establishing disability

Equality Act 2010 Section 6

(1) A person (P) has a disability if—

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

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

Eq A 2010 Section 212: General interpretation

In this Act--…

"substantial" means more than minor or trivial;

Paragraph 2 of schedule 1 to the Act prescribes that the effect of an impairment is long term if –

(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected

Sub paragraph (2) provides

"If an impairment ceases to have a substantial effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

Paragraph 5(1) of schedule 1 of the Equality Act 2010: an impairment is to be treated as having a substantial adverse effect on the ability of a person concerned to carry out normal day-to-day activities if (a) measures are being taken to treat or correct it, and (b) but for that it would be likely to have that effect. Likely means "could well happen".[1]

Guidance on matters to be taken into account in determining questions relating to the definition of disability

Paragraph A3: Meaning of 'impairment'

The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment

[1] SCA Packaging v Boyle [2009] IRLR 746 (likely in the context of whether the impairment is long term but see Piper as authority for the same meaning in paragraph 5(1))

should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.

Paragraph A5

A disability can arise from a wide range of impairments which can be:

….

- mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post traumatic stress disorder, and some self-harming behaviour;

- mental illnesses, such as depression and schizophrenia;

….

Paragraph A6

It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.

Paragraph A8

It is important to remember that not all impairments are readily identifiable. While some impairments, particularly visible ones, are easy to identify, there are many which are not so immediately obvious, for example some mental health conditions and learning disabilities.

Paragraph D3: Meaning of ‘normal day-to-day activities’

In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying

out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

Discussion and conclusions on the issue of disability

14.35. It is the claimant's burden to prove disability. With impairments said to be derived from mental health conditions, or to affect mental processing, the Tribunal can be helped by expert evidence. In this case we have had the claimant's brief descriptions of matters in his November 2020 impact statement, some reference in his witness statement to his health, and limited further information about impact. We have had his GP notes and other medical records, informing the findings above. The parties agreed the J v DLA Piper [2010] ICR 1050 approach was permissible in this case and the Tribunal could focus on substantial adverse effect and conclude impairment from that, if it was not satisfied that a diagnosis of "stress at work" established impairment.

14.36. The eight week period in 2015 when the claimant was fit for work with adjustments, is properly to be described as an episode in which the claimant was given a diagnosis of stress at work, identifying a particular stressor, part of his workload, which was removed. We had no evidence about impact on day-to-day activities in 2015. We cannot find there was a more than minor or trivial effect on his ability to undertake day-to-day activities by a condition described as stress at work in 2015. There was no evidence of substantial adverse effect until later in 2018.

14.37. We find that in the period between September 2018 and June 2019 there was a substantial adverse effect on the claimant's ability to undertake day-to-day activities: sleeping, social interaction and ordinary, necessary conversations, where his memory was sometimes impaired.

14.38. There is no difficulty for the Tribunal in applying the statutory definition: if we are satisfied that an effect is more than minor or trivial, which we are, the substantiality condition is met during that period. Aderemi V London South Eastern Railway Ltd [2013] ICR 591.

14.39. We then have to assess whether or not the longevity condition is met during the material chronology from February 2017 until the end of employment in January 2020. Has the claimant established that the substantial adverse effect had lasted a year or was likely to last a year or to the end of his life?

14.40. Given our finding in relation to the lack of evidence in respect of the 2015 episode, we look only at the episode from September 2018 to June 2019. Had the substantial adverse effect lasted for 12 months? It had not, by June of 2019. Was that substantial adverse effect likely to last 12 months or for the rest of his life?

14.41. The evidence to assist us with that is limited to the claimant's description in paragraph 12 that his **condition** is still ongoing. In considering that we gave weight to the way in which he addressed Mr Smith's questions about his disability, and when he said it was present. The impression given is that the claimant does not (and did not) identify himself as a disabled person. His bare description of a condition being present in November 2020 is simply insufficient without any reference to a substantial adverse

effect. His reference to generalised anxiety is entirely without medical evidence in support. There is no reference to it at all in the notes, which renders his reference to it, surprising, given the otherwise reliable impression of frank and honest evidence.

14.42. The claimant describes his "symptoms" easing. We have found that the claimant's use of breathing techniques treated the substantial adverse effects that he was experiencing from September 2018, such that by June 2019 there was nothing he could not do (and he did not assert that day-to-day activities were thereafter done with difficulty or subject to any adverse effect).

14.43. Was the earlier substantial adverse effect resulting from stress at work, and resolved by June, likely, then, to last for 12 months? The substantial adverse effect was reducing, through treatment, from waking twice a week at 3am at its worst, occasionally failing to recall words, irascibility and reluctance with social life. There was no further consultation with a GP after that October to June period, – and that largely corroborates the claimant's position that there was nothing he could not do from that point. Recorded as better able to cope, we cannot find that it was likely that the substantial adverse effect was likely to last a year or more (or for the rest of his life).

14.44. The likelihood of recurrence of substantial adverse effect from June 2019, nor deduced effect from June 2019 (relying on breathing techniques as the measure taken to treat workplace stress) were not argued before the Tribunal.

14.45. For these reasons we have not found that the claimant was a disabled person at any point in the material chronology. It follows that the complaints relying on that assertion are dismissed.

<u>Remaining liability issues</u>

15. The liability issues remaining for the Tribunal's determination in the order in which they were pleaded and addressed in submissions, were:

Indirect age discrimination (Equality Act 2010 section 19)

15.1. Did the PCP (requiring full-time academic staff to engage in doctoral study) put persons with whom the claimant shares the characteristic i.e. employees aged over 50, at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic i.e. employees aged 50 or under – the claimant relies on:

15.1.1. Being required to engage in a substantial time and effort commitment to obtain a qualification at a time when there was a low prospect of future benefit to him in his career; and/or
15.1.2. Being required to undertake study for a qualification which may not have been possible to complete prior to retirement; and/or
15.1.3. A greater likelihood of being subjected to disciplinary proceedings and ultimately dismissal; and/or
15.1.4. Being subjected to disciplinary proceedings and dismissed for non-compliance.

15.2. Did the PCP (rather than the claimant's conduct?) put the claimant at that

disadvantage?

15.3. Was the PCP a proportionate means of achieving the following legitimate aim: Assuring students and the wider academic and research community that academic staff have a mastery of their subject and that they have demonstrated a capacity for independent research and have the ability to communicate results and relate them to the broader discourse as part of the respondent's strategy map 2025.

15.4. Was the PCP an appropriate and reasonably necessary way to achieve those aims;

15.5. could something less discriminatory have been done instead;

15.6. how should the needs of the claimant and the respondent be balanced?

Unfair dismissal

15.7. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

15.8. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

15.9. there were reasonable grounds for that belief;
15.10. at the time the belief was formed the respondent had carried out a reasonable investigation;
15.11. the respondent otherwise acted in a procedurally fair manner;
15.12. dismissal was within the range of reasonable responses.

15.13. The matters advanced by the claimant as reasons why his dismissal was unfair were:

15.13.1. it was indirectly discriminatory on grounds of his age (and before our decision on disability, Section 15 discrimination amidst failures to make reasonable adjustments);
15.13.2. the policy was not a reasonable requirement;
15.13.3. no, or insufficient account was taken of the claimant's previous good record quality of teaching;
15.13.4. no, or insufficient account was taken time commitment to undertake doctoral studies in light of the claimant's other professional and academic commitments and stress condition;
15.13.5. it was inequitable in circumstances where other staff essentially the same duties as the claimant but on a part-time basis .5 or less WTE were not subjected to the requirement;
15.13.6. the absence of a requirement for academic staff to hold or study for a PhD at the time of the claimant's appointment;
15.13.7. the absence of any contractual requirement for the claimant to hold or study for the qualification; and/or

15.13.8. the decision to dismiss him fell outside the range of reasonable responses.

16. Further Findings of Fact

Introduction

16.1. The Tribunal has had to make findings of fact to address the claimant's indirect discrimination case, and then, exercise caution in its consideration of those facts in the unfair dismissal case. Different legal principles are engaged. That said, it was highly unlikely in this case, that had the claimant suffered indirect discrimination in the application of the PhD requirement, his dismissal could have been found reasonable.

16.2. The claimant's date of birth is 16 October 1963. He was in his early 40s when he joined the respondent as a senior lecturer, on 1 July 2005. He had spent 20 years or so in industry as a qualified accountant and is a fellow of his professional body (FCCA).

16.3. The course of the disciplinary proceedings against him is set out above in our findings on disability and the summary of the respondent's witnesses. At each stage there was an investigation, a separate and new panel was appointed to conduct the hearing, relevant documents, including the management case were sent out in advance, the claimant had the opportunity to put his position (or appeal as the case may be) in writing in advance, and a full and lengthy hearing took place in accordance with the respondent's disciplinary procedures, at which the claimant was accompanied by his trade union representative. They had the opportunity to fully discuss the issues and the meetings were conducted with apparent respect for the differing views being expressed. Decisions were largely given in writing, an exception being the first written warning hearing, where Prof Owen- Lynch gave a brief decision after a thirty minute adjournment. The outcome letters sought to address each of the substantive points raised by the claimant and his union, even if some responses were very brief – the point considered irrelevant, for example. There was no suggestion by the claimant that a fair procedure had not taken place (save that, in effect, there should have been no disciplinary charges at all); the claimant's points were substantive: as he said in evidence – has the [doctoral] policy not got to be reasonable first before you are within the disciplinary policy?

The claimant's contract of employment

16.4. The contract of employment provided at clause 5:

"*Duties and Hours of Work. 5.1 You are employed as a senior lecturer at the University. This is a full-time post and its nature is that you are expected to work such hours as are reasonably necessary in order to fulfil your duties and responsibilities. Those duties include teaching and tutorial guidance, research and other forms of scholarly activity, examining, curriculum development, administration and related activities. You are expected to work flexibly and efficiently, and to maintain the highest professional standards in discharging your responsibilities, and in promoting and implementing the corporate policies of the University.*

5.2 The make-up of your duties will be determined from time to time by your Dean of

School (or by an appropriate manager authorised by the Dean) in consultation with yourself and will be reviewed regularly through the staff appraisal system. Guidelines for the determination of the duties of lecturing staff are set out in the academic staff handbook;… Any dispute over duties or hours may, if not resolved in the first instance either between you and the appropriate manager or between you and your Dean of School, be referred to the grievance procedure.

5.3 Your formal scheduled teaching responsibilities should not exceed 18 hours in any week or a total of 550 hours in the teaching year. However this provision will not apply in subject areas where the nature of the curriculum and teaching style makes it inappropriate…

9 Research and Scholarly Activity: As part of your duties, you will normally be expected to engage in research and scholarly activity. The nature and extent of this will vary with the nature of the subjects you teach and the full range and balance of your duties and other commitments. In this context, scholarly activities includes the production of books, contributions to books, articles and conference papers, and is to be construed in the light of the common understanding of the phrase in higher education.
9.2 While it is in the nature of research and scholarly activity that it may take place throughout the year and be integrated into the overall pattern of your activities, it is envisaged that normally the periods of the year outside normal teaching weeks (clause 7 working year) and annual holiday entitlement (clause 8 holidays) will primarily be devoted to research and scholarly activity.
9.3 Your research and scholarly activity will be principally self managed. In addition these activities (and their relationship with your other duties) will be considered as part of the staff appraisal and development system, under which objectives for the coming year (or other appropriate period) can be set and achievements over the past year (or other appropriate period) can be assessed. The University undertakes to give you such support as is reasonable in the circumstances in order to help you to realise the objectives so set."

16.5. The, "such hours as are reasonably necessary" was moderated by a handbook provision on hours of work which set a "norm" for the working week of 37 hours. That "norm" was further amended by custom and practice such that all understood: "Total contract hours available to a full time member of academic staff are 1550 per annum (pro rata for part time staff)[2].

The PhD Requirement

16.6. Prior to 2013 some schools in the University had set a minimum recruitment requirement of doctoral holding or near completion for new recruits, and others had strongly encouraged and supported doctoral study by academic colleagues. Dr Lane, a senior lecturer in law, completed a PhD in May 2017, having commenced with a proposal in 2011 or 2012. She then retired in May 2020. Before 2013 the requirement for RSE in the claimant's contract had not been understood as enabling the respondent to require or instruct him (or others) to undertake a doctorate.

16.7. In 2013 the proportion of academic staff with PhDs was 39%, with a further

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36% studying to achieve a doctorate. The then leadership team decided to introduce new guidance in the form of a question and answer document, which was discussed with the Unions' joint consulting and negotiating committee (JCNC). It was not a matter which was negotiated, nor which formed part of a collective agreement, nor was it introduced as a handbook term. Nevertheless, at that time, there was no formal protest registered nor other union action taken concerning the guidance.

16.8. The guidance commenced with the question: "Are all staff required to have a doctoral level qualification? "The reply was: "A doctoral qualification is considered an essential element of the role of all staff employed on academic staff and senior academic staff contracts, University Teaching Fellows, Research Fellows, Senior and Principal Research Fellows and Principal Enterprise Fellows. All staff in these roles must either have this level of qualification or make arrangements to study for and successfully complete the award". This was a significant change; the claimant had not been required to hold a doctorate in order to be appointed to his post.

16.9. On 15 July 2013, the then Dean of the Business School emailed all academic colleagues, attaching the new guidance with the heading, "Academic staff without doctorates or who are not pursuing doctoral study". Staff were advised to talk to their heads of department or the dean. The Dean said, "the University recognises that some staff may not wish to follow the path to a doctoral qualification and if, as a result, those individuals wish to leave the University, a limited voluntary severance scheme has been made available." The severance scheme, he said, would result in staff leaving at the end of July 2014. The claimant did not wish to leave; he was not ready to retire and could not access his teaching pension at this time; he enjoyed his work with students, particularly those from disadvantaged backgrounds.

16.10. There then followed a series of questions and answers explaining over five pages other aspects of the guidance. The reason for the requirement was: "*a doctoral level qualification assures students and the wider academic research community that you have a mastery of your subject, you have demonstrated a capacity for independent research and have the ability to communicate results and relate them to the broader discourse".*

16.11. In short the guidance imposed a quality assurance standard for academics within the University. The leadership believed in "the rounded authentic academic": an academic who was a credible teacher, credible researcher and credible in their profession, if applicable. The universality of the requirement was unusual in the sector, with only one other university known to adopt the same approach (Edge Hill).

16.12. The guidance provided the details of the routes available to obtain a PhD and the support that was to be provided. That included a waiver of the fees usually charged by the University, the allocation of a mentor to provide assistance in the pre-registration planning phase; an ongoing supervisory team; and a "staff research degree forum" to meet regularly enabling staff to discuss concerns and difficulties.

16.13. When allocating workload, the guidance provided that Deans and other management would count registration for a research degree when allocating workload;

a final writing up sabbatical of up to 6 weeks was said to be available to be taken at a time agreed by the school and additional examination leave; there was also a research grant of £2000 on completion for research-related spend. It stated that the teaching timetable would facilitate a day or half a day's teaching free time to allocate to PhD studies during the teaching year. All the University's development and learning resources were also available to staff undertaking PhDs. The guidance stated that it was inappropriate to fix any precise workload allocations to accommodate a PhD but, these would be discussed with Deans.

16.14. Subsequent workload principles identified that 300 hours a year could be allocated for PhD study and these were allocated to the claimant from 16/17.

16.15. The respondent did not conduct an equality impact assessment prior to the introduction of this guidance, to assess the potential impact on the 25% of academics who did not at that point hold a doctorate. There was no direct consultation exercise with staff either. The respondent had and has about 1000 academic staff, but for the reasons explained below, the numbers affected by the new guidance were not 250, but somewhat less.

16.16. The guidance contained provision for the suspension of PhD study, typically for 12 months, in cases of illness, in liaison with the PhD supervisor/supervisory team and line manager. It also provided for exemptions for:

part-time staff who worked a full-time equivalent of 0.5 or below, because they "*will be unlikely to complete their PhDs using contractual time only";*

those who had *formally notified the University of an intention to retire in a specific year; and could not complete the study in the period up until retirement*;

16.17. There was a further indication that professionally qualified staff were not exempt but where professional practicing was required, staff would be engaged on part-time practitioner roles – for example, lawyers and accountants who remained in practice and shared this activity with part time teaching.

16.18. The guidance included the question: "what happens if I don't get a doctorate? The reply was: "*there is significant support available to staff to assist them. The requirement for staff to upgrade their qualification base is a reasonable and necessary requirement. Given the time allowed and the support available we would not expect individuals to fail. If they failed to make necessary progress without good reason this would call into question their performance in role*".

16.19. There was also a severance option made available for staff, similar to the statutory redundancy scheme but with pay uncapped. Applicants needed to apply before 27 September 2013. There was a further voluntary severance exercise in 2017 pursuant to which several unwilling doctoral students left, but some, such as Mr Fowler, were not permitted to leave.

16.20. The new guidance was aligned to the respondent's 2013 to 2018 strategy map, which saw the respondent's mission as including undertaking pioneering research

and professional practice, with students to learn from staff at the leading edge of knowledge and application, and an increased quantity and quality of postgraduate research (and income from research).

16.21. In 2016, the respondent's research strategy, 2016 to 2025, set out the following aim: "to reach a common level of knowledge and sophistication such that every member of staff will become a credible nominee for a UK Research Council peer review panel, Research Excellence Framework ("REF") subpanel or comparable international review body. Study for a research degree is an important step on this path".

16.22. Research income was secured by REF submission and about 10% of the respondent's income was to come from that source; a small but significant proportion in comparison with student fees. The respondent's leadership wished to enhance its research capability to become a research intensive university. Some universities took the approach of having "teaching only" contracts for some academic staff; the respondent took the view that all its full time, or more than half time academics, should support its research intensive aspiration.

16.23. Over the years 2011 to 2021, the respondent saw its revenues from international students to the Business School and to other departments, increase dramatically. There was no research to establish that any of the increase could be attributed to the PhD policy, and there were other factors including migration policy which affected those numbers. The trend for increase was established well before the policy.

16.24. The respondent did not take disciplinary action against any academics from 2013 to 2016, for a failure to enrol or undertake doctoral study. We find this from Mr Fowler's evidence, the absence of any such evidence in Dr Lane's statement, and the absence of any knowledge of it amongst other respondent witnesses.

16.25. In the autumn of 2016, the respondent tried to introduce a formal policy to make the doctoral requirement a contractual one, incorporated into contracts of employment. The proposals discussed with the UCU included that an academic could be dismissed for "some other substantial reason", if insufficient progress was made on securing a doctorate. The UCU you rejected the proposed policy and it did not become incorporated in the contracts of existing staff.

16.26. From 2017, when a further voluntary severance scheme was opened, we find disciplinary action was taken as a response to academics failing to comply with the guidance and there may well have been several colleagues affected[3]. Dismissals occurred in the case of the claimant, Mr Fowler and one other in connection with the requirement (who may or may not have been over fifty – the claimant could not say).

16.27. By 2020 the respondent included in its website information that 100% of its academics either had a doctorate or were engaged in doctoral study (with an asterisk

[3] For example see references to a culture of fear, and page 421 – a reference to comparable academic staff who were subject to disciplinary proceedings.

and further information describing the exclusion of fractional staff as per the guidance).

The claimant's work and plans

16.28. The claimant had planned to retire at 60, which was the point at which he could access the pension accruing from his employment with the respondent. He also had other pension provision from his years in industry.

16.29. The claimant typically worked office hours for the respondent, arriving on campus between 7.30am and 8am, whether he had teaching or not timetabled. He would leave at the end of the day, perhaps five or six pm. He received good feedback about his teaching, which he described as "the day job" – which took the vast majority of his time, either preparing teaching, live contact time with students, marking, supporting students, and associated administration.

16.30. Outside of direct teaching related work he published articles, maintained links with employers as a visiting placement tutor, co-authored articles which were published, and was involved in the business education research group. These and other activities, had comprised his contractual research and scholarly activities ("RSA"), together with a Masters degree in Accounting and Finance completed between January 2011 and a June 2013. The claimant had also become a Fellow of the Higher Education Academy, by way of teaching qualification.

16.31. In the autumn of 2014 he enroled in doctoral study in accordance with the guidance and undertook preliminary work during that academic year to complete a proposal for research. He did not meet formally each month with his supervisor and informally expressed concerns in February 2015 that he would need more time for his PhD studies. His supervisor discussed that with the head of Department – Ms Teviotdale, and she agreed to provide him with two non-teaching days a week in the timetable. The claimant was concerned that he would still not meet a deadline, in April 2015, for his research plan. As we have already found, his PhD was then suspended for a year due to the stress of being unable to combine "the day job" with the PhD, Ms Teviotdale having identified that he was suffering from stress, and acting on the claimant's GP's fit note.

Retirement of academics at the respondent

16.32. The respondent has no mandatory retirement age. Many of its academic staff participate in the Teachers Pension Scheme which permits retirement at 60. Of the witnesses before us, Dr Jarvis had retired at 63; Mr Fowler had notified a wish to retire at 65. Professor Taylor said that many academics worked "well into their sixties" and some into their seventies, and that the respondent "has people working beyond sixty five or seventy". The Tribunal sought corroboration of that evidence in its deliberations (albeit Professor Taylor was not challenged about it), and read that the age profile of lecturers and senior lecturers at the time of an Equality Act Questionnaire[4] undertaken

[4] Page 782 to which no party took the Tribunal during the hearing, the Questionnaire was not included in the agreed bundle

between 2017 and 2020. This information included that there were 26 full time academics (out of 392) aged 60 to 69 at the time of the questionnaire. There were likely to be others who worked less than full time.

16.33. We find then, that in this community of academics, retirement age and the consequences flowing from that, was very much a matter of individual decision making, with full flexibility.

Were academics completing PhDs required to engage in time and effort beyond contractual working hours?

16.34. The respondent operates two 12 week teaching terms in the 44 weeks that comprise an academic's working year (they have an entitlement to eight weeks' annual leave including bank holidays). A full workload allocation could involve 1550 hours per year. Management were provided with principles and allowances to enable them to manage workload. Those principles identified allowable hours in relation to various different activities (page 128 and following). There are 36 different types of activities. Broadly, they break down into formal teaching/contact time, closely related activity (preparation, marking, administration, planning courses) and other professional activities including research and scholarly activity ("RSE").

16.35. These principles repeated the contractual provision of self-management and professional judgement in the allocation of time to different activities, but emphasised that the allocation of duties should be seen to be fair and that there should be full consultation at the start of the summer term and confirmation of allocation in writing. The annual appraisal was said to provide an opportunity to discuss workload allocation.

16.36. Formal teaching hours were not to exceed 550 hours per year, with a typical teaching workload of between 14 and 18 hours per week in the teaching weeks. The introduction of the PhD requirement established an additional 300 hours to be allocated in the workload allocation modelling, solely for that purpose (there were 148 hours conventionally available for RSA).

16.37. The respondent considered that by amalgamating these two allowances (a total of 448 hours) it had provided academics with about 10 hours a week to attain a PhD over six years on average. That contrasted with the 17 ½ hours it indicated at enrolment would be required for the average part-time PhD student over the same period. Those external part- time students would typically also be working whilst completing a PhD, and in a variety of fields. By the time of the claimant's disciplinary proceedings, those making the respective decisions concluded that experienced academics would not require as much time as external part-time students, because they would already have many of the appropriate research skills**.**

16.38. An Investors in People Report commissioned by the respondent in December 2014, had a remit to make recommendations for how staff engagement might be improved, using one-to-one interviews and focus groups. From those staff who were affected by the requirement for PhD study, the concerns that were reported included: "*questioning how realistic the symbolic allocation of 17 ½ hours per week is, when set against the true timeframe needed to complete a PhD; the integration of such a large time commitment into existing workloads and its impact in terms of worklife balance; and research being seen to require large blocks of time which are difficult to extract from*

some of the present specific programme/course teaching patterns. ***The general view was that the pursuit of the PhD objective would need to be managed sensitively and according to personal circumstances in order not to increase levels of anxiety and erode organisational morale."***

16.39. The respondent also took part in a Quality of Working Life survey every two years, which incorporated the Health and Safety Executive's work-related stress scale, and a recognised workplace well-being outcome scale. It was a standard tool in the sector and its results were published.

16.40. In 2017, around a third of academics responding to the survey said they were always pressured to work long hours, always had unrealistic time pressures, and were unable to achieve a healthy balance between work and home life. The survey data for academics in 2019 identified similar concerns – things had not improved in these areas for academics and the respondent was well below the sector averages for this group.

16.41. Survey respondents in 2019 identified that there was a clash between teaching and research prioritization/PhD issues, with some identifying stress, unrealistic expectations about what can be achieved as a research output alongside a full teaching timetable, and encouraging the respondent to evaluate the compulsory PhD impact on staff. These issues had appeared in 2013, 2015 and 2017, with 2017 a year of peak dissatisfaction in this respect.

16.42. In May 2017 the UCU undertook research with its members which indicted that while 39% of respondents were pleased to have the opportunity to undertake a PhD, 71% did not consider "my workload allocation model" accurately reflected time for research/doctoral studies, 73% considered it was impacting on work life balance, 64% were unable to spend one day per week on research and 78% felt stressed by the policy. 158 members completed the survey, with only 8.7% identifying that they had completed a doctorate since the introduction of the compulsory requirement. 38.9% said they were currently undertaking a doctorate; and 43% said they had completed one prior to the introduction of the requirement in 2013. The survey sought age range data and gender/disability data, but the responses about workload were not analysed by reference to these characteristics.

16.43. In his own department, the claimant carried out a survey in the 2017/2018 academic year. The survey was not compulsory, but 7 colleagues in accountancy and finance completed it, with all responding that the workload allocation model did not provide them with sufficient time to undertake a PhD and 6/7 reporting that they had to use their personal time to do so. One of the claimant's colleagues said this: "a large amount of personal time was needed for completion, especially in the writing up.. This was extremely stressful and I was working full time and looking after two small children". Another said "so far I haven't had to use (personal time) but I know that in order to write up I will have no choice but to use weekends and holidays."

16.44. These various pieces of research were considered by the disciplinary panel chaired by Prof Thornton, which dismissed the claimant. This panel did not consider that the **majority opinion** considered the PhD requirement to be **unreasonably**

burdensome – this took into account that the UCU survey was only completed by about one fifth of academic staff. At the first disciplinary stage, the panel chaired by Prof Owen-Lynch took the view in November 2017 that **not all of the blame for dissatisfaction with work life balance could be laid at the door of the PhD policy** – this view was also adopted by the dismissal panel. The dismissal panel chaired by Professor Thornton further said that the UCU survey had not been shared with the University (which was not the case) and therefore it was not possible to comment. The outcome letter communicating dismissal also said that: "there was no expectation for academics to undertake work in their own time. The number of academic staff who have completed or are working towards successful completion of their PhDs further demonstrates it is possible to undertake doctoral study alongside the other requirements of an academic role". We pause here to note that "possible" does not equate to "reasonable".

16.45. Various respondent witnesses accepted colleagues would use their own time to complete PhD work, but voluntarily, not because it was required. Prof Taylor (who rejected the claimant's appeal against dismissal) and Prof Thornton, both completed PhDs while teaching, but many years ago.

16.46. Prof Donnelly, Dean of Computing and Engineering, one of the respondent's larger schools, admired those who completed a PhD whilst also working. He knew 11 or 12 colleagues who had completed them since July 2013. In his school, three older members of staff had started but not completed PhDs, instead being accepted for voluntary severance, we infer, in 2017. In support of the assertion that colleagues completing PhDs was evidence that it was possible to do so alongside other commitments, Profs Ball and Taylor asserted that "hundreds" of staff had completed PhDs since the requirement was brought in. These were unsupported statements and unlikely unless the Computing and Engineering school numbers of academics were unusually small, or they were including staff who had joined knowing that a PhD must be completed or likely to be completed within six months of arrival (which was not the new recruitment norm).

16.47. Since the requirement was brought in, there has been an increase in academics holding PhDs from 39% to 76% over eight years. Not all of this increase has arisen from pre 2013 staff complying with the requirement – it has also been driven by replacing leavers without PhDs, with joiners with PhDs or shortly to acquire them – as Prof Thornton said, there is an ever-increasing pipeline.

16.48. The respondent's position remained, throughout the claimant's disciplinary proceedings, and this hearing, that there was sufficient time within a normal 37 hour working week - for an academic to complete a doctorate over six years, given the 448 hours allocated to RSA in the workload model, and the 22 working weeks when teaching was not required (outside of annual leave). That position appears to give little credit to the fact that the 22 non teaching weeks were also busy times for academics, with exam invigilation and marking, admission activities, student support, writing new coursework and course materials and exams for the following year.

16.49. In response to the UCU research, the respondent did not undertake its own qualitative research at any stage to establish (or not) its position that additional personal

time commitment was required, because so many had completed PhDs and/or that the majority of opinion did not regard the requirement as unduly "burdensome" .

16.50. Dr Lane had used evenings, weekends and holiday time to complete her PhD alongside teaching commitments. At the time, she described herself as somebody without other calls on her time, and researching a subject where she was highly motivated to complete her doctorate.

16.51. Taking all of these matters into account, the Tribunal finds that many academic staff, completing a PhD alongside teaching commitments would need to invest evenings, weekends and holidays at various points to complete a PhD part time in six years. To adopt the language of the guidance, they, like their fractional counterparts, would not be able to complete in contractual time only alongside teaching -notwithstanding reasonable flexibility from the "such hours as are reasonably necessary" provision. This remains the case notwithstanding the respondent's support package, not least because the support package measures were not implemented uniformally in all schools accepting the UCU findings – some colleagues did not receive the full RSA/PhD allocation and some did not receive writing up sabbaticals. It also takes into account that whatever "average" amount of time is considered doable, some colleagues will take longer, and some will progress ahead of the average.

<u>The Chicken and the Egg issue</u>

16.52. For the claimant as an individual, given his experience in 2014/2015 and the commitment and time given to his teaching duties, and our findings above, we find he would have had to invest personal, or non contractual time, to complete a doctorate. He had worked Saturdays in 2015, prior to visiting his GP, and he was at the very earliest stages of the doctoral path. His belief was not blind, or stubborn, or wrong: it was based on his understanding of the working hours necessary for his teaching role and other duties, whatever was allocated by his workload allocation model. The workload allocation model was indicative – it could not be treated by any means as a record of actual time worked or necessary to undertake various tasks. It was more reliable for some tasks than others – for example - timetabled contact hours, but was otherwise not an accurate measure of time taken, or needed to be taken, in discharging necessary tasks.

16.53. In February 2015, Ms Teviotdale, the claimant's head of department with knowledge of him personally, had been prepared to timetable the claimant two days free of teaching commitments (without that necessarily being a reduction in teaching hours). After the end of a year's suspension of the PhD, in July 2016, the claimant informed Ms Teviotdale he was not willing to resume doctoral studies because he was not prepared to risk damage to his health. That was a point made throughout the disciplinary process – it fell on deaf ears. In 2016 the claimant was prepared to resign but that was neither sought nor progressed by Ms Teviotdale.

16.54. In a letter dated 10 February 2017, writing to invite the claimant to an investigation meeting, he was informed that his failure to comply with the Guidance on Doctoral Study, or avail himself of any other options, was considered a breach of the University's Disciplinary Rules, which stated that: "You will be expected to comply with

reasonable management instructions….("the Allegation")." It was not suggested to him that he could notify an October 2023 retirement date and "avail himself" of that exemption.

16.55. The allegation remained the same at each stage of the Disciplinary process and at each stage, a part of the claimant's position was that he did not consider that the instruction to him to "make arrangements to study for and complete the award", that is to resume PhD studies, in or around January 2017, to be reasonable.

16.56. During the first disciplinary hearing on 21 November 2017, chaired by Prof Owen Lynch, the claimant identified a 17.5 hours weekly study requirement, which had been included in his original letter accepting him for enrolment on doctoral studies, and **said that if his workload allocation was reviewed, he would continue with his doctorate.** That was in the context of the April 2017 confirmation from Prof Johnes that no additional hours (beyond the 448 potentially available) would be allocated to the claimant's PhD study.

16.57. In her outcome letter Prof Owen Lynch confirmed the disciplinary charge that the claimant had failed to comply with a reasonable management instruction; she recorded that the panel decided to impose a written warning; she confirmed it was clear the claimant had not complied with the management instruction because he did not consider the instruction to be reasonable, both because of insufficient time, and resultant stress. In announcing the panel's decision on the day she said this: the reasonable instruction was that you should re-enrol in your study for a PhD and our decision is that you have failed to comply with this instruction. Other issues you raised are linked with the environment and support to allow progression of the PhD studies and that needs to be discussed locally with your line management. Our perspective is we would expect you to resume your study. You have the opportunity to make a mitigating plea if you wish." The claimant said there was little he could add. By this stage there had been full discussion of his points over one and a half hours or so.

16.58. In its written outcome letter the panel's response to the claimant's position that achieving a PhD was not a contractual requirement, was that it's view differed. "The request is for you to resume your studies towards the PhD. Once this has happened then discussions can take place with your line manager to enable the support and workload balances to enable your progression with the PhD studies."

16.59. The letter went on to indicate the support mechanisms within the guidance were believed by the panel to be reasonable, and that the 17.5 hour recommendation was only that, a recommendation, and an academic staff will already have the skills required for successful completion (and implicitly would not need to spend 17.5 hours per week on average); she also referred to an allocation in the workload allocation model and that in non-teaching weeks, more time is available.

16.60. After that decision the claimant wrote to the respondent's director of HR, to assert he believed the doctoral study guidance to be indirectly discriminatory on grounds of age. He received no reply at any stage and on appeal, following discussions of the point in the hearing, the appeal outcome recorded that the panel did not consider the point relevant.

16.61. The panel relied on the contractual requirement to engage in research and scholarly activity and concluded that the instruction was therefore reasonable and that the claimant was in breach of disciplinary Rule 5.1. The panel recommended that the claimant re-enrol in PhD studies no later than 31 December 2017, and work towards gaining a qualification. That formulation – re - enrol and work towards - was repeated in the Final Written Warning. Further, that discussions should take place locally to review workload allocation so that appropriate time was allocated to the PhD activity. The claimant's position throughout was that if his head of department confirmed his timetable, and sufficient time was allocated to doctoral studies, he would re-enrol. The respondent's position throughout was, re-enrol and then your department will discuss time allocation with you.

The management of the claimant's sickness absence October 2018 to May 2019

16.62. After the claimant became unwell in October 2018, his head of department Mr Al-Najjar wrote to him on 24 November 2018, and between that date and 14 May 2019 he conducted three formal sickness absence meetings with the claimant, applying the respondent's sickness absence management procedure. He was accompanied by Ms Robinson and the claimant was accompanied by Dr Lane.

16.63. Ms Robinson indicated on the first occasion that as the absence had lasted four weeks, she wished to refer the claimant to occupational health. That referral was completed on a standard form saying the following: "Jonathan has been off work due to work-related stress since 10 October 2018. Following an informal sickness absence meeting held on 11 December 2018 Johnathan confirmed his work-related stress is all connected to recent disciplinary action concerning his refusal to engage in doctoral studies. We would like to understand if there is anything we can do to support Jonathan and to aid his return to work. The referral further included: "no problems with Jonathan's work performance. Concerns only in connection with engagement in doctoral studies." The referral form had the opportunity to attach a stress risk assessment, undertaken by management, but this had not been conducted before the referral and was not subsequently conducted. The respondent's policy for the management of stress gave management the responsibility for consideration of the many and varied possible causes of work-related pressures, and working with individuals exhibiting stress to undertake and record personal stress risk assessments and action plans – amongst other responsibilities.

16.64. Ms Robinson had posed various questions in the referral and the report was provided on 23 January 2019. In answer to the question, whether the illness was temporary or permanent, the occupational health nurse adviser said: "*I can advise that the symptoms Mr Duxbury has been experiencing are likely to be temporary, not long-term. Mr Duxbury believes that if the perceived contributing factors were to be resolved, this would likely resolve the symptoms. Mr Duxbury has been able to describe what he believes to be the contributing factors and is clear that should the requirement for him to undertake doctoral studies and cope with associated workload remain, his symptoms are likely to continue. He also believes that being involved in the associated disciplinary process over the past two years has contributed to his current state. In my opinion based on the information Mr Duxbury provided at today's assessment should there be no changes to the organisational requirements of him undertaking the PhD studies his*

symptoms are likely to remain.

16.65. In answer to the question, will the claimant be able to return the end of their fit note expiry, the adviser said this*: "should the requirements for him to undertake the PhD and also to undergo the associated disciplinary process remain, it is highly likely that he will remain absent certified by the GP and this is likely to be for the foreseeable future.*

16.66. In answer to the question, is there any additional help or support occupational health recommends, she said this: *in my opinion the issues Mr Duxbury is reporting with regards to the perceived work-related stress are not primarily medical or clinical in origin. Resolution of his perceived work-related stress and the precipitating factors is best achieved by management, not clinical intervention. A lifestyle choice may also need to be considered should Mr Duxbury believe he is not able to partake in the pending PhD. I have taken the time to discuss the benefits of Mr Duxbury having the opportunity to discuss the precipitating factors with management attempting to formulate an action plan to try and resolve these and plan a return to work as soon as it is reasonably practicable. Based on his current presentation Mr Duxbury is currently not fit to engage in any constructive dialogue but he acknowledges the potential benefits and is willing to consider this option. It would therefore be advisable to have open lines of communication on a regular basis between Mr Duxbury, HR and management in order to facilitate this. Mr Duxbury has recently commenced having a course of cognitive behavioural therapy by his local NHS service and it is anticipated that this may support him in terms of establishing positive coping strategies and mechanisms to enable him to encourage to engage with management. I have also taken the opportunity to remind Mr Duxbury about silver cloud which he may access to gain coping strategies to help support his mental well-being.…"* She went on *"I have not planned a further review of Mr Duxbury therefore he has now been discharged occupational health".*

16.67. That occupational health report was dated 23 January 2019 and the claimant's first formal meeting took place on 31 January 2019.

16.68. Despite the report, Ms Robinson did not consider that she or Mr Al Najjar could exempt the claimant from the doctoral studies requirement. She was unaware of exemptions ever having been granted on medical or other grounds. She discussed Mr Duxbury's situation with the HR Director or manager and considered it was for them to take any recommendation for an exemption from doctoral studies to the senior leadership – deputy vice chancellors and similar. It was not her responsibility. They did not do so, to her knowledge.

16.69. Similarly, despite the recommendation of the claimant's GP, the claimant's phased return was not overseen by Occupational Health; for example, occupational health was not told that the respondent had repeated the instruction for re-enroling in doctoral study at a meeting on 3 June 2019, the week of the claimant's return to work for one day, on 5 June. He was to build up to five days a week over six weeks, by 8 July 2019. On 3 June the claimant was told he was required to re-enrol by 21 June – the end of this third week back when he was to be working two days per week. He was also told that if he did not do so, the matter would be referred to a further disciplinary without any further investigation. That was in the context of having been away from work for more than eight months and the disciplinary proceedings and worry of workload from doctoral

studies being the source of that ill health.

16.70. The record of the claimant's third sickness review meeting on 8 May provided that the if the claimant did not return in June, his absence would be referred to a panel review meeting, the outcome of which could be dismissal. It was recorded that a review with occupational health would be beneficial on the claimant's return to work. This did not take place either.

16.71. As we have recorded above, the disciplinary action progressed to a disciplinary hearing following which the claimant was given notice of dismissal, and his subsequent appeal was unsuccessful.

17. <u>The Law – statutory provisions</u>

The Equality Act 2010 relevantly provides:

39 Employees and applicants

(1) An employer (A) must not discriminate against an employee of A's (B) –
(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

19 Indirect Discrimination

(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—
age;
disability;
gender reassignment;
marriage and civil partnership;
race;
religion or belief;

sex;
sexual orientation.

Section 23(1) relevantly provides than on a comparison for the purposes of Section 19, *"there must be no material difference between the circumstances relating to each case."*

The Employment Rights Act 1996 relevantly provides:

Section 94(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98

(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 subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee…

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (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.

....

The Legal Principles – indirect discrimination

17.1. In Essop v Home Office and Naeem v Secretary of State for Justice [2017] IRLR 558, the Supreme Court (Lady Hale)' summary of the features of indirect discrimination is relevant to the issues in this case; it bears repeating in full, paragraphs 23 to 29.

It is instructive to go through the various iterations of the indirect discrimination concept because it is inconceivable that the later versions were seeking to cut it down or to restrict it in ways which the earlier ones did not. The whole trend of equality legislation since it began in the 1970s has been to reinforce the protection given to the principle of equal treatment. All the iterations share certain salient features relevant to the issues before us.

The first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others. Thus there was no requirement in the 1975 Act that the claimant had to show why the proportion of women who could comply with the requirement was smaller than the proportion of men. It was enough that it was. There is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage.

A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers

which are not easy to anticipate or to spot.

A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various (Mr Sean Jones QC for Mr Naeem called them "context factors"). They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between "women's jobs" and "men's jobs" or the practice of starting at the bottom of an incremental pay scale. They could be another PCP, working in combination with the one at issue, as in Homer v Chief Constable of West Yorkshire [2012] UKSC 15; [2012] ICR 704, where the requirement of a law degree operated in combination with normal retirement age to produce the disadvantage suffered by Mr Homer and others in his age group. These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem.

A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory. The fact that some BME or older candidates could pass the test is neither here nor there. The group was at a disadvantage because the proportion of those who could pass it was smaller than the proportion of white or younger candidates. If they had all failed, it would be closer to a case of direct discrimination (because the test requirement would be a proxy for race or age).

A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. That was obvious from the way in which the concept was expressed in the 1975 and 1976 Acts: indeed it might be difficult to establish that the proportion of women who could comply with the requirement was smaller than the proportion of men unless there was statistical evidence to that effect. Recital (15) to the Race Directive recognised that indirect discrimination might be proved on the basis of statistical evidence, while at the same time introducing the new definition. It cannot have been contemplated that the "particular disadvantage" might not be capable of being proved by statistical evidence. Statistical evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link.

A final salient feature is that it is always open to the respondent to show that his PCP is justified - in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no

finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question - fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in Essop, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result

17.2. It is also helpful to be reminded:

"*Previous formulations relied upon disparate impact – so that if there was a significant disparity in the proportion of men affected by a requirement who could comply with it and the proportion of women who could do so, then that constituted indirect discrimination. But, as Mr Allen points out on behalf of Mr Homer, the new formulation was not intended to make it more difficult to establish indirect discrimination: quite the reverse (see the helpful account of Sir Bob Hepple in Equality: the New Legal Framework, Hart 2011, pp.64–68). It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages.* Homer v Chief Constable of Yorkshire Police [2012] IRLR 601 the SC held at para 14

In our judgment the question whether a claimant or persons sharing his characteristic is placed at a particular disadvantage by a PCP must be assessed at the time when the PCP is applied. The question is whether, at that time, it places them at a particular disadvantage. If it does, it is not an answer for the person applying the PCP to say that it would not have placed them at a disadvantage if they had behaved differently at some earlier time. Games v University of Kent [2015] IRLR 202 at paragraph 44.

17.3. Legal Principles Unfair Dismissal

17.4. The reason for dismissal was not in dispute in this case. The claimant accepted that Profs. Thornton and Taylor believed he had not enrolled in doctoral study and that was their reason for dismissal, and for maintaining dismissal on appeal. That was a reason which related to his conduct.

17.5. The framing of the issues above reflects the established British Home Stores Ltd v Burchell [1978] IRLR (EAT) where the reason relates to conduct.

17.6. Whether a reasonable investigation has taken place is to be determined from the outset of the employer's procedure through to its final conclusion (Taylor v OCS Group Ltd [2006] IRLR 613, Court of Appeal).

17.7. All aspects of the Burchell test are subject to the band of reasonable responses standard (see Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, EAT and for example Sainsburys v Hitt EWCA 2002 1588)

17.8. Reasonable investigations explore evidence implicating innocence as well as that

implicating guilt.

17.9. Tribunals should not re-examine previous warnings unless they are manifestly unjust or in bad faith.

17.10. The Tribunal is not concerned with whether the employee actually did do the things the employer found that it did; in line with the Burchell objective tests, the task for the Tribunal is to determine whether the employer, acting reasonably, could have concluded that he had done (Devis (W) & Sons Ltd v Atkins [1977] AC 931, House of Lords). Equally, the Tribunal cannot substitute its own view as to what sanction it would have imposed had it been in the dismissing officer's position (Trust Houses Forte Leisure Ltd v Aquilar [1976] IRLR 251, EAT); it is the sanction imposed by this employer which falls to be determined according to the band of reasonable responses test.

18. Discussion and Further Findings and Conclusions

Indirect discrimination – group disadvantage

18.1. Did the PCP (requiring full-time academic staff to engage in doctoral study) put persons with whom the claimant shares the characteristic i.e. employees aged over 50, at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic i.e. employees aged 50 or under – the claimant relies on:

18.1.1. Being required to engage in a substantial time and effort commitment to obtain a qualification at a time when there was a low prospect of future benefit to him in his career; and/or

18.1.2. Being required to undertake study for a qualification which may not have been possible to complete prior to retirement; and/or

18.1.3. A greater likelihood of being subjected to disciplinary proceedings and ultimately dismissal; and/or

18.1.4. Being subjected to disciplinary proceedings and dismissed for non-compliance.

18.2. The claimant's pleading at paragraph 29 of his claim, as further clarified by further particulars in case management, is that academic colleagues without a PhD aged over 50 (the over fifties), were put at the disadvantages above by the respondent's policy of requiring all colleagues without that qualification (subject to exceptions) to study for and obtain a PhD, in comparison with younger colleagues. It was not that the over fifties could not comply with a doctoral studies requirement (or were less likely to be able to do so).

18.3. The impression given by the claimant's witness statement, and confirmed by his oral evidence, was of great personal disadvantage to him as a result of the policy, which he considered unjustified for many reasons. He said this: : "What mattered to **me** more was the quality of time and the work life balance and I would not have chosen to spend seven years seeking an unnecessary qualification….I felt significantly disadvantaged by the doctoral policy and how it related to my stress…… The respondent was prepared to wait until I was 58 years old to get this "essential" qualification and for it then only to benefit them for a further 2 years until my retirement. That seven years would though involve significant personal investment by me without any actual professional or financial benefit accruing to me as a result, and act as a

distraction from the role that I had to perform… I am at an age where my career and reputation is established and I had no particular corporate ambition beyond what I had achieved. I am professionally qualified…. The respondent accepts that my student feedback is very good." (Emphasis added).

18.4. In his oral evidence, that impression was confirmed, but he added his sense that he would have coped better with the stress and pressure of undertaking a doctorate in his twenties or thirties, rather than his late forties when the policy was introduced. He added that in his early fifties he was doing a responsible job (compared to someone who had come to doctoral studies in their twenties as a full time student); and that part-time study is far more stressful than full time study. The claimant's belief was that those without PhDs were predominantly in his age group. Dr Lane said that colleagues in their fifties to sixties, with a few in their forties, came to her to raise concerns when the policy was introduced, because of struggling with demands on their time. Mr Fowler's oral evidence indicated the caring responsibilities of those over fifty, put them at a disadvantage in comparison with younger colleagues, in effect mirroring Dr Lane's evidence.

18.5. Ms Sleeman submitted that statistical evidence was unnecessary in this case and she relied on London Underground V Edwards (No 2) [1999] IRLR 364 – by analogy - encouraging the Tribunal to take account of its own knowledge of the inherent disadvantage suffered by older colleagues faced with a qualification requirement later in their careers. Further, that Homer, Games v University of Kent [IRLR] 2002 and an Employment Tribunal decision, Allington v Grange Rose Hill School Limited Case Number 2304873/2019 were all examples of a common sense recognition of group disadvantage. In the latter: "it seemed obvious that people between 60-65 are less likely to enrol in undergraduate courses compared to younger age groups".

18.6. Mr Smith's submissions on group disadvantage relied heavily on the statistics generated in the course of the hearing which the respondent sought to introduce (and we refused). The Tribunal did not take account of those statistics. Some contemporaneous statistics were reasonably available to both sides in this case, in the form of the Equality Act questionnaire, partially discussed in Mr Fowler's disciplinary proceedings. Rather than provide that material, the claimant asks us to make common sense findings of group disadvantage against the facts of this case, taking into account his evidence, and that of Dr Lane and Mr Fowler.

18.7. We have found that "personal time" or non contractual hours would be required to complete a PhD in six years, for academics undertaking doctoral study while working more than half time. It is clearly disadvantageous - a detriment reasonably to be complained about - for academics unwilling to do so, to be required to do so, over the course of six years.

18.8. The volume of colleagues put at that disadvantage was not all those without a PhD working over half time, and not otherwise exempted. It was the proportion of that group who were unwilling to do so. Taking into account the UCU survey finding that 39% of academics were happy to have the opportunity to undertake a PhD, it is likely that two thirds were in the unwilling category (allowing for some to be both happy to have

the opportunity, but unwilling to invest personal time in its execution). This was likely to be around 150 colleagues, taking into account that those on 0.5 or less FTE contracts was less than 100 colleagues (Professor Thornton, para 39), full time were around 400 colleagues (the Equality Act Questionnaire), 25% of 1000 or so colleagues did not have a PhD in 2013 (around 250), and many fractional staff were exempted.

18.9. The pleaded particular disadvantage that older academics are said to suffer is low prospect of future career benefit, from that unwilling, personal time investment pre-retirement. Common sense tells us that an academic in their twenties will secure maximum benefit (in terms of longevity) from a PhD, but does it tell us much more, particularly when careers and advancement are often not linear?

18.10. The claimant had chosen to retire at 60 and unlike Dr Lane, he placed no personal value in having a PhD; he did not seek its kudos because he was fully satisfied with his achievements in his practicing and teaching careers. He had no further career aspirations. He would not have used the title Dr. For him, that investment of personal time had no corresponding reward.

18.11. The difficulty with establishing that the disadvantage to the claimant was shared by his over fifties colleagues, is that we must apply to them the same lack of further career aspiration, and the same or similar retirement intentions.

18.12. Our industrial knowledge, and our findings in this case, confirm that where there is no mandatory retirement age, the date of retirement is a very personal decision. It takes account of a great number of features unique to each person; their health, their aspirations for further work, study or leisure; their feelings about work; their finances; their families; and so on.

18.13. Our industrial knowledge also tells us that one can make no assumptions about career advancement or aspirations at any point in a career or age. Those matters too are driven by personal and often unique circumstances. Similarly colleagues views on the value or benefit to be derived from a PhD in teaching terms – the claimant and Mr Fowler saw no value because they had their professional qualifications and that was what informed their teaching. That may equally be true for younger, professionally qualified colleagues.

18.14. The fact that the claimant in his mid fifties, and Mr Fowler (over sixty), experienced the disadvantage identified from 2017, and were dismissed for not complying with the PCP in 2020, does not persuade us that the particular disadvantage was shared by the over fifties at large. It does speak to their particular and personal circumstances and professional backgrounds.

18.15. The concerns brought to Dr Lane by those in their forties, fifties and sixties, were the difficulty in finding the time to undertake the PhD. The total time required was accepted to be the same, whatever the age of the student; and the claimant's research showed that although the calls on personal/caring time for colleagues might be different in nature (for example looking after three children rather than an elderly relative), what determined feeling time pressure was other commitments. All working ages, apart from

perhaps many in their early twenties – will have caring or other calls on their personal time.

18.16. Asking ourselves the Allington question, is it obvious that academics over fifty have a low prospect of future career benefit from a PhD? In our judgment it is not – that is a matter very closely related to individuals and their other qualifications, circumstances and aspirations and choice of retirement date.

18.17. Similarly, is it obvious that the over fifties may not complete their PhD studies before retirement (the claimant's case), in comparison with the under fifties? Again, the answer is, that depends on the retirement date chosen, the start date, the progress and time committed and so on. That is insufficient, in our judgment. This is not a case where evidence of group disadvantage is not available – as in Allington (because Mrs Allington was the only teacher affected), but this is a case where many colleagues were affected and data was available and could have been put before the Tribunal.

18.18. As for the third and fourth particular disadvantages, the PCP did not put the claimant, Mr Fowler and others over fifty at greater risk of disciplinary proceedings than younger colleagues. Firstly, the PCP did not indicate that the disciplinary procedure would be used as a means of compelling compliance, but rather insufficient progress would call performance into question. The disciplinary approach arose after the respondent was unable to secure union agreement to a contractual requirement for PhD study, and, taking a more determined stance, adopted the Clause 5.1 disciplinary strategy (failure to comply with a reasonable management instruction).

18.19. Secondly, none of the survey data (IIP, QWLS, UCU or the claimant's survey) supports the suggestion that being over fifty correlated to a decision not to enrol in doctoral study as opposed to enroling and making slow progress, for example. That appears to have been unique to the claimant and Mr Fowler. The characteristics they shared, which caused them to make those decisions were professional considerations, a belief that the policy was discriminatory and outwith their contracts and did not achieve its purpose, and concerns for their mental health. Given the hardening of the respondent's position – engendering a culture of fear in connection with the PhD requirement – all academics who did not enrol and engage in study from 2017 were at equal risk of disciplinary action, we find.

18.20. For these reasons the claimant has not proven the PCP put him and those over fifty at the pleaded disadvantages, and the indirect discrimination complaint is dismissed.

19. Unfair Dismissal

Unfair Dismissal – discussion and conclusions

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19.1. In light of our conclusions on the claimant's Equality Act case, we have considered the claimant's unfair dismissal case, as set out above at 15.13.2 to 15.13.8 (claim form 38 (d) to (j)) and as developed by Ms Sleeman.

19.2. The claimant accepted that Profs Thornton and Taylor had a genuine belief that he had not complied with a management instruction – his response in oral evidence was – doesn't the instruction have to be reasonable? His case was put on the basis that there were not reasonable grounds for Profs Thornton and Taylor to hold that belief and the investigation of these matters (looking at the investigation in the round and from start of the first warning investigation, to finish) was outside the band of reasonable investigations.

19.3. The length of investigations at different stages of an investigation is not always an indicator of the content or quality of investigation – the respondent was examining these matters over nearly three years; similarly lengthy discussion of issues during hearings, considering them and giving a decision in writing, is not equivalent to investigating. The critical issue to be investigated was whether Mr Duxbury, an academic in good standing, had engaged in misconduct.

19.4. We deploy our industrial knowledge in recognising that employers in all sectors frequently impose new qualification requirements on staff without there being any reference to those at appointment, or in their contracts - a requirement for care staff to complete NVQ qualifications, for example. The opportunity to gain new qualifications is often welcomed by staff as an investment in their future. That is frequently recognised in collective negotiations.

19.5. Similarly, where new regulatory requirements mandate qualified staff, instructions to gain these are reasonable management instructions with sufficient support. Equally, an employer is entitled to change its strategy or evolve that strategy, with consequent impact on the reasonable needs it places on staff and their qualification requirements. Section 98 specifically provides that dismissal for want of a qualification can be a reasonable dismissal, as it relates to the capability of an employee. The respondent did not embark on dismissals on capability grounds.

19.6. In oral evidence, the claimant accepted that the aim of delivering a quality standard through doctoral achievement was a legitimate aim - and it follows, a reasonable aim. That was in spite of taking issue with the wisdom of that strategy, particularly for the disadvantaged undergraduate students he served. The claimant felt a PhD would be of no value to those students, whereas his professional background as an accountant was of considerable value. Nevertheless different universities take different approaches, as we have found, and the respondent's aim was unassailable.

19.7. On the other hand, the means of achieving that aim, publishing guidance informing staff of the requirement for all staff without a doctorate to undertake and complete doctoral studies, was advanced by the claimant as both unreasonable and disproportionate.

19.8. We do not consider the guidance document, of itself, to be outside the band of reasonable policies, even though it is rare in the sector. It is certainly the strongest of encouragements to staff, but there were a number of options or safeguards within the document itself. Time allocation was to be discussed in department, with the workload allocation model being the means to allocate doctoral research hours.

19.9. The retirement option, properly construed, did not place any restriction on the time within which that retirement had to occur. The only condition was that completion of the award would not be possible before retirement. There was no restriction on when the notification could be given. That would have meant that a retirement date could have been notified by the claimant at any time for six years hence: this was the de facto "veto" that was suggested to him in cross examination, but then withdrawn the following day.

19.10. That proposition had to be withdrawn because, in implementing the guidance with the claimant from 2017, the respondent's HR representative departed from the words of the guidance and introduced a new requirement (no doubt on senior management instruction) that retirement had to be within a year. The guidance said nothing of the sort.

19.11. The fact that the respondent did not embark on direct staff consultation about its approach before or during 2013, however desirable, is not of itself outside a band of reasonable conduct when the guidance was taken to JCNC. However, given the provisions of the guidance, particularly to be able to notify a retirement date, voluntary severance, exemptions for fractional staff and time allocation to be given in the workload allocation model and discussed in departments, it is not surprising that at that stage, there was no formal complaint from the UCU.

19.12. As to a reasonable belief that the 2017, and subsequent instructions based on Clause 5.1 of the disciplinary policy were reasonable, Professor Thornton's evidence is instructive: the guidance did not rule out the use of discipline. That is far from reasonable grounds to believe that an instruction is reasonable and failure to comply with it, misconduct. The weight of evidence pointed in the opposite direction.

19.13. The IIP report had indicated that matters needed to be handled sensitively: our industrial knowledge tells us that in workplace contexts, stress can arise through a lack of control. The reasonable instruction/discipline approach from 2017 to compel the claimant to enrol and complete PhD study was not sensitive. Moreover it was reasonably likely to cause stress, given the claimant's previous record and background.

19.14. At no stage did the claimant's line manager undertake a stress risk assessment, to document the measures put in place to alleviate the stress – for example, by documenting the additional time he sought to undertake doctoral study, and/or discontinuing the instruction/discipline approach. In not enrolling the claimant was seeking to protect his health when there was no commitment to extra time for him to study.

19.15. The last instruction was given for compliance during the claimant's phased return, when it was not in doubt that the claimant had suffered illness and the previous cause of it was concern about workload from the PhD requirement. Professor Thornton's evidence was that stress was best alleviated by getting through the disciplinary proceedings as soon as possible – or that was the gist of it. That demonstrates a wholly closed mind to the claimant's reasonable expectation that his health be properly considered and the disciplinary approach be abandoned.

19.16. Secondly, we have found the time allocation provided through the workload allocation model was insufficient for many; personal time, non contract time, would be required. That was a necessary finding in the Equality Act case. In the unfair dismissal case, the issue is whether the respondent had reasonable grounds to believe there was sufficient time, and whether it sufficiently investigated that matter.

19.17. Apart from the time issue, the claimant's contract of employment provides for his undertaking of RSA to be largely **self managed**. He had voluntarily invested in and secured qualifications which the respondent considered desirable since commencing his teaching career and he had undertaken various types of RSA. The essential difference between those endeavours and achieving a doctorate was longevity of personal effort and time, and scale of that personal effort and time. It was also a dramatic change in time allocated within the working week, from the 3 hours per week previously (the 148 RSE hours). Those hours were no doubt wholly absorbed by the need to research generally and keep up with resultant writing in any field of teaching.

19.18. The respondent took the view that seeking to impose PhD study on the claimant was within his contract because of the obligation to undertake RSA. Again, the issue is whether the respondent had reasonable grounds for its believe, or reasonably investigated that matter.

19.19. It was self evidently the case in imposing PhD study the respondent was expecting to displace other necessary and self managed research. What investigation did it undertake of whether the claimant's, or its view of the contract issue, was right? Mr Taylor referred to legal advice being taken, which without waiver is privileged. In such a grave situation, where an academic in good standing had been dismissed and was appealing, it was always, and in our judgment, reasonable for the respondent to disclose the analysis of that issue which supported its view. It did not do so.

19.20. In our judgment requiring PhD study and completion was undoubtedly a change to the claimant's contract of employment, or to put it in another way, it was outwith his contract. There were not reasonable grounds, reading the claimant's contract of employment in the context of the sector, to consider otherwise.

19.21. The limit on the respondent's investigation of the working time issue was to look at its work allocation model for the claimant – what theoretical hours he had been allocated during the 2016/2017 and subsequent years. This was a key issue between the parties throughout the disciplinary process. Despite believing there was no contractual basis for the instruction, that a PhD would not serve his students, that the requirement was discriminatory, and that he would be unlikely to complete the doctorate, the claimant said he would enrol if sufficient time was allocated to him.

19.22. Given the critical part the time issue played in the disciplinary process, and the evidence presented by the respondent, the workload allocation model was insufficient grounds to believe that personal time was not a requirement of the claimant; nor was the fact of completion of PhDs by others. Similarly a belief that experienced average academics can undertake a PhD in around 10 hours per week (rather than

17.5). The claimant evidence before the respondent included his own evidence and four separate surveys. Given our analysis of the likely numbers affected there were no reasonable grounds to conclude the UCU evidence was not significantly representative. No reasonable employer would have countered this volume of evidence with bare assertions as to the reliability of its model and completion by others. A reasonable employer has an obligation to reasonably investigate matters which exonerate an employee facing disciplinary measures, as much as those which suggest otherwise. At no stage did the respondent undertake research on the hours imposed by the doctoral requirement.

19.23. The respondent took an early view in the disciplinary process that the claimant's concerns of age discrimination were not relevant, or could be addressed as "without evidence", despite the claimant and his representative put material before the panel; indeed the HR director did not reply to the claimant's early complaint to that effect at all. This approach was wholly out with the respondent's own Equality Policy aims. By the final written warning appeal, and dismissal and appeal hearings, the respondent engaged with the claimant's references to case law, but undertook no investigation of potential adverse impact.

19.24. It is not surprising, against the investigative failings that we have found, and the lack of reasonable grounds for belief in misconduct, that the respondent decided to dismiss the claimant, in spite of his previous good record and quality of teaching.

19.25. In our judgment there were not reasonable grounds for the respnodent's belief in misconduct, and there was not a reasonable investigation through the disciplinary process as a whole, and the respondent did not act reasonably in treating its reason as a substantial enough reason to dismiss. The claimant's previous good record and dismissal in spite of that only serves to compound that unreasonableness. It follows that we consider the first and final warnings were also manifestly unjust, in light of the contractual position and the requirement for non contractual hours in undertaking doctoral study.

19.26. As to the chicken and the egg issue - the respondent's refusal to provide in writing the time that would be made available for the claimant's study – requiring him to re-enrol first. We accept that the detail of particular accommodations and timetabling over time needed to reflect the nature and planned course of the PhD. However, in light of the claimant's previous succumbing to stress, the reasonable employer would not have insisted on that artificial step first. It could reasonably have provided in writing an average weekly allowance out of the 39 contractual hours, or annualised allowance which had to be protected for PhD study. The claimant acted with integrity throughout: he was not prepared to enrol for study which, without being provided with sufficient hours, be believed would further damage his health. It is no answer to that to say, "just enrol". Then we will discuss the measures in place. That approach was entirely outside the band of reasonable responses.

19.27. Finally, there is the issue of lack of equity between factional and full time colleagues. It was clear that for both fractional and full time (or greater than .5 staff) there would be an impact on time available for teaching and a requirement to use non

contractual hours. A further reason for the exemption of fractional staff was that they made up less than 10% of the academic staff, and their exemption did not therefore put the achievement of the respondent's aim back a great deal.

19.28. Considering the Section 98(4) test, the claimant asks us to consider whether the respondent acted reasonably or unreasonably in treating his failure to comply with an instruction as sufficient reason to dismiss him, taking into account the inequity of excluding fractional staff.

19.29. As we have found an unfair dismissal for other reasons, this final matter serves only to illustrate why the respondent took the approach it did to the claimant and had a closed mind to other means of resolving matters. We were told that permitting an exemption in the claimant's case, a full time senior lecturer, would have encouraged others to resist compliance. This ultimately explains why Profs Thornton and Taylor chose to believe the instruction was reasonable, against all weight of evidence that it was not. The fractional exemption does not add to the substantive unreasonableness of the dismissal.

20. For all these reasons the claimant's unfair dismissal complaint is well founded and succeeds.

Employment Judge JM Wade

30 April 2021