Neutral Citation Number: [2026] EAT 75

Case No: EA-2024-000118-TH

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 May 2026

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

MR E KOMENG

Appellant

- and –

NATIONAL HIGHWAYS LIMITED

Respondent

- -
- -

Roisin Swords-Kieley (instructed via Advocate) for the **Appellant**
Edmund Beever (instructed by Gowling WLG (UK) LLP) for the **Respondent**

Hearing date: 17 March 2026

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JUDGMENT

SUMMARY

Fixed-Term Employees Regulations

Where a fixed-term employee is found to have been treated less favourably than a comparable permanent employee in relation to the opportunity to receive training, pursuant to reg. 3(2) **Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002**, that constitutes less favourable treatment contrary to reg. 3(1), subject to reg. 3(3). There is no requirement in such a case for a discrete additional finding that the employee has thereby been subjected to a detriment. The outcome of the complaint will then turn on whether, pursuant to reg. 3(3), the treatment is on the ground that the employee is a fixed-term employee and is not justified on objective grounds.

In the present case the tribunal erred by importing an additional requirement for a discrete finding of detriment in such a case. But it did not err in concluding that the treatment in question was objectively justified, nor in concluding that the complaint in question was out of time.

As to objective justification, specifically, the tribunal did not err with respect to cost being a factor in the respondent's decision. **Heskett v Secretary of State for Justice** [2020] EWCA Civ 1487; [2021] ICR 11 applied. Nor, on the facts of this case, did it err with respect to the respondent having been influenced, in not informing the claimant about a career-development training course, by the fact that he was due to leave its employment shortly after the course would take place, at the end of his then fixed-term contract. **de Diego Porras v Ministerio de Defensa** [2016] ICR 1184 ECJ considered.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. I will refer to the parties as they were in the employment tribunal, as claimant and respondent.

2. The claimant was employed by the respondent from 27 January 2020 on an 18-month fixed-term contract working 30 hours per week, in the role of Senior Caseworker – Employee Relations. In September 2020, as part of a departmental restructure the claimant's job title changed to HR Manager – Employee Relations, but the tribunal found that the fundamental nature of his role did not change. On 5 July 2021 he moved on to a permanent contract on full-time hours. In March 2022 he gave notice of resignation and his employment came to an end on 11 April 2022.

3. The claimant complained of unfair dismissal, direct race and sex discrimination, and treatment contrary to regulation 3 **Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002**. There was a hearing in Birmingham in October 2023 before EJ Meichen, Mrs D Hill and Mr T Liburd. In a 39-page reserved decision all of the complaints were dismissed.

4. At an EAT rule 3(10) hearing eight amended grounds of appeal were permitted to proceed. In the event ground 8 was no longer pursued. The grounds relate to one of two complaints that were brought under the **2002 Regulations** and to unfair dismissal. At the hearing of this appeal the claimant, who represented himself at the tribunal hearing, was represented by Roisin Swords-Kieley of counsel. The respondent was represented at both hearings by Edmund Beever of counsel.

The Appeal Against Dismissal of the 2002 Regulations Complaint

5. The complaint pursuant to the **2002 Regulations** to which this appeal relates was found to have been presented out of time and the tribunal held that it was not just and equitable to extend time. It also found that it would in any event have failed on its merits. Ground 1 challenges the decision not to extend time. Grounds 2 to 5 challenge the conclusion on the merits. It was common ground that, in order to disturb the decision dismissing this complaint, the claimant must succeed on (a)

ground 1; *and* (b) ground 2 or ground 3; *and* (c) ground 4 or ground 5. I will consider first the challenge to the merits decision.

The Legislative Framework

6. The **2002 Regulations** were introduced to give effect to **Council Directive 99/70/EC** concerning the framework agreement on fixed-term work. Reg. 3 provides:

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

7. Reg. 2 contains a definition of "comparable permanent employee" which includes requirements that they have the same employer and are "engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills".

The issues before the tribunal

8. The agreed list of issues took the form of a series of questions. In relation to direct sex and/or race discrimination one of the questions was framed as follows. Did the respondent:

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

9. For the purposes of the constructive unfair dismissal claim, the same conduct was said to have

amounted, or contributed, to a breach of the implied duty of trust and confidence.

10. In relation to the complaints under the **2002 Regulations** the first question concerning the particular complaint at issue was framed as follows. Did the respondent "fail to inform the claimant of the HRBP training programme". The list of issues then asked whether that was "less favourable treatment than a comparable permanent employee", and identified that the comparators were the same as in relation to the above sex and race discrimination claims. It then asked whether the respondent infringed a right conferred by reg. 3, and, if so, whether the treatment was objectively justified.

The tribunal's findings and conclusions touching on the merits of the complaint

11. Although, in relation to the HRBP course, this appeal only concerns the complaint under the **2002 Regulations**, the tribunal's various findings of fact and conclusions about all of the complaints relating to that course overlap and should be read as a whole.

12. The claimant's line manager was Fay Judge. Relevant findings of fact were as follows.

> **"47. In around December 2020 Nicky Welch (who was Mrs. Judge's manager) organised a Human Resources Business Partner ("HRBP") development masterclass course. This was due to take place in May 2021. It was a one-off training opportunity to prepare employees who may wish to become a HRBP. A HRBP is a different and more senior role within HR than the HR Manager role which the claimant was doing. It is a potential route of progression from the HR Manager role. There are of course other routes of progression.**
>
> **48. Consistent with the fact that Mrs. Judge was a supportive and encouraging manager she spoke regularly to her team including the claimant about how they wished to develop and progress. In her discussions with the claimant he never expressed any interest in the HRBP route. The claimant was instead focused on doing his CIPD training. This is a valuable qualification which could pave the way for the claimant to progress to more senior strategic roles in HR. Mrs. Judge supported the claimant's ambition to undertake CIPD training. She obviously thought highly of the claimant and she wanted him to become a permanent employee. She made it clear that as soon as the claimant was made permanent his CIPD training could be arranged and paid for.**
>
> **49. The claimant wanted to complete CIPD level 7 which is the advanced level of CIPD equivalent to a postgraduate qualification. Mrs. Judge agreed this was relevant for the claimant and it would support his future development possibly into more strategic HR roles in the future. Equally Mrs. Judge made it clear that it was not something that the respondent could support before the claimant was a permanent employee. The CIPD course required a significant financial and time investment. If the respondent agrees to pay for the course the employee enters into a training contract which involves the repayment of the training fees if the employee leaves the business within three years. Mrs. Judge considered it would not be appropriate to use public funds to make a significant investment like CIPD Level 7 in a fixed term worker who was only contracted to work for the respondent for 18 months.**
>
> **50. Nicky Welch asked Mrs. Judge to put forward candidates for the HRBP development masterclass course. It was made clear that the candidates should not only be those who had the potential to be a**

> **HRBP but who had expressed an interest in taking that path. Mrs. Judge put forward a number of candidates from her team who fulfilled those criteria. She did not put forward the claimant because although she considered that he had the potential to become an HRBP he had not expressed any interest in doing so. In addition Mrs. Judge considered that it was not appropriate to put the claimant forward because he was at that stage still on a fixed term contract which was due to end in July 2021. There was a cost associated with employees attending the HRBP course (amounting to about £600 per employee) as well as the time that would be involved in doing the course. Mrs. Judge did not consider that it was appropriate to make that sort of investment in the claimant and use public funds to pay for his training when he was due to leave shortly after the course. Furthermore Mrs. Judge was aware of the difficulties which the claimant was experiencing during lockdown and she considered that was a further factor that meant it was not appropriate to put him forward.**
>
> **51. The claimant has pointed out that Mrs. Judge had shared with him she wished him to become a permanent employee and she would support him in that endeavour. However, the fact remains that at the time Mrs. Judge was putting forward candidates for the HRBP course the claimant's permanent position had not been confirmed and he was due to leave upon the expiry of his fixed term contract in July 2021. Mrs. Judge also did not offer a place to Tracey Potter who was another member of her team on a fixed term contract at the time. She accepted that the fact that both the claimant and Tracey Potter were on fixed term contracts was a factor in her decision not to put them forward for the HRBP course."**

13. Further on, the tribunal made findings about an end of year review discussion between the claimant and Mrs Judge around the time he was made permanent. They included the following:

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

14. Further on, the tribunal described how the claimant began a period of sickness absence on 12 October 2021. Immediately prior to going off sick he had spoken to another member of the team and learned from them about the HRBP training course in May 2021. While off sick, on 4 December 2021, he emailed Mrs Judge raising various work-related concerns, including as to lack of training opportunities. The tribunal found that the claimant had simply not mentioned any such concerns previously, and that that email came as a bolt out of the blue to Mrs Judge. The claimant and Mrs Judge went on to discuss the concerns he had raised, in a number of one to one meetings.

15. The claimant also emailed the Executive Director of HR, Ms Billington, about certain of his concerns on 16 December 2021. Her response in January 2022 did not address his concern about the

HRBP course, as he had indicated that he would be raising a separate grievance about it. The claimant returned to work on 31 January 2022 on reduced hours. On that same date he raised a grievance which included reference to the fact that colleagues who had attended the HRBP training course were white British. His grievance was investigated by Liz Herridge who held a meeting with him in February 2022 which was minuted. The tribunal's findings about it included the following:

> **"77. Reflecting on the key part of his complaint about not being offered the HRBP training the claimant said this: "Just want a response on the training and why I was not part of it. Am I not performing? I'm working hard and deserve the same opportunities. Same work, same standard. Not sure when they did the course whether it was when I was FTC or permanent? If it was when I was FTC, then I would understand. If September or October when I was permanent, then why?"**
>
> **78. These comments appear to suggest that the claimant could understand why he would not be offered HRBP training if he was on a fixed term contract when it took place. It has now been established that the claimant was on a fixed term contract when the training took place. Yet the claimant has pursued his complaint that the failure to offer HRBP training was discriminatory on the ground of race or sex. Again this gives the impression that the claimant may not really believe in this part of his complaint."**

16. When it turned to its analysis and conclusions the tribunal first considered time-limit issues. The complaints about the HRBP training programme, of direct sex and race discrimination, and under the **2002 Regulations**, were found to be out of time, and the tribunal declined to extend time, for reasons to which I will return. It went on in any event also to reject them on their merits.

17. In its conclusions on the unfair-dismissal complaint the tribunal considered first whether the respondent breached the implied duty of trust and confidence. That included the following passage:

> **"101. The respondent did not fail to advance the claimant's career development needs. We have found that Mrs Judge was a supportive manager who sought to assist the claimant with his career development. She took the time to understand what he wanted in terms of career development and gave appropriate and reasonable support to enable his development to take place. Mrs Judge was committed to the career development of her team, including the claimant. Her commitment was only fettered by what could be viewed from a business perspective as a sound investment. This was particularly important because the respondent runs on public funds, which should be invested wisely and for the benefit of the business as well as individual employees.**
>
> **102. Mrs Judge did not put the claimant forward for the HRBP course. We found there were in summary three reasons why Mrs Judge did not put the claimant forward for the HRBP course. Firstly, because the claimant had not expressed any interest in becoming an HRBP. Secondly, because the claimant was still on a fixed term contract. Thirdly, because of the personal difficulties which the claimant was experiencing during lockdown. The tribunal accepted these were the genuine reasons why the claimant was not put forward. In that context we do not consider that not putting the claimant for the HRBP course can be seen as demonstrating a lack of support or a failure to advance the claimant's career development needs which might go towards a breach of the implied term.**

18. Further on, at [106], the tribunal said this:

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

19. The tribunal went on at [126] – [128] to reject the complaints of direct race and sex discrimination relating to the HRBP course, in light in particular of the positive findings it had made about the three reasons why Mrs Judge did not put the claimant forward for it, its consideration of the circumstances of the three named comparators, and its consideration of the case of Ms Potter, who was also on a fixed-term contract and was also not offered a place on the course.

20. The tribunal's conclusions about this particular complaint under the **2002 Regulations** were set out in the following passage:

> **"163. We turn to the second allegation of less favourable treatment made by the claimant under the regulations. We find that the respondent did fail to inform the claimant of the HRBP training programme. This was not disputed by the respondent and it is consistent with our findings of fact.**
>
> **164. We find that the comparators relied upon by the claimant - Tara Green, Tania de Piano, Angela Symonds, Rachel Davis – are comparable permanent employees. We find that all the criteria set out in Regulation 2 are fulfilled. Again we did not understand this to be disputed by the respondent and it is consistent with our findings of fact.**
>
> **165. We find that a reason why the claimant was not offered the HRBP was because he was on a fixed term contract. This was not the only reason but it was a material reason. This was not disputed by the respondent – in fact Mrs Judge asserted in her witness statement that this was a factor in her decision making.**
>
> **166. We find that the respondent did not infringe a right conferred on the claimant by regulation 3, because the claimant was not treated less favourably by being subjected to a detriment. We consider it was clear that the claimant's career path was not focused on becoming an HRBP. He was instead focused on completing CIPD and the different career opportunities doing that would open up. Mrs Judge explained in her evidence, and we accepted, that she had taken the time to understand the career aspirations of her team and the comparators were those who were known to be keen to progress to HRBP. As recently as October 2020 Mrs Judge had asked the claimant (along with the rest of the team) if he had any development requests and the claimant had not mentioned anything about HRBP. It was known that the claimant was interested in CIPD and he discussed that with Mrs Judge. We do not consider that it can be said that the claimant was subject to a detriment by not being offered a course which he had no interest in doing. A reasonable employee would not consider they had been subjected to a detriment in these circumstances.**
>
> **167. In any event we find that the treatment complained of has been justified by the respondent on objective grounds. This is in view of the time and cost investment required to do the HRBP course and the fact that at the time the course was taking place the claimant's fixed term contract was due to end shortly afterwards. Mr Beever submitted that the respondent had a legitimate aim of meeting individual development needs of all employees with an appropriate use of public money. This aim had not been clearly pleaded but the claimant accepted there was no prejudice to him in allowing the**

> **respondent to rely on it and so we allowed the respondent to do so. The point had been apparent at least implicitly throughout the evidence.**
>
> **168. We find this was a legitimate aim. It is legitimate for the respondent to aim to meet employees' known career development aspirations in a way which reflects an appropriate use of public money. In other words the respondent had to be assured that meeting employee's career development needs was a sound investment. We think that is clearly legitimate.**
>
> **169. We find the respondent acted proportionately in achieving the legitimate aim by seeking to ensure HRBP training was offered to those who were interested in it and those who were permanent employees so that the respondent could see the benefit of the time and financial investment it made in the training. We considered that not offering the claimant the HRBP training was an appropriate and reasonably necessary way to achieve the respondent's legitimate aim. We did not consider that the legitimate aim could have been realised in a less discriminatory way. The respondent could not realistically be expected to offer the training and make the financial and time investment in a fixed term employee who was due to leave shortly after the training and therefore the respondent may well not see any benefit to its investment. This would not be a sound investment or a good use of public money. The claimant's place could have been occupied by a permanent employee who was more likely to remain in the organisation and who was actually interested in the HRBP career path and therefore the respondent would be more likely to see a benefit to its investment and would be using public money wisely.**
>
> **170. We considered that overall the needs of the claimant and the respondent had been appropriately balanced because it was clear that the respondent did not neglect the claimant's development needs. On the contrary Mrs Judge supported and encouraged the claimant in his career development, including when he was a fixed term employee. The only caveat was that she was aware that she was using public funds and therefore she had to ensure any investment was sound and one which the respondent, as well as the claimant, was likely to see a return on. This was a proper and, in our view, unobjectionable balancing of the parties' needs.**
>
> **171. For these reasons the claim under the regulations would fail and we would dismiss it on its merits in any event."**

The Grounds of Appeal Against the Merits Decision

21. Ground 2 contends that the tribunal erred at [166] by considering whether the claimant was subjected to a detriment. It contends that, where a fixed-term employee is found to have been treated less favourably than a comparable permanent employee in relation to the opportunity to receive training, that amounts to treatment contravening the right conferred by reg. 3(1), with no requirement for a discrete additional finding that the employee has thereby been subjected to a detriment.

22. I start by considering the matter purely as one of construction of regs. 3(1) and (2), and without regard to the **1999 Directive** or any light cast on the matter by any authority.

23. Mr Beever argued that reg. 3(2) is parasitic upon reg. 3(1). Accordingly, he contended, every reg. 3(2) complaint must fall under either reg. 3(1)(a) or reg. 3(1)(b). So, if the given case does not

fall under reg. 3(1)(a), then, in order for it to be within scope of reg. 3(1)(b), the treatment must be found to amount to the subjection of the employee to a detriment. Although it might at first blush seem attractive, I reject that construction. That is for the following reasons.

24. First, the overall structure of reg. 3 is that it proscribes less favourable treatment of a fixed-term employee than a valid comparator with respect to certain treatment. Reg. 3(1)(a) identifies one specific kind of proscribed treatment and reg. 3(1)(b) refers to a generalised residual category of treatment, defined by the requirement that it involves subjecting the employee to a detriment. The reference to any "other" detriment in reg. 3(1)(b) suggests that Parliament considered that treating a fixed-term employee less favourably as regards the terms of his contract, as contemplated by the specific example in reg. 3(1)(a), inherently amounts to detrimental treatment. So, in such a case, there is no requirement for a separate finding to that effect. Against that background, reg. 3(2) then sets out three further specific forms of less favourable treatment which are proscribed, without the regulations indicating there the need for a separate discrete finding that they amount to detrimental treatment. That suggests that they, too, are regarded as forms of treatment that are to be regarded as inherently detrimental.

25. Further, reg. 3(2) provides that the right conferred by reg. 3(1) "includes" the right "in particular" not be treated less favourably than a valid comparator in relation to the three things set out at (a), (b) and (c). While, as a matter of fact, a given case falling within reg. 3(2) might or might not relate to the terms of the contract, there is nothing in reg. 3(2) to indicate that that distinction matters. Reg. 3(2) also refers to "the right" conferred by reg. 3(1), in the singular, without distinguishing its two sub-strands. So reg. 3(2) simply adds to the list of specific proscribed kinds of conduct covered by that overarching right. That reading is also consistent with the language of reg. 3(6).

26. This construction also reflects two consistent features of the overall architecture of domestic discrimination legislation over many years. The first is that, in the realm of what lawyers call direct

discrimination, the wrong generally takes the form of "less favourable treatment" of a comparator (though, in the **2002 Regulations** that must be an actual comparator within reg. 2). The second is that the prohibition attaches either to certain specified types of conduct, or to a residual generalised category of any other conduct, so long as it amounts to the subjection of the complainant to "any other detriment". This model was adopted in the **Sex Discrimination Act 1975**, the **Race Relations Act 1976**, pre-dating the **2002 Regulations**, and, post-dating them, the **Equality Act 2010.**

27. In those statutes separate provisions addressed or address the definition of the wrong (involving less favourable treatment) and the nature of the conduct to which it applies, because they were, or are, concerned with conduct in a number of different fields and situations. In the **2002 Regulations**, which apply only in a specific work-related context, both aspects are covered in reg. 3. It is also noteworthy that it is headed: "Less favourable treatment of fixed-term employees", with a separate right not to be subjected to a detriment on proscribed grounds being found in reg. 6. The same approach was taken in the similarly work-specific **Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000**, which preceded the **2002 Regulations** in point of time.

28. Mr Beever, however, argued that it would have been open to the drafter of the **2002 Regulations** to simply list treatment in relation to the three matters in reg. 3(2) as additional forms of treatment listed under reg. 3(1) (after (a) and before what is, in the event, (b)), taking in effect the same approach as the drafter of the **Equality Act 2010** section 39 took. That, he contended, would have been the way to provide that they are *all* deemed to be detrimental treatment, without the need for a discrete finding to that effect. But the drafter of the **2002 Regulations** had not done that.

29. As to that, I note that the three strands of reg. 3(2) correspond to three specific provisions of the framework agreement adopted by the **1999 Directive**. Reg. 3(2)(a) mirrors clause 4(4) in relation to service qualifications. Reg. 3(2)(c) and (6) mirror clause 6(1) in relation to information about vacancies for permanent positions. The counterpart of reg. 3(2)(b) is clause 6(2) relating to

"appropriate training opportunities". Although the clause 6(2) duty on employers is prefaced by the words "[a]s far as possible", the Directive obliged member states to introduce domestic legislation giving effect to all three specific strands. That might be thought to explain why the drafter dealt with them together as a group. In any event I consider that this is a matter of drafting style, not substance.

30. Mr Beever also submitted that the reading contended for by this ground could not be correct, as it would mean that a fixed-term employee could potentially complain about not being given access to *any* opportunity to receive training given to a permanent colleague, even if the training had no obvious relevance or benefit to the fixed-term employee at all. However, the right only arises if the opportunity to receive the training in question was given to a *comparable* permanent employee. Such a comparator must be "engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills". There must also have been less favourable treatment on the ground that the employee is a fixed-term employee, which is not justified on objective grounds. That is a formidable constellation of safeguards against any such absurd result.

31. As for authority, I was referred to **Coutts & Co plc v Cure** [2005] ICR 1098. At [26] the EAT said that a complaint arises where a number of conditions are met, including that "the less favourable treatment takes the form of detriment". However, that case concerned a complaint that fixed-term employees did not benefit from a particular bonus given to permanent colleagues. It was not a reg. 3(2) case and no consideration was given to reg. 3(2). That being so, I do not read this passage as extending to a reg. 3(2) case, or, if it was intended to be a general statement about reg. 3, then it went beyond what was needed to decide the case in hand, and, in respect of a reg. 3(2) case, it was *obiter* and not binding upon me. Neither counsel found any other relevant authority.

32. Pausing there, for all these reasons, I conclude that, where the tribunal finds that a fixed-term employee has been less favourably treated than a reg. 2 comparator in relation to the opportunity to receive training, on the ground that they are a fixed-term employee, then the right conferred by reg.

3(1) will have been infringed, subject to reg. 3(3). There is no requirement for an additional finding that the treatment subjected the employee to a detriment.

33. Turning from the law to this decision, Ms Swords-Kieley submitted that, as this tribunal had, nevertheless, considered in the course of [166] whether the claimant had been subjected to a detriment by the treatment at issue, concluding that he had not, it had therefore erred in this respect.

34. When I first read the decision I was not sure that the matter was quite so straightforward. As I have noted, the list of issues identified the issue of whether there was less favourable treatment. Correctly, as I have found, it did not identify any additional issue of whether the treatment was detrimental. When it came to its conclusions on this complaint, after finding that the comparators relied upon by the claimant fell withing reg.2 and that a reason why the claimant was not offered the HRBP course was because he was on a fixed-term contract, the tribunal then opened [166] by stating that "[w]e find that the respondent did not infringe a right conferred on the claimant by regulation 3, because the claimant was not treated less favourably by being subjected to a detriment." There is, prior to [166], no express finding elsewhere that the treatment was less favourable.

35. While discrimination legislation distinguishes the concept of less favourable treatment from that of detrimental treatment, and while, as Lord Hoffmann contemplated in **Chief Constable of West Yorkshire Police v Khan** [2001] UKHL 48; [2001] ICR 1065, at [53], a person may be treated less favourably and yet suffer no detriment, in practice, in many cases where both questions do require to be considered, the answers to both will go hand in hand. It therefore seemed to me that one possible way of reading [166] was that the tribunal had concluded that the claimant was *not* treated less favourably than the comparators *because* the treatment was not detrimental.

36. However, in argument Ms Swords-Kieley contended that the correct reading was that it was to be inferred that the tribunal did consider the treatment to be less favourable, but concluded in [166] that it was not *also* detrimental treatment, and did not contravene reg. 3 because (what the tribunal

wrongly took to be) that additional requirement was not satisfied. She also fairly noted that it had not been contended either in the respondent's answer or in Mr Beever's skeleton argument that the tribunal had not found that there was less favourable treatment, or had found that there was none. Ultimately, given that (as I will describe) I consider that the language used by the tribunal in [166] was indicative of it specifically applying the distinct legal test of detriment, I am persuaded that Ms Swords-Kieley's reading is right. The tribunal did, in error, proceed on the basis that there was a distinct additional legal requirement of detriment in this case. Ground 2 therefore succeeds.

37. Ground 3 contends (in the alternative to ground 2) that, if the tribunal did *not* err by considering whether the treatment in question was detrimental treatment, then it erred in concluding that it was not, by not applying the correct legal test, failing to provide adequate reasons, or reaching a perverse conclusion. As these points were all argued, and there was some overlap with points that crop up again in the context of other grounds, I will set out my conclusions on these aspects.

38. First, I do not consider that the tribunal erred by applying the wrong legal test. The test is well-established. As Lord Hope of Craighead put it in **Shamoon v Chief Constable of the RUC** [2003] UKHL 11; [2003] ICR 337 at [35]: "Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to 'detriment'." Although the tribunal did not, in its self-direction, refer to this, or any other authority, on the point, this is very familiar territory to tribunals. Further, I do not agree that in stating at [166]: "A reasonable employee would not consider they had been subjected to a detriment in these circumstances" the tribunal showed that it was applying the wrong test. To the contrary, I consider that this phrase shows that it had the **Shamoon** test in mind.

39. Nor do I consider that the tribunal reached a perverse or inadequately-reasoned decision on this point. That criticism focusses on the statement, within [166], that the claimant could not be subjected to be a detriment "by not being offered a course which he had no interest in doing". Ms

Swords-Kieley submitted that this was erroneous because this complaint was about not being *informed* about the course, the tribunal had found as a fact that the claimant was not informed about it, and he could hardly have expressed an interest in a course that he did not know about.

40. However, this passage, and the relevant parts of the decision, must be read as a whole. In the course of its fact-finding the tribunal found that Mrs Judge spoke regularly to the claimant about how he wished to develop and progress, and that he "never expressed any interest in the HRBP route" [48]. It also found that candidates put forward for the HRBP should be those "who had expressed an interest in taking that path" but the claimant had not expressed any interest in becoming an HRBP [49]. It also found that at the review meeting around the time that he became permanent the claimant focussed on his desire to complete CIPD training and "did not mention any interest in HRBP" [58].

41. At [163] the tribunal then correctly identified that this complaint was that the claimant was not "informed" about the course, and confirmed its factual finding that he was not informed about it. In what followed it then referred to him not being "offered" the course. That shows that the tribunal had not lost sight of the particular conduct complaint of, and in referring to him not being "offered" the course, was referring to the fact that Mrs Judge did not inform him about it. The overall sense of these passages, and what follows [163], is that she did not either "offer" it to him – that is, tell him about it – nor did she put his name forward to the organiser, for the reasons that the tribunal set out.

42. I note also that, in the course of [166] the tribunal (drawing on earlier detailed findings of fact) found that Mrs Judge had taken time to understand the career aspirations of her team, and contrasted the fact that the comparators were known to be keen to progress to HRBP with the position in relation to the claimant. Against that backcloth, the fair reading of [166] is that the tribunal was of the view that the claimant could not reasonably subjectively view the fact that she did not inform him about the course as detrimental treatment, in circumstances where she had – correctly in the tribunal's view – understood that he in fact had no interest in pursuing the HRBP path.

43. Nor do I consider that the fact that the claimant later raised a grievance about the matter meant that the tribunal's finding to that effect was perverse. The tribunal was not bound to infer from the fact of the later grievance that the claimant had in fact been interested in pursuing the HRBP route. I note in this regard that the tribunal formed the impression that the claimant may not really believe in his own complaint of sex and race discrimination relating to the HRBP course [78]; and at [87 – 88] it noted that he had in terms expressed his appreciation to Mrs Judge when he told her he might be leaving to take up another offer; and it considered that he would not have done this "if he really believed she was responsible for the allegations he now makes against her". In short, it plainly considered that the grievance on this subject lacked conviction.

44. For these reasons, had I not upheld ground 2, I would not have upheld ground 3. I turn to grounds 4 and 5, which both concern the upholding of the defence of objective justification.

45. Ground 4 contends that the tribunal erred in respect of what it found to be the legitimate aims. First, it is said to have impermissibly placed significant emphasis on cost. Secondly, it is said to have erred by relying on the fact that at the time, the claimant was "due to leave" shortly after the course. Alternatively, the reasoning on these aspects is said to have been inadequate.

46. As to the first strand of this ground, concerning cost, the authoritative decision is that of the Court of Appeal in **Heskett v Secretary of State for Justice** [2020] EWCA Civ 1487; [2021] ICR 110. Underhill LJ (McCombe and Macur LJJ concurring), following a comprehensive review of the authorities at all levels, drew out the following conclusions.

> **"81. I turn to the fundamental question, which is what is meant by the phrase "solely [to avoid] increased costs", and more particularly what is the effect of the word "solely" . On this, it seems to me that we are bound by the guidance given by Rimer LJ at paras 66—67 of his judgment in *Woodcock* [2012] ICR 1126; but even if we were not, I would respectfully agree with it. He says in para 66 that the CJEU's language "cannot mean more than that the saving or avoidance of costs will not, *without more*" – my emphasis – "amount to the achieving of a 'legitimate aim'". In other words, to take the paradigm case of discriminatory pay, an employer cannot "justify the discriminatory payment to A of less than B simply because it would cost more to pay A the same as B."**
>
> **82 That might seem too trite to need saying – "unsurprising", as Rimer LJ puts it – but it is not difficult to understand why the CJEU thought it important to spell it out. It is the same obvious but important point that the Supreme Court makes at several points in *O'Brien* [2013] ICR 499: see para**

> **67 of its judgment ("very different from deliberately discriminating against part-time workers *in order to save money*"), para 69 ("a legitimate aim *other than the simple saving of cost"*) and the example given at the end of para 74 ("it would not be legitimate to pay women judges less than men judges *on the basis that this would cost less*").**
>
> **83 It follows that the essential question is whether the employer's aim in acting in the way that gives rise to the discriminatory impact can fairly be described as no more than a wish to save costs. If so, the defence of justification cannot succeed. But, if not, it will be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim is legitimate. The distinction involved may sometimes be subtle (to adopt the Supreme Court's language in *O'Brien*) but it is real."**

47. After illustrating his conclusions by reference to various authorities Underhill LJ continued:

> **"88. The upshot of all this is that there is certainly an established principle that, to take Rimer LJ's formulation in *Woodcock*, "the saving or avoidance of costs will not, without more, amount to the achieving of a legitimate aim" for the purpose of the defence of justification in a discrimination claim; but that that principle needs to be understood in the way that I have sought to explain it in the preceding paragraphs. It only bites where the aim is, as the CJEU put it in *Hill and Stapleton*, "solely" to avoid costs.**
>
> **89. That being so, the "cost plus" label (and its cognates such as "cost alone" and "the plus factor") cannot be said to be incorrect, and it is sometimes too convenient a shorthand to eschew. However, that language is not in fact used either by Burton P in *Cross* or by Rimer LJ in *Woodcock*, and I would prefer to avoid it so far as possible. In my experience it can lead parties, and sometimes tribunals, to adopt an inappropriately mechanistic approach (see my observations in *Woodcock* quoted above). It is better, in any case where the issue arises, to consider how the employer's aim can most fairly be characterised, looking at the total picture. It is only if the fair characterisation is indeed that the aim was *solely* to avoid increased costs that it has to be treated as illegitimate."**

48. In the present case the tribunal found that there were a number of reasons why Mrs Judge acted as she did, as set out at [50] and further summarised at [102]. These included her belief that the claimant had no interest in the HRBP path, and what it referred to as the "difficulties that the claimant was experiencing during lockdown". (There was an earlier passage in which the tribunal had made specific findings about those difficulties. It also found that this aspect influenced Mrs Judge's view that it was not yet a good time for the claimant to embark on the CIPD course.) Secondly, cost itself was mentioned at [50] in the context of a consideration of whether it was justified to send the claimant on this training when, at that point, he was due to leave shortly after it would take place; and the tribunal there referred to both the cost and the time involved. It is also noteworthy that, in the more concise summary at [102], it did not refer to cost at all, but to that more general point.

49. It is clear from these findings that the tribunal considered that the aim was not solely to avoid the cost of sending the claimant on the training. The tribunal did not find that Mrs Judge acted as she

did solely because of a wish to save costs. It did not err as contended by the first strand of this ground.

50. Turning to the second strand, Ms Swords-Kieley relied on the tribunal having found – indeed Mrs Judge having accepted – that the fact that the claimant was, at the time, on a fixed-term contract was a material influence on her decision. She submitted that it is not lawful to rely on the fact that an employee is on a fixed-term contract to justify treatment contrary to the **2002 Regulations**.

51. However, what the CJEU has said, for example in **de Diego Porras v Ministerio de Defensa** [2016] ICR 1184 ECJ at [47], is this:

> **"If the mere temporary nature of an employment relationship were held to be sufficient to justify a difference in treatment as between fixed-term workers and permanent workers, the objectives of Directive 1999/70 and the framework agreement would be rendered meaningless, and it would be tantamount to perpetuating a situation that is disadvantageous to fixed-term workers".**

52. In the present case the tribunal's findings of fact were not that Mrs Judge was influenced *merely* by the fact that the claimant was, at the time, a fixed-term worker. Rather, she was influenced also by the fact that he was not interested in the HRBP route, and the fact that she did not consider the time was right for him to go on training, because of his personal difficulties at that time.

53. Further, even in respect of his being a fixed-term worker, as the tribunal found, Mrs Judge was influenced by the fact that what was at issue was the provision of training with a view to *career progression* of a worker who was, as it was put at [50], "due to leave shortly following the course". The same point was reiterated by the tribunal as significant when weighing the justification defence at [169]. On a fair reading, therefore, while Mrs Judge accepted, or asserted, that, as the tribunal put it, the claimant being on a fixed-term contract was "a factor" in her decision, the material feature found to have influenced her was the fact that he was (at the time in question) due to leave shortly after the date of the course (which was, in turn, because he was on a fixed-term contract).

54. Nevertheless, the framing of the ground specifically challenges the reliance on the fact that he was "due to leave" as impermissible. The ground cites [47] of **Diego-Porras**, but what that passage

indicates is that the "mere" temporary nature of the employment is not sufficient to amount to justification. As I have noted, the tribunal did not find that the respondent relied merely on that.

55. In argument Ms Swords-Kieley contended that the tribunal still erred, because it was possible that the claimant's fixed-term contract might yet be made permanent, and this was something that he wanted, and that Mrs Judge in fact supported. She relied in this regard on the opening words of [51] of **Diego-Porras**, in which the CJEU stated:

> **"Moreover, the argument based on the predictability of the end of the temporary replacement employment contract is not based on objective and transparent criteria, given that not only could such a temporary replacement employment contract in fact become permanent, as in the situation of the applicant in the main proceedings, in respect of whom contractual relations have continued over a period of more than ten years but, in addition, that argument is contradicted by the fact that, in comparable situations, the relevant national legislation provides that compensation for termination of the employment contract is granted to other categories of fixed-term workers."**

56. However, that paragraph alludes to the fact that the applicant in that case had started in 2003, had several successive "temporary" replacement contracts, the last dating from 2005, and had been in post for more than ten years by the time of the termination giving rise to the complaint in question. Further, the complaint in that case specifically related to entitlement to compensation on termination of her contract. Given that context, and the careful framing of [47], I do not think [51] will bear the wide interpretation that Ms Swords-Kieley seeks to put upon it in relation to the present facts.

57. Further, the tribunal specifically considered at [51] the point that Mrs Judge supported the claimant in seeking a permanent position; but it properly relied upon the fact that, at the relevant time, he did not have a permanent position confirmed and was due to leave in July 2021. This is reinforced by further findings at [52] that the business case that she advanced for him was twice rejected before it was approved, that this was communicated to the claimant in May 2021, that he still had to be interviewed for a vacancy, and was (only) successful and offered a permanent position in June 2021.

58. For these reasons, I do not think that the tribunal erred in law with respect to the fact that Mrs Judge's conduct was influenced by the fact that the claimant was, at the relevant time, "due to leave".

59. Nor, having regard to the various passages addressing this aspect, do I consider its reasoning in this regard to have been inadequate.

60. For all of these reasons, ground 4 fails.

61. Ground 5 contends that the tribunal erred in its approach to proportionality for the purposes of justification. It asserts that it "did not have proper regard" to the fact that the conduct was by way of failing to *inform* the claimant about the course; that a failure to consult with him about its usefulness must have been a "relevant and compelling factor under the proportionality assessment"; and that the tribunal gave no regard to whether his employment was likely to be extended.

62. For reasons I have already set out when discussing ground 3, I consider that the tribunal plainly understood that the complaint was that the claimant was not informed about the course (and, hence, not consulted about it); and it was not bound to infer from the fact that he later raised a grievance about it, that, had he known of the course at the time, he would have wanted to go on it.

63. In her skeleton Ms Swords-Kieley also suggested (although this did not form part of the ground) that the tribunal had failed to pay proper regard to the fact that attendance on the course had a "cost of just £600". But again the tribunal was plainly aware of that fact. Ms Swords-Kieley also accepted that, if the tribunal had (contrary to her case) properly found that the claimant had in fact not been interested in the HRBP route, that could properly be regarded as a relevant consideration in the context of justification. As I have set out, I consider that the tribunal *did* properly conclude that Mrs Judge was correctly of the view that the claimant was not interested in the HRBP route.

64. As I have discussed, the tribunal was also plainly aware that the claimant wanted to be made permanent and that Mrs Judge was supporting him in that endeavour. But it also properly took into account that that was not in her gift, and he was some way off achieving it at the relevant time.

65. In its self-direction as to the law, the tribunal identified that the test of justification in this

context is essentially the same as in the context of a complaint of indirect discrimination, requiring the treatment to respond to a genuine need, to be appropriate to the objective and reasonably necessary. The grounds of appeal (rightly) do not challenge that self-direction. At [169] and [170] the tribunal specifically applied the right test, considering whether the treatment was an "appropriate and reasonably necessary" way to achieve the aim, whether it could realistically be achieved in a less discriminatory way, and whether the needs of the parties had been appropriately balanced. In answering these questions the tribunal properly took account of all of the factual features that it referred to there, including the fact that the claimant was, at the time, due to leave shortly after the training, the fact, as it properly found, that he was not actually interested in the HRBP career path, and the fact, as it found, that the respondent did not neglect the claimant's development needs.

66. For all of these reasons ground 5 also fails.

67. Because both ground 4 and ground 5 have failed, the challenge to the tribunal's decision that this complaint in any event failed on its merits must fail. The tribunal did not err in concluding that, even if the conduct was otherwise contrary to reg. 3, it was justified. It also follows that, even if the tribunal erred in its decision that it was not just and equitable to extend time, the decision dismissing this complaint must in any event stand. Nevertheless, I will also consider that challenge.

The Time Decision

68. Ground 1 contends that the tribunal erred in declining to extend time in respect of this complaint in two respects. First, it is said that it erred in stating at [95(x)] that there was no prejudice to the claimant in applying the rules on time limits. That statement is said to be obviously wrong or at least insufficiently explained. Secondly, the tribunal is said to have erred in relying on the merits of the claim as a factor if, in fact, the merits are (contrary to the tribunal's conclusion) sound.

69. As to the first limb, although he allowed this to proceed at the rule 3(10) hearing, the judge who did so observed that he was satisfied that the relevant passage could sensibly be read as

"proceeding from the assumption that there will always be some prejudice in refusing to extend time."

70. I do not need to set out the whole of [95]. Its preamble indicates that it is a list of factors that the tribunal took into account when deciding that it was not just and equitable to extend time in respect of those complaints (including the **2002 Regulations** complaint in question) that were out of time. The first nine focussed on the question of why the claim had not been brought in time, or sooner than it was, and whether there was what the tribunal regarded as a good reason, in the context of this issue. They also made the points that the delay was substantial, that there is a public interest in the enforcement of time limits, and a "general" prejudice to a respondent if time is extended.

71. Following on from these paragraphs the tribunal then began (x) by saying: "There cannot be said to be any prejudice to the claimant in these circumstances in applying the well-known rules on time limits." It also referred to there being "no good reason" to extend time. I think it is clear, therefore, that the tribunal was here reaching a conclusion that reflected its evaluation of the particular facts and circumstances of this case. As the ground asserts, it is obviously always the case that, if a complaint is dismissed purely on the basis that it is out of time, then the complainant loses, at least, the chance to have that complaint adjudicated purely on its merits. I agree with the view of the rule 3(10) judge that the tribunal did not err by taking a different view.

72. As to the second limb, in its self-direction as to the law, the tribunal cited **Kumari v Greater Manchester Mental Health NHS Foundation Trust** [2022] EAT 132; but that was concerned with whether, in deciding as a *preliminary point* whether it is just and equitable to extend time, it is necessarily an error to have regard to what are assessed to be the *prospective* merits of the complaint in question. In this case, item (xi) of [95] referred to the fact the complaints in question all *substantively* failed on their merits. Inclusion of that reference in the list of factors within [95] might, as such, suggest that this was a factor taken into account in relation to the time point.

73. However, what the tribunal actually wrote at [95(xi)] was: "We considered the claimant's

claim in its entirety in any event and we found all of the allegations would fail for the reasons we have set out." It went on at [96] to indicate that while "all these relevant factors weighed against the grant of an extension" it had "[n]nevertheless and for completeness" set out its findings on the allegations in question. Standing back, on balance I consider that there is some infelicity in expression or presentation at work here, and that the tribunal's substantive conclusion was that, even had the complaints in question been otherwise meritorious, it would have declined to extend time.

74. As the challenge to the tribunal's conclusion that this complaint was unmeritorious has failed, this strand of ground 1 gains no purchase, and so the ground must be dismissed. But, for the reasons I have given, I would have dismissed ground 1, even had the challenge to the merits decision succeeded; and so I would still have concluded that the decision to dismiss this complaint must stand.

*Outcome in respect of the **2002 Regulations** complaint*

75. As noted, it was common ground that, in order to disturb the tribunal's decision dismissing this complaint, the claimant needed to succeed in ground 2 or 3, *and* ground 4 or 5, *and* ground 1. The claimant has not so succeeded, and so the appeal against that decision is dismissed.

Unfair Dismissal

76. Grounds 6 and 7 relate to the dismissal of the complaint of unfair dismissal.

77. There was no dispute that the claimant's employment ended by resignation. He complained of constructive unfair dismissal, relying on the respondent having done a number of things said, separately or cumulatively, to amount to a breach of the implied duty of trust and confidence. Among these was said to be the failure to put him forward for the HRBP course. Working through the list the tribunal concluded that some of the factual assertions were not made good, and, in light of its overall findings as to what did occur, and why, that the respondent was not in breach of that implied term. For that reason this complaint necessarily failed. I have already set out the particular findings and conclusion that, in this context, it reached about the HRBP course, at [102] and [106].

78. The tribunal continued:

> **"122. We should also record that we found that the claimant did not resign in response to the alleged breach of the implied term. The claimant resigned because he had found a job on more pay which appeared to be more in line with his career aspirations. The alleged breach of contract was not a reason for the claimant's resignation. The claimant's own evidence to the tribunal was that he had speculatively changed his LinkedIn status and this had resulted in an approach from a recruiter, his application and ultimately the new job offer. The job offer was on more pay and it gave the claimant the opportunity he was looking for to step up to a more senior role and build a team. It was quite obviously too good to turn down. The claimant left for that reason.**
>
> **123. Further, we observe that on the claimant's case Mrs. Judge was responsible for most of the conduct relied upon to establish breach of the implied term. Yet when he met with Mrs. Judge on 9 March and explained he was planning to resign and take up the new job the claimant said to Mrs. Judge "it's not you, I appreciate you, it wasn't about you. Appreciate that.". Both in the meeting and in his formal resignation letter the claimant gave his reason for leaving as the new job he had been offered and he expressed gratitude towards Mrs. Judge. In the tribunal's view this severely undermines any suggestion that the claimant was leaving because of repudiatory conduct largely committed by Mrs. Judge. It supports our finding that the claimant did not resign in response to the alleged breach; it was simply because he found a better job."**

79. Ground 6 contends that the tribunal's conclusion that there was no fundamental breach of the implied term is unsafe if the tribunal's conclusion dismissing the **2002 Regulations** complaint relating to the HRBP course on its merits is itself unsafe or wrong. As I have concluded that the appeal challenging that merits decision fails, ground 6 must also fail; and I do not need to consider further the other arguments in relation to it. But I note that Ms Swords-Kieley acknowledged that, even had that complaint relating to the HRBP course succeeded, that would not, as a matter of law, necessarily point to the conclusion that that conduct also breached the implied term.

80. Ground 7 contends that the tribunal applied the wrong test in reaching its conclusions on the issue of why the claimant resigned. It contends that the tribunal considered what was the claimant's singular reason for resigning, whereas it would have been sufficient if a fundamental breach of contract on the part of the respondent had played a part in the decision to resign. Alternatively, it contends that the tribunal's reasoning was inadequate, given that, at the time of his resignation, the claimant had already submitted a grievance about the matters on which he sought to rely.

81. Ms Swords-Kieley acknowledged that, if the challenge to the tribunal's decision on the merits of the **2002 Regulations** complaint relating to the HRBP course did not succeed, then, as well as

ground 6, ground 7 must also fail. That is because the only challenge to the conclusion that the respondent was not in breach of the implied term was by ground 6. So, if that failed, that conclusion would stand, and the constructive unfair-dismissal complaint would have been properly dismissed for that reason alone, regardless of whether the tribunal erred in the manner contended by ground 7.

82. For completeness, however, once again I will consider this ground on its merits.

83. The legal test is well established. If there is a fundamental breach on the part of the employer, it is enough if the employee "resigned in response, at least in part," to that breach (Keene LJ in **Meikle v Nottinghamshire County Council** [2005] ICR 1. Ms Swords-Kieley noted that the tribunal did not address this point in its self-direction as to the law. However, the point is extremely familiar to tribunals and has been reiterated in a number of decisions since **Meikle**.

84. In this case the list of issues correctly formulated the issue as being whether, if a fundamental breach was found, that breach was "a reason" for the resignation. At the start of [122] the tribunal indicated its conclusion that the claimant did not resign "in response" to the alleged breach of the implied term. That language did not betray any error as to the test. The tribunal then went on to make a positive finding as to the reason why the claimant resigned, and then stated in terms that the alleged breach of contract was "not a reason for the claimant's resignation". That phrase again correctly reflected both how the question had been put in the list of issues and the legal test.

85. At the end of [122] the tribunal found that the job offer that the claimant had got was too good to turn down, and that he left "for that reason". At [123] it referred to other findings supporting its conclusion that the claimant did not resign "in response" to the alleged breach – again betraying no error as to the legal test. It then concluded that it was "simply because he found a better job". Reading these paragraphs as a whole, I agree with Ms Swords-Kieley that the tribunal essentially found that there was one reason why the claimant resigned. But that does not mean that it fell into the error of considering that as a matter of law, there *could* be only one reason, nor that, had there been more than

one, the alleged breach would have to have been the sole or main reason. Rather, it recognised that it would be sufficient if there was more than one reason, of which the alleged breach, if found, was one; but it found as a fact that it was not, and that there was in fact, in this case "simply" one reason.

86. Nor did the tribunal err in light of its finding that the claimant had already submitted a grievance, nor by giving inadequate reasons. There may be cases where it is found that the employee felt unable to resign in response to the treatment relied upon until they had secured alternative employment, and that the treatment was still "a reason" for the resignation. But the present tribunal found at [122] that the claimant had, on his own evidence "speculatively changed his LinkedIn status"; and that the offer to which this led was, because of the features the tribunal identified, "quite obviously too good to turn down". These findings sufficiently explained its conclusion that in this case the claimant did not, in fact, resign in response to the alleged breach.

87. For these reasons, even had ground 6 succeeded, I would have dismissed ground 7, and the challenge to the dismissal of the unfair dismissal complaint.

Overall outcome

88. For all the foregoing reasons, this appeal is dismissed.