EMPLOYMENT TRIBUNALS

Claimant: **Dr B Radeljic**

Respondent: **University of East London**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **15-17; 23-24 September 2021 (with the parties)**
12, 18 October 2021; 25-26 November 2021 (in chambers)

Before: **Employment Judge Gardiner**

Members: **Miss M Daniels**
Ms P Alford

Representation

Claimant: Mr M White, counsel
Respondent: Ms J Smeaton, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant has suffered detriments on the ground that he had made protected disclosures, contrary to Section 47B Employment Rights Act 1996.**

2. **The Claimant's resignation amounted to a constructive dismissal, which was automatically unfair contrary to Section 103A Employment Rights Act 1996. The reason for the dismissal was that the Claimant had previously made protected disclosures.**

3. **The Claimant's dismissal was a wrongful dismissal in that the Claimant was not paid the three months' notice pay to which he was entitled.**

4. **The Tribunal has decided various disputed Remedy issues. The parties will be given a period of around two months to attempt to settle the remaining disputes and their financial consequences. If this is not achieved, then the Tribunal will schedule a Remedy Hearing on a date convenient to all, which will be listed at a future telephone case management Preliminary Hearing.**

REASONS

Introduction

1. The Claimant brings a claim for constructive unfair dismissal following his resignation from employment with the Respondent as a Reader. In addition, he alleges that certain incidents in the period leading up to his resignation were detriments for making protected disclosures. He also alleges that his resignation was an automatically unfair dismissal, on the basis that the principal reason for the treatment said to amount to a constructive dismissal was that he had previously made protected disclosures. There is also a wrongful dismissal claim for notice pay. All claims are disputed by the Respondent.

2. In addition to the liability issues, the parties asked the Tribunal to decide matters of remedy with the exception of pension loss. This was on the basis that it would be difficult for the Claimant to attend a remedy hearing given he was about to move abroad; the parties had prepared evidence on remedy issues (apart from pension loss); and it was hoped that the issue of pension loss could be dealt with by written submissions subsequently, if not agreed. As the Tribunal explains below, we have decided the liability issues and the issues of principle arising on remedy issues (apart from pension loss). We have not quantified the non-pension remedy issues, although these should be capable of agreement given our conclusions.

3. The Claimant gave evidence in support of his complaints. For the Respondent the following witnesses were called to provide evidence: Peter Gregory (Director of HR); Andrea Diable (HR Business Partner); Yasmin Miah (PA to HR Director); Professor Verity Brown (Pro Vice-Chancellor (Impact and Innovation)); Suzanne McDonald (School Manager, Royal Docks School of Business and Law); and Dean Curtis (Deputy Vice-Chancellor).

4. All witnesses were cross examined on the contents of their witness statements. The Tribunal was referred to an agreed bundle of documents which included 907 PDF pages. On the second day, the Respondent added further pages by agreement taking the last page to page 912. The bundle contained, at pages [76-83], an agreed List of Issues to be determined. In response to a request from the Tribunal, the Claimant provided clarification in a further written document as to the incidents of breach of the implied term of trust and confidence; and as to the legal obligations that the Claimant believed to have been breached when making the alleged protected disclosures. The List of Issues was subsequently further amended to restrict the breach of contract claim to a claim for notice pay.

5. Numbered references in these Reasons in square brackets are to the corresponding page number of the agreed bundle.

6. Both counsel submitted opening notes at the start of the case. There was also an agreed Chronology and Cast List. At lunchtime on 15 September 2021, Mr White,

counsel for the Claimant, produced a List of Breaches relied upon in relation to the constructive unfair dismissal claim, and clarified the legal obligations relied upon in the protected disclosure claims. After all evidence had concluded, both counsel provided written closing submissions, which they spoke to orally. There was insufficient time for the Tribunal to deliberate and reach a decision on the final day, given that the hearing had been shortened from six days to four and a half days. Accordingly, the Tribunal reserved its decision.

Findings of fact

7. The Claimant is an academic in the field of international relations, specialising in the Balkans. The Respondent is a university based in Docklands in East London. The Claimant's employment with the Respondent started in February 2008. On 30 September 2011, he was promoted to Senior Lecturer. He was promoted again to Reader. We find this was in October 2016, not October 2015, despite the agreement of the parties as to the earlier date. This is because this is the date indicated by the contemporaneous documents at pages 189-191. He had been successful in his promotion application to Reader at the third attempt. When he had made his second application, he had been optimistic that this application would be successful, given the steps he had taken to address the feedback from his first application. However, it was also unsuccessful.

8. The Claimant's hours had increased from an initial 0.6 Full-Time Equivalent (FTE) to full-time hours with effect from September 2014.

9. His contractual terms were as set out in his Contract of Employment. This was updated with effect from 21 January 2013 [109]. The contractual terms referred to the Respondent's grievance policy under the heading 'Grievance'. The heading had equal prominence to items which were obviously contractual terms such as 'Location', 'Pay' and 'Duties and contractual hours'.

10. The Contract of Employment made no reference to the Promotion Policy or to the Staff Appeals Policy. The Claimant's letter of engagement dated September 2011 referred to further contractual terms being included on the HR website [84].

11. The way in which the 'Terms and Conditions' were drafted concluded with the word:

> "Your terms and conditions of employment are determined in accordance with the Articles of Government. Changes to your terms and conditions will be negotiated between the University of East London and yourself or any Trades Union which the University of East London recognises in respect of your employee group. Any changes agreed with the recognised Trades Unions will automatically be incorporated into your contract of employment. Details of the recognised Trade Unions and your other terms and conditions of employment are set out on the HR Services' website at http://www.uel.ac.uk/hrservices "

12. It is unclear whether these documents were included in the HR website. Neither party referred the Tribunal to the HR Services website to argue that there were any other relevant contractual terms beyond those contained in the bundle used at the Final Hearing.

13. The applicable document titled "Procedures for Promotion to Reader or Professor 2018/19" [117] did not specify that it was a contractual document or state that it had been negotiated with the Trade Unions. In his witness statement at paragraph 9 when discussing this document, Mr Gregory does not refer to any consultation with Trade Unions in the run up to the launch of 2018/2019 process; or when discussing whether any lessons had been learnt from the previous promotion process that had taken place.

14. The Promotions Policy is not referred to with the employment contract itself. There is no evidence that the HR website indicated this policy had contractual status. There is no specific evidence of involvement of the unions in creating or reviewing these procedures ahead of the promotion round in 2018/2019 which is the subject of these proceedings. There is no basis within the wording of the contract itself to find that the Promotions Policy had contractual status.

15. The Claimant argues that the Promotions Policy has contractual status as a result of a longstanding custom and practice that it should be followed when considering promotion applications. There is limited specific evidence that the particular Promotions Policy or its predecessors had both been in place in previous years and also that it had been followed strictly as it were a contractual term. There had been a two-year freeze on promotions during 2016/17 and 2017/18.

16. A written procedure set out the process for applying for promotion in 2018/2019, together with a timeline. Applicants were required to prepare a personal statement (known as a case statement), highlighting specific aspects of their CV. In addition, they were required to provide the names of two academic referees; peer to peer reviews of teaching for the past two years, as well as details of their four best articles.

17. The Procedure sets out four stages for considering an application for promotion to Reader or Professor. The first stage, Stage 1, involves the application being considered by a College Panel. The Procedure states that the College Panel will comprise the Pro-Vice Chancellor Dean, two Heads of School, the College Director of Research, the College Director of Learning and Teaching, an HR representative and an external referee. The test for the College Panel to apply is whether there is a "reasonable case for promotion".

18. The Procedure does not require the College Panel to have a subject expert in relation to each of the specialist subjects of promotion candidates. It does require the College Panel to seek, via the Head of School, two additional external referees who are the subject/discipline specialists from a list of names provided by the candidate's Head of School [118]. The Head of School at the time was Dr Carrie

Weston. The Respondent argues that the procedure is potentially ambiguous as to whether this step is to be taken by the College Panel or at the next stage. We find that the wording of the Procedure envisages that the views of two external referees will be sought at Stage 2 [128], after the College Panel has decided whether to advance the application at the College Panel stage (Stage 1), although we agree that the wording is not as clear on this point as it should be. It is certainly capable of being read as requiring that the external references from subject/discipline specialists are to be considered at Stage 1.

19. At the second stage, references will be requested from the external academic referees nominated by the candidate and from referees independently recommended by the Head of School. It follows that references supplied by the candidate will not be taken up by the College Panel but will feed into the later University Panel stage.

20. At the third stage, those candidates put forward from the College Panel will be considered by the University Professorship and Readership Panel. The Procedure provides that this University Panel is to be chaired by Vice Chancellor or Deputy Vice Chancellor. This Panel is told by the Guidance to "interpret their terms of reference widely and in full generality in order to safeguard the reputation of the University and also the standing of its Professors or Readers as persons of outstanding academic achievement".

21. The fourth stage is that successful candidates will normally receive written confirmation of the Panel's decision within seven working days of the final meeting. Promotions were stated to take effect from 1 May 2019.

22. Paragraph 4.5 specifies four criteria for promotion to Professor, listing the detailed factors that should be taken into account in relation to each application, spanning four pages in total. The four criteria are:

    (1) Contribution to research and scholarly activity
    (2) Contribution to knowledge transfer, enterprise and innovation
    (3) Contribution to learning and teaching
    (4) Contribution to administrative/academic management

23. Paragraph 4.5.1 states that "successful applicants will need to demonstrate evidence of excellence in at least one of research and scholarly activity, knowledge transfer, enterprise and innovation, learning and teaching and administration and academic management. Paragraph 4.6 is worded as follows, with the text in bold below also in bold within the Promotions Policy:

> "The above lists are not intended to be exhaustive and may vary depending on the applicant's discipline. **It is important to bear in mind that the Panel may promote someone to Reader or Professor only on their contribution under (A), (B), (C) or (D) above, or a combination of two or three of those categories."**

24. Paragraph 4.7 states that "in assessing academic achievement it will be important to determine the professional standing of the individual nationally and internationally and the individual's specific contribution where there has been collaboration with others".

25. Paragraph 7.4 provides as follows:

> "In conferring the title of Professor, regard shall be had to the person's proven standing in the relevant subject or profession, as established by outstanding contributions to its advancement through publications, creative work, clinical activity, public policy or other appropriate forms of scholarship, and through academic leadership and teaching development. Other contributions to the work of UEL, learned societies and other relevant bodies will also be taken into account".

26. By way of contrast to the criteria for advancement to Professor, paragraph 7.5 is worded "In conferring the title of Reader regard shall be had to the person's proven standing in the relevant subject or profession as established by contributions which are significant and judged to hold very considerable promise".

27. The Procedure made it clear, at paragraph 6.2.4, that the decision to confer the title of Professor must be unanimous and that the decision of the University Panel "shall be final". The implication was that there was no right of appeal. There is nothing expressly stating that there is no right of appeal against a refusal to put a candidate through at Stage 1, the College Panel stage. Nor is there anything saying that candidates had a right to receive feedback if they were rejected at College Panel stage. It was only at the University Panel stage that the procedure stated that "unsuccessful candidates will be given detailed feedback on request by a member of the Panel".

28. The Promotions Procedure provided that when referees were contacted by HR Services, the letter would "refer to the UEL criteria for promotion to Reader and Professor", and would "enclose a copy of the candidate's CV, personal statement, publication list and the criteria for promotion".

29. The Grievance Procedure provided that a formal grievance would not normally be accepted where no prior attempt had been made to resolve the issue through informal means "unless there is a strong reason for doing so". The Grievance Procedure added that it is recognised that "for some issues, commencing at the formal stage of the grievance process may be appropriate."

30. Under the Grievance Procedure, the Respondent's HR Director was given specific roles and responsibilities. The Procedure stated he could be consulted by both parties for advice and may be asked by a manager involved to attend a formal grievance meeting. Prior to proceeding to a formal stage in the Procedure, he would ask the staff member raising the grievance if he or she wished to use mediation as an alternative to proceeding with the next formal stage. If mediation was accepted, then it was for the HR Director to assign a mediator.

31. Where there is a formal grievance, the Grievance Procedure specified that, at Stage 1, there should be a meeting held with the immediate line manager to discuss the grievance and the available evidence, together with a written outcome. If the employee was not satisfied with the outcome, there was the right, at Stage 2, to a meeting with the Dean of School or Director of Service. Following this meeting the member of staff would be notified as soon as possible of the outcome to the meeting. If the employee remained dissatisfied with the grievance outcome, they could submit an appeal to the Respondent's Appeals Panel.

32. The Grievance Procedure stated that it was important that grievances, at any level, were investigated expeditiously and without undue delay. The procedure specified time limits for each element of the formal procedures "to ensure prompt decisions and are in the interests of both parties". It goes on to say that "time limits may be modified by mutual agreement". The Procedure specifies that grievances should be acknowledged in writing within 10 working days and those lodging a grievance should be invited to a meeting as soon as possible. The written outcome should "normally" be provided within ten working days of the meeting. Where this cannot be done the delay should be explained and the employee told when a response can be expected. This is referred to as Stage 1. Second grievances to the Dean of School or Director of Service at Stage 2 should be lodged within ten working days, and similar timescales apply to the date for notifying arrangements for the meeting and for the written outcome following the meeting. If dissatisfied with the outcome at Stage 2, then there is a further ten working days to seek a review of the grievance at Stage 3. This is also described as submitting an appeal to the UEL Appeals Panel.

33. The Grievance Procedure made it clear that where a grievance is raised against an immediate line manager, then that line manager will only take part in the formal process where it is appropriate for them to do so as a witness. Appendix A set out the parameters for a meeting held at the informal stage. Essentially it is the immediate line manager's role to act as an informal mediator, seeking to resolve a dispute between the person bringing the grievance and the person against whom the grievance was brought. Appendix D is worded as follows:

> "If the Grievance is against a Dean of School or Director of Service and it was not resolved to the staff member's satisfaction at the informal stage, the staff member may proceed to Stage 3 by completing the UEL Appeal Form (above) and sending it to the Director of HR Services …"

34. The Grievance Procedure attaches a document headed "Formal Grievance Form" for use in instigating the grievance, and an Appeal Form for appealing against a Stage 2 decision of the employee's Dean or Director.

35. The Tribunal was not shown any separate whistleblowing policy setting out the procedure for employees to take if they chose to make a protected disclosure. This implies that the Grievance Procedure appears to be the only formal procedure for raising wider concerns.

36. As already stated, the Grievance Policy cross refers to the Staff Appeal Policy. Regulation 1.3 of the Staff Appeal Policy describes an appeal as a review of "the case previously presented under the relevant staff policy … which is intended to establish whether the conduct of the process was fair and had been conducted properly, and that the decisions made were not the result of perversity of judgment in the face of the evidence presented". Regulation 1.1 makes it clear that it only applies to staff policies and procedures that explicitly include an appeal stage. Regulation 2.2 makes it clear that it includes appealing against the outcome of a grievance. Under the initial review process in Regulation 3.1, the member of the Board of Governors should consider whether the case meets the criteria for appeal in Regulations 1.3 and 1.4. If the criteria were not met the person bringing the appeal will be told this. If the criteria are met, then an Appeal Panel will be convened comprising three members drawn from the permanent members of the Board of Governors' Appeals Committee.

37. On 7 December 2018, the Claimant applied for promotion enclosing a Case Statement, CV (which included details of the Claimant's four best articles), a List of Referees, two student evaluations and two peer enhancements [192]. On 10 December 2018, Yasmin Miah confirmed that she had received the Claimant's application and supporting documentation.

38. As already stated, the first stage in considering the Claimant's application was for it to be considered by a College Panel. This was scheduled to meet on 11 and 12 February 2019 and be chaired by Annette Cast.

39. On Thursday 31 January 2019, Suzanne McDonald emailed the Claimant's nominated referees asking for references. As the Claimant's application had yet to be considered by the College Panel, the Promotion Procedure did not provide for references to be obtained at this stage. The reference request attached the Claimant's CV. Contrary to what was stated in the Promotions Procedure concerning the information to be provided to referees, it did not specifically attach the selection criteria for the role or include the Claimant's Case Statement. Ms McDonald asked for the referee to comment on the Claimant's suitability based on five factors. Mistakenly it referred to the Claimant as applying for the role of Reader (when this was obviously an application for promotion to Professorship), and misgendered the Claimant by asking for comments about "her suitability". The five factors were not the same as the selection criteria being applied under the Promotions Policy. The reference request asked for a response by Monday 4 February 2019. This gave the referees only two working days to provide their feedback.

40. The emails sent to the Claimant's referees were not seen by the Claimant at the time. One of the referees responded on 2 February 2019, seeking clarification that the Claimant was applying for a role as Professor rather than Reader. At 08:54 on 4 February 2019, the deadline day for returning the references, the referees were told that the Claimant was applying for promotion to Professor, not to Reader.

41. On the same day, at the instigation of Peter Gregory, Yasmin Miah wrote to Suzanne McDonald, telling her that they had decided to hold off obtaining any references at the moment until each of the College Panels had met and gone through the shortlisting process. References already received would be held on file and would be referred to the University Panel considering the promotion applications. The Tribunal notes from this email that there had been a degree of confusion within the Respondent as to the appropriate stage for seeking references from referees nominated by candidates. It does not appear to the Tribunal that candidates were ever told that references required with the tight timescale would not in fact be considered by the College Panel. The Claimant only knew that his references had not viewed by the College Panel.

42. On 3 February 2019, the Claimant emailed Greg Price, Senior HR Manager, to request a meeting, to discuss his concerns that the Respondent's promotion policy was being breached. We accept the Claimant's evidence that there was no response to this request from Mr Price.

43. The Claimant's referees both provided their references for the Claimant in accordance with the tight deadline they had been set, namely 4 February 2019. One reference came from a Professor at King's College London. The other came from an academic at the University of California, Berkeley.

44. In the absence of a response from Mr Price, on 8 February 2019 the Claimant emailed David Douglas, Employee Relations Manager, requesting clarification of the matters where he had raised concerns. This led to a face to face meeting with Mr Douglas on 20 February 2019. The outcome was that Mr Douglas said he would speak to Dr Weston suggesting a meeting between the Claimant and Dr Weston.

45. There were seventeen applicants for the College Panel to consider at their meeting on 11 February 2019, including five applying for the position of Professor. As well as the Claimant, Dr Carrie Weston was also one of the candidates applying for the role of Professor. In her role as Head of School, she also sat on the College Panel, although she recused herself when her own application was being discussed.

46. The College Panel meet on 11 and 12 February 2019. The Claimant was not aware of the dates of this meeting at the time. The Panel was expected to complete a Professors Promotion feedback sheet at the conclusion of their meeting. This required comments under various sub-categories in relation to each of the four criteria. The only feedback provided in relation to the Claimant's application was in relation to category A, Contribution to Research and Scholarly Activity where the feedback form recorded "Lots of good quality research but not enough research informed teaching. No recent grant funding". There was no feedback whatsoever in relation to categories B, C and D. The overall comment was "This candidate scored lower than others being considered. Not recommended at this time. Still has stretch targets at Reader level".

47. The Tribunal notes that the overall comment made a comparison between the Claimant and other candidates, even though there was apparently no cap on the number of candidates that could be referred to the University Panel. The feedback form did not record the scores achieved by the Claimant against each of the criteria.

48. The College Panel provided more extensive, though still rather limited, comments in relation to two candidates whose applications were advanced to the University Panel Stage [227] [228], and in relation to two other unsuccessful candidates [226] [229].

49. On 20 February 2019, the Claimant spoke to Dr Weston in the corridor, to seek feedback on the current position in relation to his promotion application. According to the Claimant, Dr Weston said that the Claimant should approach Ms Cast (who was the chair of the College Panel).

50. The Claimant did not receive any specific feedback from the Panel following the College Panel meeting. Nor did he have sight of the feedback form at the time.

51. On 21 March 2019 Peter Gregory informed all candidates that there was a delay in processing applications and the hope was that candidates would be notified no later than 1 April 2019.

52. On 3 April 2019, the Claimant chased for an update [249]. He wrote: “there is a rumour going around these days that one of the applicants is supposed to sit on the panel – do you know anything about it?”.

53. On 4 April 2019, Yasmin Miah told the Claimant that there had been a further delay and it was hoped that notifications would be out “by Friday this week”. The email sought to address the Claimant’s concern about the composition of panel. In terms of its wording, it assumed that the Claimant’s concern related to the composition of the final panel. It stated: “Having an applicant sit on the final panel undermines the whole promotion process, and therefore is not a step that the University would take”.

54. We find that the Claimant and Ms Miah were at cross purposes – the Claimant was referring to the College Panel but Ms Miah assumed wrongly he was referring to the University Panel, which had met by that stage to discuss those candidates submitted by each of the three Colleges. As a result, the Claimant sought further clarification – “sorry to be a pain but does this also apply to the interim panel?”.

55. Ms Miah responded to assure him that each promotion application would be assessed on its own merits. “No one has been or will be involved in any panel discussion related to their application”. This wording implied that the College Panel had already met. The Claimant made a further request for clarification: “Are you trying to say (1) that there was NO applicant present on the interim panel or (2) that there was an applicant present on the interim panel who did not judge their own

application, but judged other applications?". Ms Miah did not engage further in this email discussion. She wrote that "it may be best for you to meet with [Mr Gregory] who will be happy to answer your queries". The Claimant thanked her for the offer but wrote he would "appreciate to receive [Mr Gregory's] response in writing". Ms Miah maintained the same line in her response – "[Mr Gregory] had suggested he is happy to meet with you in the first instance to fully understand the query. Following on from that, he will then be happy to put in writing the answer to your query".

56. The Claimant made a further attempt to obtain a written response to his concern, in an email dated 8 April 2019: "Has a fellow applicant for promotion service as a Panel Member at ANY stage of the 2018/2019 Promotion Round? This pertains to applications for their own promotion AND/OR other applicants' promotion.". Not receiving any response from Ms Miah, he sent a chasing email on 17 April 2019 and a further email on 29 April 2019, which he copied to Mr Gregory. This elicited the following one-line email from Ms Miah: "I can confirm receipt of your emails sent below". There was no further reference to the promised meeting with Mr Gregory to discuss the Claimant's concern.

57. In the meantime, on 5 April 2019, all candidates including the Claimant were told by email that there had been a further delay in the processing of all applications. The email stated that the Respondent anticipated coming back to the candidates with a decision as soon as they could. No deadline was provided as to when the result would be announced, and no explanation given for the delays that had taken place to date.

58. None of the Respondent's witnesses provided a clear explanation as to why there was a significant delay in providing an outcome to a process which had been scheduled to conclude by 28 February 2019, at least in relation to the College Panel stage.

59. On 9 April 2019 the Claimant self-referred to Occupational Health with mental health issues. He met with Occupational Health on 15 April 2019.

60. We find that the Claimant considered that Mr Gregory was reluctant to address his concerns, and specifically that Mr Gregory was reluctant to put in writing a response to the Claimant's query. This was a reasonable reaction from the Claimant, given the Respondent's failure to answer the question he was repeatedly asking or explain clearly why this question could not be answered. We do not accept Ms Miah's explanation that she was on holiday during the period by way of satisfactory explanation for the delay in responding to the Claimant's queries. It appears from documents in the bundle she was emailing others on 10 April [240], 12 April [239], 15 April [238] and 29 April 2019 [242]. Had she been on holiday on a day when she was emailed by the Claimant it is likely that it would have generated an out of office auto reply email. No such email features in the bundle.

61. During the course of the evidence, it was suggested that the reason why there was a reluctance to respond to the query was because it concerned a confidential matter, namely the identity of a fellow candidate during the same promotion process. If this was so, then this explanation could have been provided in writing by way of prompt response to the Claimant's query, if this had been the only basis on which the query was being ignored.

62. On 29 April 2019, the Claimant received an email from Ms Miah, which ended "Kind regards, Peter Gregory". It informed the Claimant of the outcome of the promotion process. He was told that "the panel" spent some time considering it, without specifying whether this was the College Panel or the University Panel. He was told his application for promotion to Professor had been unsuccessful. No specific reason given in the email. He was offered feedback from Carrie Weston in her role as College Dean of Professional Services. The Claimant was dissatisfied with this outcome to his application.

63. On 20 May 2019, in an email to Mr Gregory, the Claimant asked for feedback as to the reason why his application was unsuccessful. He stated that he would like this to be from someone other than Carrie Weston. The Claimant was not alone in requesting feedback where candidates had been unsuccessful. Professor Brown accepted in her oral evidence that 20-25 people across the university were dissatisfied that their promotion applications had been rejected at the College Panel stage, although she added that some of these accepted the outcome after receiving feedback.

64. On the same day, Mr Gregory asked Verity Brown to provide the Claimant with feedback. Professor Brown had not been on the College Panel which had considered and rejected the Claimant's application. She agreed to do this, asking Mr Gregory to provide her with the names of the external referees.

65. Ms Miah told her that no external referees had been obtained. She did not tell Professor Brown that two external references had been obtained from referees nominated by the Claimant.

66. At this stage the feedback requested and offered by Mr Gregory was feedback on why those members of the College Panel were not sufficiently persuaded to submit the Claimant's application to the University Panel. It was not expressed to be an independent evaluation of the potential strength of his application.

67. On 21 May 2019, the Claimant had a meeting with Professor Brown to receive feedback on his unsuccessful promotion application. Professor Brown did not keep a contemporaneous note of what was discussed. The closest record of the content of this meeting is the Claimant' reference to it in his grievance lodged on 24 May 2019. There is a factual dispute as to whether Professor Brown had spoken to any of the panel members before the meeting took place. In her oral evidence (though not in her witness statement) Professor Brown claimed that she had. We reject that evidence. We find that Professor Brown had not spoken to any of the members of

the College Panel in advance of the meeting. Had she done so she would have mentioned this during the meeting. Such a comment from Professor Brown would have been recorded when the Claimant set out a detailed account of the meeting the following day. As a result, Professor Brown was not in a position to provide any direct feedback as to the basis on which the application had been refused.

68. At the outset of the meeting, the Claimant expressed his frustration at the lack of response from HR to the concerns he had been raising about a potential conflict of interest. He told her he had been "blowing the whistle" on this conflict of interest, because Dr Weston had both applied for promotion herself and served on the College Panel. During the meeting, Professor Brown showed him a spreadsheet on her computer screen. This was the spreadsheet compiled by the College Panel recording their comments on his application, as detailed above. Professor Brown told him she did not have his references but had read his 13-page Case Statement. She told him he could have distinguished between the achievements that had led to his Readership promotion and those that had occurred since. The Claimant responded that this distinction was obvious when reading both the Case Statement and the CV.

69. There is a further dispute as to whether Professor Brown expressed any views as to the merits of the Claimant's application during the course of this meeting. The likelihood is she said words to the effect "I can't see any reason why it did not go forward". The Claimant took from this that she was recommending he should be put forward to the University Panel. He did not necessarily pick up the nuance in the phraseology used and so took it that she was supporting his application to proceed to the panel. The Claimant told Professor Brown he was about to lodge a grievance about the way in which he has been treated.

70. The whole purpose of the meeting was to provide him with feedback. Yet Professor Brown did not have any feedback from the Panel as to why his application did not proceed. She did not even promise she would take further action after the meeting to obtain such feedback. That is likely to have frustrated the Claimant in undermining his trust in the Respondent, given that providing him with feedback was the very purpose of this meeting.

71. The Claimant's union representative, Abigail Jackson, lodged the Claimant's grievance on 24 May 2019. It was expressed to be against Peter Gregory and the Promotions Panel of the College. The Claimant rehearses the background, emphasising his "overwhelming fear that [his] contract was being breached". The Grievance had two aspects. The first was in relation to his MSc International and Comparative Public Policy course, which had apparently not been advertised on the website for a period of around a month. His complaint was that Dr Carrie Weston had been the person, he believed, who had authorised the removal of this course, even though she had denied any knowledge when the Claimant had spoken to her about it. By way of comment on this aspect of his grievance, the Claimant stated in his witness statement, that this incident caused him to question her integrity. The second aspect of the grievance related to the promotion

application process. It emphasised the tight deadline given to referees, the fact that the reference request was wrongly expressed to be for a reference for his promotion application to Reader, the fact that referees were not sent his personal statement or "any other documents", and the fact that when the Claimant had raised his concerns about the process, copying in Dr Weston, "she never responded or commented on the issues that were raised". He referred to a rumour that Dr Weston had applied for promotion herself as well as serving on the College promotion panel considering promotion applications. He then set out in some detail, by way of further complaint, the lengthy email exchange with Yasmin Miah and Peter Gregory referred to above. He concluded his grievance by referring to the feedback meeting with Professor Brown, in which he believed she had told him that there was no obvious reason why his application should not have been put forward to the University Panel.

72. He listed three outcomes he was seeking from the grievance [264]:

1. Reconsideration of my case for promotion to Professorship (and by a panel consisting of members at professorial level and a subject-area specialist, should a new evaluation be required);

2. Revision of HR Procedures for Promotion to Reader or Professor (including consultation with all members of staff about the process, so that greater transparency and accountability will be ensured);

3. Development of a precise Academic Promotion Appeals Procedure.

73. The second and third outcomes extended beyond his personal position. This was because around this time, the Claimant was learning that others were also dissatisfied with how their promotion applications had been handled. In his witness statement, the Claimant named eight other academics who told him they were dissatisfied with the 2018/2019 promotion round. According to the Claimant, one of these, JF, also lodged a grievance about how they had been treated. The contents of that grievance were not in the papers before the Tribunal.

74. The Respondent emphasises that none of these outcomes seek an acknowledgement of alleged failings or an apology for the same. That said, with the body of the grievance, the Claimant was asking the Respondent to determine various alleged procedural failings in his case as the basis for the Respondent revising the HR procedures more generally.

75. There is no evidence in the bundle that the Claimant was sent an acknowledgement that his grievance had been received.

76. The Claimant and Mr Gregory met on 14 June 2019. This meeting was also attended by the Claimant's trade union representative, Abigail Jackson. Rather curiously, it was not referred to at all in Mr Gregory's witness statement. No notes were made of what was discussed at the meeting. The reason for the meeting, as

understood by the Claimant, was that this was the informal stage meeting contemplated in the Respondent's Grievance Procedure. The Claimant's evidence, which we accept, is that Mr Gregory focused during this meeting on the promotion aspect of the grievance and did not discuss any of the other matters.

77. Following this meeting, there was no written communication from Mr Gregory summarising his understanding of the status of the Claimant's grievance. There was no communication from the Claimant withdrawing his grievance. We accept the Claimant's evidence (at paragraph 67 of his witness statement) that he continued to maintain to the Respondent that the other aspects of his grievance should still be considered.

78. Around this time an ad-hoc process was devised and offered to the Claimant in which he could appeal against the decision to refuse to refer his application to the University Panel. This prompted a series of questions from the Claimant's union representative, which was answered by Professor Brown in an email on 17 June 2019. She said that:

> "The initial consideration of an appeal will be by a sub-set of the promotions panel: me (PVC, Impact & Innovation), Peter Gregory (HR) and Amanda Broderick (VC&P), and other relevant members as required. External assessors are not consulted with respect to deciding whether a case has been made that there are grounds for appeal. This is because having grounds for appeal is not an academic judgment. Furthermore, it has no bearing on the merits of the case for promotion … In the event that an appeal is upheld, the process followed will be shaped by the particular circumstances of the appeal. Nevertheless, there will be a reconsideration of the potential impact on the decisions made and decisions will be revisited, with appropriate consultation, externally if necessary. In the event that a decision is reversed, the revised decision will be implemented as if it had been the original decision (ie there will be no detriment to the candidate). The candidate will be kept informed of the process."

79. In accordance with this ad-hoc appeals process, the Claimant decided to lodge an appeal against the rejection of his promotion application. He was not told that by so appealing, it would be deemed he was withdrawing his grievance. This was lodged on 20 June 2019. In his appeal, he repeated many of the criticisms made about the promotion procedure in the original grievance. He said that the appeal "follows on from my formal grievance which was filed on 24 May 2019" [273-274] and attached that grievance in an appendix to his appeal. He did not say that he was withdrawing his grievance. This grievance therefore remained live and required resolution in accordance with the Respondent's grievance procedure to the extent to which it was not considered as part of his 20 June 2019 appeal.

80. On 2 July 2019, Professor Brown emailed the Claimant telling him that his appeal had been partially upheld. She explained that the basis for partially upholding the appeal was the second point made in his appeal email, namely that referees had

only been provided with part of the information that the procedure required. She did not provide any response to the other points in the appeal letter, which were unaddressed. In oral evidence before the Tribunal, Professor Brown stated that her email was wrong. Point 2 was not the reason for upholding the appeal. The real reason for upholding the appeal was a point not made in the appeal letter, namely the failure to provide the Claimant with proper feedback.

81. By way of resolution, she proposed the following [276]:

> "I think the more logical thing to do would be seek an external review of the case for promotion — more than a referee, someone to read and consider the case and provide detailed feedback to you and the panel so we can make a decision based on that. This means I need some names I can approach to ask for this. Can you give that some thought and let me know? Ideally, these would be people of international standing — e.g., FBA or equivalent."

82. The Tribunal note that the stated purpose of the review was to provide detailed feedback "so we can make a decision based on that". From the preceding phrase in her proposal we deduce that the "we" is "the panel". It is not clear whether this was the sub-set of the promotions panel, or the promotion panel itself. The decision that this panel would be making was not stated in this communication – whether it was a decision on promotion itself or a decision on whether the Claimant's application should be referred for more detailed consideration in some other format. In the light of the oral evidence from Professor Brown, the Tribunal considers that this communication was misleading. At most, the process followed in relation to the Claimant and others was designed to provide evidence to persuade a reluctant Vice-Chancellor to agree to reconstitute a promotions panel. The true purpose of the ad-hoc process was not made clear to the Claimant at the time.

83. On around 7 July 2019, the Claimant emailed Professor Brown with the names of five potential subject specialists that the Respondent could approach for a reference. The Respondent initially approached two of the names provided, one at Regent's College and the other a different academic at UCL Berkeley. There is no indication in the covering emails that these referees were provided with the Respondent's specified criteria for promotion. These two individuals provided references within the required timescale.

84. On 14 August 2019, the Claimant chased for a response. He was told by Yasmin Miah that Mr Gregory was on leave and "we should be in a position to update you more over the next couple of weeks". She apologised for the time it had taken thus far.

85. By 19 August 2019, the Respondent had decided to follow a different process, by commissioning its own choice of independent assessor to assess the strength of the Claimant's work. No explanation has been given as to why the Respondent was now amending the process identified by Professor Brown in her email of 2 July 2019.

86. On 19 August 2019, Professor Brown contacted a former colleague at the University of St Andrews, where she had previously worked. This person was asked whether the Claimant had the professional standing to merit the title of professor. The person was asked whether the Claimant's scholarly outputs were of international standing and whether his research was at the forefront internationally. They were also asked to comment on whether the Claimant was making a significant contribution to the discipline through his leadership, teaching and mentoring. They were asked to comment on whether this application for professorship "would be likely to succeed in his own institution" ie St Andrews University [284]. Along with the covering email, the Professor was provided with the Claimant's CV, his case for promotion and the two references that had recently obtained from Regent's University and from UCL Berkeley. Professor Brown did not attach the Respondent's Promotions Criteria, which she justified in her evidence on the basis that the criteria for promotion to Professor was very similar across the higher education sector. The Tribunal notes that the Respondent was following its own ad-hoc procedure at this point, and therefore a failure to provide the criteria for promotions at the Respondent was not an express breach of any published procedure. She did not attach the original references obtained on 4 February 2019, although did include the names of the Claimant's original referees.

87. On 23 August 2019, Professor Brown told the Claimant that an assessor had been identified but did not name that person. She told him that she hoped to get the assessment by the end of September [285].

88. The Tribunal considers that the questions asked of this Professor were surprising. The Professor was not in a strong position to comment on the Claimant's leadership, teaching and mentoring, having never seen him engaged in these activities. Whilst they could comment on whether the Claimant might secure promotion at St Andrews, this was not the same benchmark that would necessarily apply to the Claimant's application for a position of Professorship at the Respondent, given the different academic standings of the two institutions. As shown by a printout from the Guardian's University League table for 2019, St Andrews was ranked third in the League Table. The Respondent was ranked 88th in the same table [773].

89. In response, the Professor set out his views as follows:

> "Thank you again for thinking of me.
>
> I confess, in order to be helpful, that I am rather torn on this matter, and have reflected at some length on it. I have read the supporting materials and among other points, gather a sense of wan ng to move this application forward.
>
> If that is so, I wish not to be contrarian, and perhaps would suggest other external reviewers be consulted. The first that comes to mind is, if not the doyen, then certainly an outstanding and universally-cited scholar of Balkan history and politics, Professor Sabrina Ramet.

You ask about comparison to St Andrews. I address this with, inter alia, having been asked to provide written assessments of promotion applications within St Andrews (including to Chair), and as external assessor across the EU and North America. This had included for the Chair in Central and Eastern Europe and Eurasian studies.

Frankly, I cannot see how this application would secure a Professorship.

Some reasons, but not exclusively, include:

- the presence of only one monograph – we would expect far more, even if the one was recognised as a seminal work

- other works that are edited (and I say that as a supporter of edited books, if done well)

- many publications that are in low-ranking journals (and I am not a proponent of metrics and supposed journal prestige); but major journals seem to be missing, as evidence of the ability to transfer areas studies to disciplinary journals (as is very much expected in our School)

- many of the publications (too many to count) are in fact book reviews

- the service seems to be (as a referee noted also, if positively) that of being on committees. Is there evidence of some significant contribution, of some distinct leadership? The latter has of course been an express part of professorial applications and interviews at St Andrews.

- how much do grants matter? Their absence may not, if there are world-leading and seminal publications.

- the application, and references speak to teaching. Great. Is that sufficient, particularly in view of the above questions?

Forgive this frankness – but I see no other way of answering your question.

If it is that the momentum is for promotion, could I suggest that my views be discounted, and someone like Professor Ramet (an American, with decades-long experience of international academia, and of the Balkans particularly) be asked to give a view.

I would also wonder if we want not to disclose, or take any further, this assessment.

I apologise if I make matters complicated but, as said, I am not certain how else to answer this properly.

Thank you (nevertheless) for thinking of me. I remain honoured."

90. By 31 August 2019, Professor Brown had decided that the Claimant's challenge to the outcome of his promotion application would be rejected. In her response to the academic at St Andrews on that date, she wrote "Obviously, people do not like to receive disappointing news, but it is easier to take if you have feedback from someone who is respected and a known authority. This application had been rejected, but on the advice of someone whom the applicant felt was not qualified to judge. I assured him that I would consult someone who definitely was and, even if the decision was not overturned (which I warned was a possibility) he would at least have feedback he could trust to enable him to improve his application".

91. On 18 September 2019, the Claimant was informed of the outcome of this process in an email from Yasmin Miah, again written by Mr Gregory. Before quoting from what the academic had said in his assessment, it stated "We identified a highly experienced and well respected academic in the same field as yours, and we have now received his feedback. Whilst he does not consider you are ready for promotion at this time, he has made a number of constructive comments which we trust will assist you to achieve the level required to reach Professorship … I am sure Verity will be happy to debrief you and provide further advice on how you can achieve your goals". The clear inference from the last sentence quoted was that the Claimant's promotion application would not be reactivated, although this was not stated expressly. With this email from Mr Gregory, the Claimant was not sent the questions that had been asked of the academic, nor was he sent the part of the academic's response commenting on whether the Claimant would secure a Professorship at their institution.

92. The following day, the Claimant asked a series of questions in his response, including asking for the name and affiliation of the external assessor. Mr Gregory replied, described him as a professor, in the UK system, at a 'top' university. "I selected them because of their eminence and because they have published in a similar field … if you insist, you are of course entitled to know who it is, but I hope you will give it some thought and reconsider the request". The Claimant repeated his request for the academic to be identified. Mr Gregory asked him to bear in mind that "the reviewers and external assessors are not the one who make promotion decisions – they are the experts who are invited to give advice to the panel. The panel decides which advice to heed". Again, he did not identify the panel that had made the promotion decision in the Claimant's case.

93. We reject Professor Brown's assertion in her witness statement that she was hoping for a ringing endorsement from the St Andrews academic. The way that her initial email to that person was framed asking whether he might be promoted to Professor at St Andrews, coupled with the wording of her response, both indicate that she was expecting that the Claimant would not be endorsed by her former colleague. It is not true to say the academic at St Andrews was "quite clear" that the application did not merit professorship. Had this been so, he would not have suggested that a second opinion be obtained from the Balkans expert cited in the email. Professor Ramet. Professor Brown has not provided any good reason why she chose not to contact Professor Ramet. The Claimant was confident that had

this step been taken, Professor Ramet would have provided a strong endorsement of his suitability to be a Professor, given that Professor Ramet had invited the Claimant in 2016 to serve as a PhD external examiner in Norway. We find that Professor Brown's original scepticism about the merit in the Claimant's application was confirmed by the view of the academic from St Andrews. She saw the comments as potential material she could use to explain to the Claimant why his original application was unsuccessful.

94. We reject Professor Brown's explanation to the Claimant that the decision not to progress the application was that of "the panel". There is no evidence that any panel was reconvened to make a decision in the light of the advice from the St Andrews academic. Had that been done, the decision is likely to have been minuted. At the point when the request was made of the St Andrew's academic Amanda Broderick, the Vice Chancellor, was still opposed to reconstituting the promotion panel. As Professor Brown herself commented in a later email sent to Mr Gregory on 8 October 2019, "I sought additional feedback for this applicant, but *this did not offer a possibility of promotion* because feedback from an external expert is not the same as a decision to promote, which can only be taken by a panel chaired by the Vice Chancellor" [426] (emphasis added). Further, the purpose of seeking the view of the assessor was not to assess the fairness of the Respondent's processes, but to comment specifically on the merits of the Claimant's application in order to provide the Claimant with more detailed feedback.

95. Following this email exchange, it was agreed that Professor Brown and the Claimant would meet on 20 September 2019. In advance of the meeting taking place, at 09:04 on 20 September 2019, the Claimant was emailed by Ms Miah who told him that she had contacted the Claimant's named referees. She added she had sent across his full case statement and CV. By implication, she had not sent them the Respondent's criteria for promotion.

96. At the meeting on 20 September 2019 the Claimant repeated his criticisms of the process the Respondent had chosen to follow, criticising in particular the failure to contact Professor Ramet to ask for further information about his abilities.

97. Shortly after this meeting, the Respondent decided that it would be appropriate to reconstitute a full panel to consider the promotion applications from six candidates who had previously been unsuccessful. The Tribunal finds that, by this point, Amanda Broderick had been persuaded in the light of the apparent strength of other applications that this change should be made to the normal annual process for considering promotion applications.

98. On 25 September 2019, unaware that the Respondent was about to reconvene a promotions panel, the Claimant chose to lodge an appeal against "against the poor handling of the 2018/19 promotions round and the rejection of his promotion to Professor". In so framing his appeal, he was asking that it cover the same ground as his original grievance, even though it was not expressly brought under the grievance procedure. We reject the Respondent's contention (closing submissions

paragraph 77) that this was not a request for his underlying complaints to be addressed separately. If (which we do not accept) the scope of the appeal was unclear within the document itself, the Claimant subsequently clarified that it was also raising concerns about the procedure followed, as explained below.

99. This appeal was sent to various individuals, including Peter Gregory. The Claimant considered he was lodging this appeal under the Staff Appeal Policy. With his covering email he included an appeal notice and case for appeal, which included his original grievance, his original appeal against the refusal of his promotion application, several emails during the period from 20 June 2019 to 20 September 2019, his CV, his original case statement, the two references that were obtained in July 2019 as part of the ad hoc review, and some further documents described as module evaluations and peer enhancement.

100. The appeal letter stated that the 2018/19 promotions process has raised serious concerns regarding fairness and equal opportunities at the Respondent. He mentioned that the way he felt he had been treated had impacted on his health. His request at the conclusion of his appeal letter was that the Respondent reconsider the decision with regard to his case for promotion "under mutually agreed terms". He said that he hoped the situation could be resolved internally, avoiding the need for legal action.

101. The same day, Professor Brown phoned the Claimant informing him that there would be another Promotions Panel. She attempted to persuade him to drop his appeal and focus on persuading the Promotions Panel that he should be promoted. The Claimant indicated he wanted to pursue his appeal.

102. On 3 October 2019, the Claimant and others were informed that a University promotion panel would be constituted to consider their applications for promotion. As far as was possible, those on the panel would not be those who had previously considered the Claimant's application. The panel would be chaired by the Vice-Chancellor as the head of the Respondent's institution. Mr Gregory added the following:

> "The panel's decision will be binding and will mark the end of your appeal. If you agree that this is a fair and transparent process and are prepared to accept the decision of that panel as final, your application will be taken forward. I would therefore be grateful if you could confirm to me your agreement to these conditions."

103. In responding in this way, Mr Gregory appeared to be accepting that the Claimant had lodged a valid appeal. He was suggesting a route which if the Claimant accepted, would bring his appeal to an end. This was not an unconditional offer, but an offer that required that the Claimant drop his criticisms of the promotion process.

104. The Claimant did not hear back from Mr Gregory specifically in relation to the status of his pending appeal. As a result, he re-sent the appeal on 3 October 2019 by

email and in hard copy. On 8 October 2019, still awaiting any response to his appeal, the Claimant chose to email Dean Curtis (Deputy Vice Chancellor) and Ian Pickup (Pro Vice Chancellor (Education and Experience) and Chief Operating Officer) [427].

105. On 10 October 2019, Mr Gregory wrote to the Claimant in response to his appeal. He noted that the remedy sought in the appeal was that the Respondent reconsider the decision with regard to his case for promotion. He wrote "we have reconsidered the decision and have agreed to submit your promotion case to a new institution-wide panel". Mr Gregory asked the Claimant to confirm he was content for the application to be considered by the panel.

106. In reply, the Claimant said: "both the original process and the ad hoc review were accompanied by major procedural irregularities, altogether raising some serious concerns about fairness and equal opportunities". As a result, he maintained his position that his appeal should progress, and asked that it be put forward to a Member of the Board of Governors, as stipulated by clause 3.1 of the Staff Appeal Policy. The Tribunal notes that his email ended by saying that if the Respondent was not prepared to take this route, "I will also have to explore other options externally". This was another reference to the possibility of legal action.

107. On 11 October 2019, the Claimant emailed the members of the Board of Governors directly, referring to the appeal he had lodged on 25 September 2019. He complained about procedural irregularities and asked for a fair and transparent process to be followed in relation to his appeal.

108. On 18 October 2019, Mr Curtis replied to the Claimant's email of 8 October 2019, noting that he had since written to the Board of Governors. He said that the Head of HR Services (Peter Gregory) had forwarded the appeal documentation to him and that he as Deputy Vice Chancellor would review the case and provide his submission to a Member of the Board of Governors. The Board member would decide whether the case met the criteria for a valid appeal. He concluded his email stating that he would endeavour to conclude the matter as quickly as possible, subject to the availability of a suitable board member.

109. On 29 October 2019, the Claimant clarified the scope of his appeal in an email to Professor Brown. He said that the review process "was accompanied by major irregularities and therefore it also raises issues about fairness and equal opportunities. So, and I am sure you know this, my appeal refers to the outcome of the ad hoc review of my case". In so clarifying, the Claimant was not limiting his appeal to the single issue of whether he should be promoted but was seeking to raise wider issues of the fairness of the process followed during the ad hoc review.

110. On 31 October 2019 [488], David Douglas wrote to the Claimant saying "Despite you not having confirmed that you wish to have your promotion case placed before a new institution-wide panel as set out in Peter's email to you of 3rd October, considering the correspondence on this matter combined with the fact that this is

the only panel which can award professorships, I am writing to advise that your case will be considered by the panel." This email did not require the Claimant to withdraw his pending appeal before his promotion application would be considered by the university panel.

111. On 13 November 2019, the Claimant emailed David Douglas in HR stating he had hired a lawyer to follow his case. The Claimant said: "it comes as a surprise to that even though I stated on various occasions that I did not want my case considered by a new panel, you have decided to ignore my position". He stated that although his "grievance and appeal have promotion as the core concern, the new ad hoc panel will not hear the scope of the complaints I have made, and these should be determined by an appeal hearing". This email made it clear to the Respondent's HR department that he still wanted the original complaints made in his grievance to be determined, notwithstanding the offer of a new promotions panel. He stated: "the official appeal policy should have more weight than an ad hoc policy, especially when the previous attempt to deal with my case is considered." The Claimant believed that the powers of the Board of Governors were not restricted, and so would be able to consider promotion in an appropriate case. He chased to find out when his appeal would be considered by a Board Member. In response he was told by Mr Curtis that there were difficulties in finding a volunteer on the Board to consider his appeal but once one was identified he would let the Claimant know.

112. On 13 November 2019, Tristan Foot, the Respondent's Acting University Secretary emailed to say: "We've not asked governors. I thought that Peter/Verity were screening this to stop it getting that far" [482]. On 14 November 2019, Mr Gregory emailed Mr Curtis with various suggestions as to how to proceed. The penultimate bullet point was worded as follows: "We need to write to him to confirm that we will abide by his instructions not to have his application considered by the new panel and that, for the avoidance of doubt, that is his only route to promotion to Professor".

113. In the same email, Mr Gregory commented "I think he is showing signs of obsessive behaviour. There's no recorded history of mental problems, but I should check confidentially with his line manager to see if there are any other signs?". Professor Brown, who had been copied into this email exchange provided her own comments on the Claimant's mental health: "I agree that the behaviour is illogical, but I am not sure that it is evidence of clinically significant neurosis. He did report to me that he was stressed, not sleeping and feeling anxious – but it is important to distinguish between a 'normal response to abnormal circumstances' (not clinically significant) rather than an 'abnormal response to normal circumstances (clinically significant)". Mr Curtis' view was "we should stop pretending that the individual is going to accept something different from what the procedure says. It has been attempted and failed. Let's just get the governor and move through the motions".

114. The Tribunal infers from the stance he was taking in these emails that Mr Gregory was looking to minimise the extent to which the Respondent needed to further

engage with the Claimant in relation to his concerns, and specifically his complaint about procedural failings earlier in the year.

115. By 22 November 2019, it had been agreed that Janette Withey, a member of the Respondent's Board, would review the Claimant's appeal. A meeting was scheduled to take place which would be attended by Ms Withey, Professor Brown and Dean Curtis. In subsequent emails, it was decided that Mr Gregory was better placed to meet with Ms Withey than Mr Curtis. On the same day, the Claimant was informed that his case would be reviewed by Janette Withey.

116. On Friday 29 November 2019, Ms Withey was sent the case papers in relation to the Claimant's appeal. The email indicated that a meeting had been arranged between herself, Peter Gregory and Professor Brown on Tuesday 3 December 2019 at 1pm. It is unclear what was discussed at that meeting.

117. On 29 November 2019, Mr Douglas wrote to the Claimant saying that "for the avoidance of doubt, in line with your wishes for your application not to be presented to the new institution wide panel (which we have made clear is the only route whereby a professorship can be awarded), your application has not been forwarded for consideration." This replaced the position set out in his email of 31 October 2019.

118. On Monday 2 December 2019, the Claimant emailed the Board of Governors. The purpose of his email was to clarify various points before they were considered by the Board of Governors. In his email he said it was worrying that the new promotions panel would not hear the substantial past complaints he had made. He added that the new promotions panel was not part of any official university policy, which raised additional questions for him regarding fairness and transparency. He stated that he could not agree to a process that "will adhere to the same principles and guidelines" as the previous panel, given his concerns as to how the panel previously considering his case had conducted itself.

119. On 3 December 2019, Janette Withey responded to the Claimant with her decision as to whether the appeal was properly constituted. She said: "Since the University has remedied the essence of this part of your appeal, I do not believe that there is a basis for convening a panel of Governors to consider this element of your case." The apparent purpose of the initial review being carried out by a single Board member, Janette Withey, was to decide whether the case met the criteria for an appeal set out in regulations 1.3 and 1.4.

120. Ms Withey urged the Claimant to reconsider his decision that the new panel would not consider his promotion appeal as this panel was the only route whereby his promotion could be considered. She told him, if he did not already know, that the promotions panel would be meeting in two days' time, on 5 December 2019. In relation to the other aspects of the appeal, she wrote as follows:

> "I am also mindful that you have raised concerns about the 'poor handling of the 2018/19 promotions round'. In my view, these constitute a complaint

rather than an appeal and I will ask the University's Human Resources Director to advise you of the appropriate process by which a complaint can be dealt with."

121. Given that the concerns about the poor handling of the 2018/19 promotions round had first been raised in the Claimant's grievance lodged back in 24 May 2019, over six months earlier, and not yet determined, the Tribunal finds Ms Withey's view surprising. Given that the Claimant's concerns were in part about the involvement of Mr Gregory, it is also surprising that Ms Withey was directing the Claimant to Mr Gregory for advice on the appropriate process to follow.

122. The following day, 4 December 2019 at 9:11, the Claimant responded to Ms Withey, taking issue with her analysis of his appeal and disputing the decision that it should not be referred to an Appeal Panel. He sent his email to Mr Gregory, Professor Brown and the entire Board of Governors. He ended his email by asking Mr Curtis to respond to him at the earliest convenience, given that he regarded it as Mr Curtis's role under the Staff Appeals Policy to communicate with him, rather than the Board Member making the decision. That afternoon, Mr Curtis responded to the Claimant emphasising that the decision was final and stating the matter was now considered closed.

123. On 4 December 2019, Professor Brown emailed Amanda Broderick to inform her that the Claimant would like his application for promotion to be considered by the panel. In response Professor Broderick stated that before the Claimant's case was considered by the panel, the Claimant needed to send an email to "relevant colleagues including independent governors" setting out his understanding of the way forward.

124. At 9:21 on 5 December 2019, the Claimant emailed in the following terms:

"Following the legal advice I have received in relation to (1) the Board's, or Janette's, decision, (2) Dean Curtis's acceptance of the decision, and (3) the consequent correspondence, including Verity's email from last night (21:58), please allow me to stress two key points at this very moment.

First, it is highly problematic that Dean has supported Janette's evaluation and decided to close my case in front of the Board of Governors, even though Janette's conclusion is founded on an inaccurate consideration of my case. This raises additional questions regarding the fairness and transparency of the whole process.

Second, Verity, considering your email from last night (21:58), please do not try to put words into my mouth. The panel which is scheduled for today is NOT the remedy for my appeal and this must be clear. Let me remind you, back in early July, when you decided to uphold my appeal (following my grievance and the consequent meeting with Mr Peter Gregory) and decided to pursue a review process in order to determine my suitability to become a professor, this very process was the remedy of my case. This is obvious from our summer correspondence, all of which is documented in my Appeal (25 September).

With the above in mind, I reserve all my rights in relation to my case."

125. In this email the Claimant was not saying that he did not want the Promotions Panel to consider whether he should be promoted. What he was saying was that he wanted to have the opportunity for the procedural complaints about the promotion procedure first raised in his grievance and repeated in the September appeal to be considered on their merits.

126. His email was taken to be insufficiently clear in the terms required by Professor Broderick to merit his case being considered by the promotions panel. As a result, the case was taken off the list to be considered by the panel. The Agenda for the meeting included timings which suggested that the panel's deliberations would conclude at 4pm. Consideration of applications from the same College as the Claimant was scheduled to take place between 1.45pm and 2.45pm.

127. On 5 December 2019, Mr Gregory was not in work. He was at hospital with his wife who was having an operation. He responded to the Claimant's email at 13:19 in which he asked for a clear acceptance that the panel was the only route by which the Claimant's promotion could be determined and that the Claimant accepted that the outcome of the panel was final. He did not deal with whether the Claimant would still be able to seek a determination of the procedural complaints raised in the Claimant's appeal paperwork. The Claimant responded at 14:37, stating he confirmed he accepted his case could be considered by the panel today, adding he hoped it would conclude in a satisfactory manner. On receipt of this email, Mr Gregory phoned Mr Douglas from the hospital to indicate that the Claimant wanted his case considered. Mr Douglas told Mr Gregory that the panel had already completed their deliberations and had finished for the day.

128. In advance of the panel's deliberations on 5 December 2019, Professor Brown had prepared notes on each of the candidates to be considered. Her notes on the Claimant were worded as follows:

> "[The Claimant] did not get approved for progression from College to University Panel.
> He appealed on the grounds of procedural error: he was not given adequate feedback from the panel to explain why his case did not move forward.
> His appeal was considered by [Peter Gregory] and me and upheld. It was not obvious why it had not progressed.
> The initial remedy for appeal was to seek external feedback, however [the Claimant] said he did not want feedback from an expert, but rather the chance to be promoted which he would have had if he had progressed from the College to the University Panel.
>
> The case for promotion is made on the grounds of 'research excellence'. He will be returned to REF with one output that has been rated as 3*. He has not contributed to an ICS.

Recommendation: this is not a strong case for promotion"

129. Similar recommendations were made in relation to other candidates. In two other cases it was said that there was not a strong case for promotion. In two other cases it was said that there was a strong case for promotion, and in another that there was "a case for promotion".

130. The following day, Mr Gregory updated Mr Curtis that the Claimant's letter agreeing to his papers being considered by the panel had arrived after the panel had finished deliberating. As a result, his promotion application was not considered. He added "Meanwhile he has been elected to be a UCU rep". In response, Mr Curtis wrote "Hohoho – ucu rep. Are you being santa?". Mr Gregory responded "UCU's Xmas present to me perhaps?". Mr Curtis replied: "Without a doubt – did someone leave or is he an extra?". The Tribunal finds that these email exchanges showed a lack of concern and respect for the Claimant's position, making light of the Claimant's status as a UCU rep.

131. On 6 December 2019, Mr Andrew Hodge filed his report into complaints made about Dr Weston's conduct, including her involvement in the College promotion panel despite being a candidate herself. Mr Hodge concluded that "this obviously created a potential conflict of interest". He said that although Dr Weston "recused herself from review of any application that might compete with her own, but this did not cure the essential problem".

132. On 10 December 2019, the Claimant was emailed by Mr Gregory who said that the Claimant's email had arrived after the panel had ended their deliberations on Thursday 5 December 2019 and the Claimant's case was therefore not considered. The Claimant's reply on the same day was that "with everything taken into consideration, I will instruct my solicitor to take over my case".

133. On 18 December 2019, the Claimant's solicitors, Meaby & Co, wrote a lengthy letter, extending to nine pages and 61 numbered paragraphs. In that letter they recorded many of the Claimant's concerns which had been previously raised. It commented that the decision to confine the Claimant's complaint to the rejection of his promotion application meant that the other elements of the Claimant's grievance were ignored. The solicitors argued that the June process was not in fact an appeal against any grievance outcome because there had been no hearing of the original grievance. The solicitors characterised the Claimant's appeal dated 25 September 2019 as an appeal against the outcome of the Claimant's grievance, insofar as there was an outcome. It was clear from the overall content of the letter that the Claimant still wanted his procedural complaints to be considered and determined. The letter did not ask for a particular workplace-based solution to the various issues the letter was raising. It did, though, ask for the Respondent's prompt response to the matters raised.

134. The Respondent replied on 2 January 2020. Its letter was written by Mr Gregory. He noted that the Claimant had already been provided with appropriate feedback,

although he did not specify when this feedback had been provided and the contents of the feedback. He summarised the process followed in relation to the Claimant's promotion application. He said the Respondent was grateful for the solicitors' comments. He added that the Respondent had reviewed its processes and would be proposing a revised process "going forwards". He concluded his letter by recording that the Respondent was prepared to reconvene the University Professorship and Readership Panel solely to consider the Claimant's case.

135. Mr Marshall of Meaby & Co responded to Mr Gregory on 3 January 2020. It noted the many procedural irregularities raised in his previous letter and expressed disappointment that Mr Gregory's letter had not dealt with these matters. At paragraph 5, Mr Marshall said as follows:

> "The procedural flaws are important to our client, and the reason he raised those on 20 June 2019 and 25 September 2019 was that he wished these to be addressed. To the extent that the University has not specifically addressed these, it has breached the implied term of trust and confidence in his employment contract with the University"

136. Mr Marshall noted that the Claimant would not be taking up an offer of another re-hearing of his promotion application until the procedural flaws previously raised had been addressed.

137. On 7 January 2020, Professor Brown circulated some proposed guidance for handling promotion applications during the next promotion round, which was sent to the Claimant by her union representative. There is no evidence that the Claimant volunteered any comments in relation to these proposals.

138. There then was a delay of two weeks before the Respondent replied to Mr Marshall's letter on 21 January 2020 [554]. Again, the response was signed by Mr Gregory. It stated that the letter of 3 January 2020 left Mr Gregory confused as to what the Claimant wanted. He asserted that the outcomes sought by the Claimant appeared to have been achieved, with the Respondent agreeing to reconsider the Claimant's case for promotion and revising the process. Mr Gregory asked three numbered questions which he said would assist the Respondent in giving the situation proper consideration:

> "1. Each specific procedural failing Dr Radeljic believes has not been properly
> considered and/or addressed?
> 2. How exactly Dr Radeljic thinks it should be considered/ addressed?
> 3. What resolution Dr Radeljic is hoping to achieve from such consideration —
> short of the reconsideration of his case which has been offered; how, in practical terms, does he want the alleged procedural flaws/issues to be addressed?"

139. On 23 January 2020, the Claimant's solicitors sent a detailed table, listing nineteen acts or omissions under the heading "procedural failing". In respect of each, the desired outcome was that the University would acknowledge its failings. Ms Smeaton argues that this was the first time that the Respondent understood that the Claimant wanted more than simply a reconsideration by the Board. The Tribunal disagrees. The Claimant had wanted the Respondent to accept the extent of the procedural failings ever since his initial grievance on 24 May 2019 and had made this clear repeatedly in correspondence.

140. During this exchange of correspondence, responses came swiftly from the Claimant's solicitors. There was a gap of some days before replies from the Respondent. This was explained on the basis that the Respondent needed to take legal advice at each point before responding. In addition, the Claimant's solicitors had asked the Respondent to complete an extensive table setting out their specific responses to a lengthy list of allegations raised by the Claimant.

141. The Respondent asked its solicitors to assist in drafting responses to be included in the table. A partially completed table was sent to Mr Gregory's PA, Yasmin Miah, on 5 February 2020, to which Ms Miah responded on 12 February 2020. She asked the solicitor to provide his comments on the details that the Respondent had added.

142. On 13 February 2020, Ms Miah updated Mr Marshall that the Respondent was still reviewing the table of comments sent across on 23 January 2020. She said that the Respondent "aimed to come to him in due course". Both Ms Miah and the Respondent's solicitor were on annual leave during the school half term holiday, which started on Monday 17 February 2020. They had agreed to finalise the responses to the Claimant's solicitors table once half term had ended.

143. On 27 February 2020, before receiving any further update from the Respondent in relation to the timescale for sending a completed table, the Claimant emailed Mr Gregory with the subject line headed "Resignation". He attached a resignation letter. This letter stated he was resigning in response to a repudiatory breach of his contract. He said he considered himself constructively dismissed. He referred to the Respondent's procedural irregularities and their failure to acknowledge and fully investigate his complaints about these matters. He stated that the final straw was the email dated 13 February 2020, sent to his solicitor, in which the HR department stated that it was "still reviewing the table of comments sent across on 23 January 2020". He concluded it was five weeks since he tabulated his complaints and his desired remedies without receiving a substantive response. He said that many of the complaints dated from 22 May 2019.

144. He did not specifically allege that the way in which he had been treated was influenced by his having made any protected disclosures. However, he did end the letter by saying that he reserved the right to bring to the attention of the authorities any of the other instances of malpractice which he had experienced or witnessed.

145. The following day, 28 February 2020, at 12:41 the Respondent sent a completed table responding to the itemised list of nineteen complaints. The contents of this table are likely to have predated receipt of the Claimant's resignation, given a draft had been distributed for checking internally around a fortnight earlier.

LEGAL PRINCIPLES

Incorporation of contractual terms

146. In the present case, the Claimant argues that his contractual terms were also contained in documents other than the contract of employment. Specifically, he contends that the grievance procedure, the Promotions Procedure and the Staff Appeals Policy were contractual terms.

147. Parties to an employment contract may agree to incorporate into that contract terms from other sources. Whether a particular term has been incorporated into a contract is a matter of law. A term may be expressly incorporated into a contract of employment if reference is made in the contract to the particular source in question so long as the term is 'apt' for incorporation.

148. Whether a particular term should be implied into a contract is a question of law. A term will not be implied simply because it would be reasonable to do so, nor because an agreement would be unreasonable or unfair without it. In order to imply a term into an employment contract, the Tribunal must be satisfied that:

    (1) The term is necessary to give the contract business efficacy;
    (2) It is normal custom and practice to include such a term in a contract of the particular kind;
    (3) There is a clear intention to imply the term demonstrated by the way in which the contract has been performed and/or
    (4) The term is so obvious that the parties must have intended it at the time the contract was made.

Constructive dismissal

149. 'Dismissal is defined in section 95(1) Employment Rights Act 1996 to include 'constructive dismissal' which occurs when an employee terminates their contract of employment (with or without notice) in circumstances where they are entitled to terminate it without notice by reason of the employer's conduct (Section 95(1)(c) ERA 1996).

150. The test of whether an employee is entitled to so terminate their contract is a contractual one. The first question being whether the employer has acted in such a way as to amount to a repudiatory breach of the contract or, by its actions, has shown an intention not to be bound by an essential term of that contract (*Western Excavating (ECC) Ltd v Sharp* [1978] QB 761). The breach must be a significant breach going to the root of the contract (*Western Excavating* at 769A).

151. In cases where the employee relies on the implied term of trust and confidence (as here), the Tribunal should ask itself whether the employer has, without reasonable and proper cause, acted in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (*Malik v Bank of Credit and Commerce International Limited* [1998] AC 20 at 45E). Any breach of this implied term is a fundamental breach which necessarily goes to the root of the contract. The burden of proof is on the employee.

152. The employee can rely on a one-off act or a continuing course of conduct extending over a period and culminating in a 'last straw', which considered together amount to a repudiatory breach. The 'last straw' need not amount to a breach of contract by itself but must contribute something to the breach. "If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history". Whilst the last straw must not be entirely innocuous or utterly trivial, it is not required to be unreasonable or blameworthy (*London Borough of Waltham Forest v Omilaju* [2005] ICR 481 at paragraph 20).

153. The question of whether there has been such a breach is determined objectively ie would a reasonable person in the circumstances consider that there had been a breach (*Leeds Dental Team Ltd v Rose*) [2014] IRLR 8, EAT at paragraph 18).

154. There is also an implied term that employers will reasonably and promptly afford a reasonable opportunity to obtain redress of any grievance they may have (*W A Goold (Pearkmak) Limited v McConnell* [1995] IRLR 516 at paragraph 11).

155. In circumstances where a fundamental breach is found to have occurred, the Tribunal should next ask itself whether the employee has accepted the repudiation by treating the contract as at an end ie whether he resigned in response to that breach. If he has, the fact that the employee has also objected to other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It is enough that the employee resigned in response, at least in part, to the fundamental breach by the employer (*Nottinghamshire County Council v Meikle* [2004] IRLR 703, CA at paragraph 33). Again, the burden of proof is on the employee.

156. The Tribunal must finally ask itself whether the employee has delayed so as to waive any breach. The employee "must make up his mind soon after the conduct of which he complains; if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract" (*Western Excavating* per Lord Denning at paragraph 15).

157. Affirmation can be implied. In *WE Cox Turner (International) Limited v Cook* [1981] IRLR 443, the employee delayed in resigning for four weeks once told that his grievance would not be remedied. This resulted in a finding that he must be taken to have affirmed the contract. However mere delay will not amount to affirmation. Working under protest eg whilst continuing with a grievance in respect of a matter, is inconsistent with affirmation. Engagement with grievance procedures is unlikely itself to constitute affirmation: *Gordon v J & D Pierce (Contracts)* [2021] IRLR 266 (EAT), paragraphs 23-24. The issue is whether by words or conduct the Claimant is

'letting bygones be bygones': *Cantor Fitzgerald v Bird* [2002] IRLR 867 at paragraph 129.

158. If a resignation amounts to a constructive dismissal, then the dismissal will be an unfair dismissal, unless the Respondent can show that the dismissal was for a potentially fair reason. Here the Respondent does not advance any positive case as to the reason for a constructive dismissal, given it denies the Claimant was constructively dismissed.

Protected disclosure detriment

159. The three essential features which must be established if a claimant is to succeed in a claim for protected disclosure detriment are:

(1) Establishing that the claimant has made a protected disclosure;
(2) Establishing a subsequent detriment;
(3) Making the necessary causal connection between the protected disclosure and the detriment.

160. Protected disclosures are qualifying disclosures made in circumstances that are deemed to be protected by the Employment Rights Act 1996 ("ERA 1996").

Qualifying disclosures

161. So far as is relevant to the present case, qualifying disclosures are defined as follows, under Section 43B ERA 1996:

(1) In this part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:
  (a) That a criminal offence has been committed, is being committed or is likely to be committed;
  (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
  (c) …
  (d) That the health or safety of any individual has been, is being, or is likely to be endangered;
  (e) …
  (f) That information tending to show any matter falling within any one of the proceeding paragraphs has been or is likely to be deliberately concealed.

162. The starting point is that the disclosure must be a "*disclosure of information*" made by the employee bringing the claim. That disclosure must have two features. Both are based on the belief of the employee, and in both cases the belief must be a reasonable belief. The first is that at the time of making the disclosure the worker reasonably believed the disclosure tended to show wrongdoing in one of five specified respects in Section 43B(1); or deliberate concealment of that wrongdoing. The second is that at the time of making the disclosure, the employee reasonably believed the disclosure was made in the public interest.

163. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 Sales LJ noted that allegations could amount to disclosures of information depending on their content and on the surrounding context. He set out the following test for determining whether the information threshold had been met so as to potentially amount to a qualifying disclosure: the disclosure has to have *"sufficient factual content and specificity such as is capable of tending to show"* one of the five wrongdoings or deliberate concealment of the same. It is a matter *"for the evaluative judgment of the tribunal in the light of all the facts of the case"* (paras 35-36).

164. The Tribunal needs to assess whether, given the factual context, it is appropriate to analyse a particular communication in isolation or in connection with others. In *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540 (EAT), Slade J (at para 22) said that *"an earlier communication can be read together with a later one as embedded in it, rendering the later communication a protected disclosure, even if taken on their own they would not fall within Section 43B(1)(d)*". Whether or not it is correct to do so is a question of fact.

165. In *Kilraine*, one of the alleged protected disclosures was made using these words: *"There have been numerous incidents of inappropriate behaviour towards me, including repeated sidelining, and all of which I have documented*". In itself, this lacked sufficient factual content and specificity. The oblique reference to other documented instances did not incorporate other documents by reference. In *Simpson v Cantor Fitzgerald Europe* [2020] ICR 236, the EAT upheld the ET's decision not to aggregate 37 communications to different recipients in order to assess whether there was a protected disclosure.

166. So far as the reasonable belief that the disclosure tends to show wrongdoing, there are two separate requirements. Firstly, a genuine belief that the disclosure tends to show wrongdoing in one of the five respects (or deliberate concealment of that wrongdoing). Secondly, that belief must be a reasonable belief. If the disclosure has a sufficient degree of factual content and specificity, then that belief is likely to be regarded as a reasonable belief (*Kilraine* at paragraph 36).

167. The belief has to be that the information in the disclosure tends to show the required wrongdoing, not just a belief that there is wrongdoing (*Soh v Imperial College of Science, Technology and Medicine* EAT 0350/14). What is reasonable within Section 43B involves an objective standard and its application to the personal circumstances of the discloser. A whistleblower must exercise some judgment on his own part consistent with the evidence and the resources available to him (*Darnton v University of Surrey* [2003] IRLR 615, EAT). So a qualified medical professional is expected to look at all the material including the records before stating that the death of a patient during an operation was because something had gone wrong (*Korashi v Abertawe Bro Morgannwg University Health Board* [2012] IRLR 4 at paragraph 62). However, the disclosure may still be a qualifying disclosure even if the information is incorrect, in that a belief may be a reasonable belief even if it is wrong: *Babula v Waltham Forest College* [2007] ICR 1026.

168. In relation to each of the five prescribed types of wrongdoing, there is a potential past, present or future dimension. For instance, in relation to breach of a legal obligation, the reasonable belief must be that the information disclosed tends to

show that a person has failed, is failing or is likely to fail to comply with any legal obligation. So far as future wrongdoing is concerned the phrase "*is likely to*" has been interpreted as meaning more than a mere possibility. In *Kraus v Penna* [2004] IRLR 260 the EAT held that to be a qualifying disclosure, the information disclosed should tend to show, in the claimant's reasonable belief, that failure to comply with a legal obligation was "*probable or more probable than not*".

169. So far as breaches of a legal obligation under Section 43B(1)(b) are concerned, any legal obligation potentially suffices, including breach of an employment contract: *Parkins v Sodexo* [2002] IRLR 109. Employment Tribunal cases have held that a wide range of legal obligations are potentially applicable. A belief that particular conduct amounts to discrimination is a *"breach of a legal obligation"*.

170. Unless the legal obligation is obvious, Tribunals must specify the particular obligation that the Claimant believes has been breached – the source of the obligation should be identified and capable of verification by reference to statute or regulation: *Blackbay Ventures Ltd (t/a Chemistree) v Gahir* [2014] ICR 747 (EAT) at paragraph 98. An employee's belief that a legal obligation has been breached need not be formed by reference to a detailed or precise legal duty, though it must amount to more than simply a belief that the impugned conduct is wrong: *Eiger Securities LLP v Korshunova* [2017] ICR 561 (EAT), per Slade J at paragraph 46. It is not necessary that the disclosure identify the specific legal obligation that is said to have been breached: *Twist DX Limited v Armes* (UKEAT/0030/20) at paragraph 84.

171. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850, the disclosure in issue related to an occasion when the worker had raised a child safeguarding issue and claimed to have received an inadequate response. The tribunal held that this did not tend to show breach of a legal obligation, and this was upheld in the Court of Appeal. As the Court of Appeal noted, nothing in the Particulars of Claim or the witness statement indicated that the claimant had a particular legal obligation in mind. It was only later that her representative suggested a potential breach of the Children Act 2004 and the Education Act 2002.

172. Section 43B(1) also requires a claimant to have a reasonable belief that the disclosure was in the public interest. This requirement has two components – first a subjective belief, at the time, that that the disclosure was in the public interest; and secondly, that the belief was a reasonable one.

173. What amounts to a reasonable belief that disclosure was in the public interest element was considered by the Court of Appeal in *Chesterton Global Limited v Nurmohamed* [2018] ICR 731. The Court of Appeal considered that a disclosure could be in the public interest even if the motivation for the disclosure was to advance the worker's own interests. Motive was irrelevant. What was required was that the worker reasonably believed disclosure was in the public interest in additional to his own personal interest. So long as workers genuinely believed that disclosures were in the public interest when making the disclosure, they could support the reasonableness of the public interest element by reference to factors that they did not have in mind at the time.

174. Underhill LJ, giving the leading judgment, refused to define "public interest" in a mechanistic way, based merely on whether it impacted anyone other than the claimant or whether it impacted those beyond the workforce. Rather a Tribunal would need to consider all the circumstances, although the following fourfold classification of relevant factors was potentially a "useful tool":

    (1) The numbers in the group whose interests the disclosure served – although numbers by themselves would often be an insufficient basis for establishing public interest;

    (2) The nature and the extent of the interests affected – the more important the interest and the more serious the effect, the more likely that public interest is engaged;

    (3) The nature of the wrongdoing – disclosure about deliberate wrongdoing is more likely to be regarded as in the public interest than inadvertent wrongdoing;

    (4) The identity of the wrongdoer – the larger or more prominent the wrongdoer, the more likely that disclosure would be in the public interest.

175. Underhill LJ said that Tribunals should be cautious about concluding that the public interest requirement is satisfied in the context of a private workplace dispute merely from the numbers of others who share the same interest. In practice, the larger the number of individuals affected by a breach of the contract of employment, the more likely it is that other features of the situation will engage the public interest.

Protected disclosures

176. A qualifying disclosure is a protected disclosure if it is made to the claimant's employer (sections 43A and 43C Employment Rights Act 1996). In the present case, all of the alleged disclosures were made to the Respondent. Therefore, if the alleged disclosures were qualifying disclosures, they were also protected disclosures.

Detriment

177. The concept of 'detriment' in relation to protected disclosures was summarised by Sir Patrick Elias in *Jesudason v Alder Hey Children's Hospital* at paragraphs 27-28 in the following terms:

> "the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment … an unjustified sense of grievance does not amount to a detriment … Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the

claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective."

Causation

178. Section 47B ERA 1996 is as follows:

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act on the ground that the worker has made a protected disclosure.

179. Section 48 ERA 1996 is as follows:

(1A) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.
(2) On a complaint under subsection (1A), it is for the employer to show the ground on which any act or deliberate failure to act, was done.

180. The effect of these sections is that it is for the worker to prove, on the balance of probabilities, that there was a protected disclosure, that there was a detriment and the employer subjected the claimant to the detriment. If so, then the burden shifts to the employer to show the ground on which the detrimental act was done: Section 48(2) ERA. If a Tribunal rejects the reason advanced by the employer, then it is not bound to accept the reason advanced by the worker, namely that it was on the ground of a protected disclosure: it is open to the Tribunal to find that the real reason for the detriment was a third reason.

181. The Tribunal must consider what, consciously or unconsciously, was the employer's motivation for the detrimental treatment. Causation will be established unless the protected disclosure played no part whatsoever in its acts or omissions: *Fecitt v NHS Manchester* [2012] ICR 372, CA. The result is that there will be a sufficient causal connection if a protected disclosure was one of several reasons for the detriment, even if it was not the predominant reason. It is enough if it was a material influence, in the sense of being more than a trivial influence. There is no need to consider how a hypothetical or real comparator would have been treated.

Automatic unfair dismissal

182. Section 103A ERA 1996 provides:

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure"

183. In contrast to a claim of protected disclosure detriment, a claim of unfair dismissal for making a protected disclosure requires the Tribunal to determine the principal reason for the dismissal. It is not sufficient if the Tribunal decides that the breach of contract was materially influenced by protected disclosures, but the principal reason is not related to the protected disclosures.

184. In a constructive dismissal claim, this requires the Tribunal to focus on the Respondent's actions forming the constituent parts of the fundamental breach of contract and determine the principal reason for those actions. It is fundamental that the Tribunal engages with the Respondent's explanation for why it acted as it did and makes clear findings as to whether that explanation was accepted or rejected and if rejected, the reasons why (*Salisbury NHS Foundation Trust v Wyeth* UKEAT/0061/15 at paragraph 48).

Wrongful dismissal

185. In a claim for wrongful dismissal, where the claimant has not been paid for their notice period, the claimant is seeking to recover an amount equivalent to the pay that ought to have been paid during the notice period. An employer is contractually obliged to pay the salary due in the notice period, except where the employee is in fundamental breach of their employment contract. In the present case, because the Claimant resigned alleging constructive dismissal, his entitlement to recover his notice pay will depend on whether he can establish he has been constructively dismissed.

Time limits

186. By the end of the evidence, both parties agreed that the Tribunal had jurisdiction to determine each of the substantive issues in the List of Issues on their merits. This is because it was agreed that events occurring on or before 30 November 2019 were part of a series of similar acts or failures where the last act or failure occurred after 30 November 2019. Accordingly, the Tribunal does not need to determine whether complaints relating to events on or before 30 November 2019 have been brought within the statutory time limits.

Failure to mitigate

187. If the Claimant successfully recovers compensation for financial loss consequent on his resignation, he is under a duty to mitigate his loss. Section 123(4) ERA 1996 provides:

> "In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales …"

188. This rule requires him to take reasonable steps to reduce or eliminate his ongoing financial loss by applying for alternative employment and accepting any suitable job offers, giving credit for the income received. Where, as here, the Respondent argues that the Claimant has failed to comply with this duty, the burden is on the Respondent to show that there has been a failure to act reasonably in applying for appropriate roles; and also to show that had reasonable applications been made, such a role would have been offered at a particular income level.

189. This requires the Tribunal to address three questions (see *Gardiner-Hill v Roland Berger Technics Limited* [1982] IRLR 498):

(1) What steps were reasonable for the claimant to have to take in order to mitigate his or her loss;
(2) Whether the claimant did take reasonable steps to mitigate loss; and
(3) To what extent, if any, the claimant would have actually mitigated his or her loss if he or she had taken those steps".

190. The Tribunal should not apply a standard to the Claimant that is too demanding. He or she should not be put on trial as if the losses were his or her fault, given that the central cause of those losses was the act of the employer in unfairly dismissing the employee.

Uplift for failing to follow the ACAS Code of Practice

191. Under Section 207A of the Trade Union and Labour Relations Consolidation Act 1992, the Tribunal has a discretion to adjust financial awards by up to 25% where the Tribunal finds that there has been unreasonable non-compliance with the ACAS Code of Practice on Disciplinary and Grievance Procedures. The wording of the statutory section is as follows:

> **207A Effect of failure to comply with Code: adjustment of awards**
>
> (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
>
> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
>
> (b) the employer has failed to comply with that Code in relation to that matter, and
>
> (c) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.
>
> (3) …
>
> (4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

192. If there has been an unreasonable failure to comply with the Code of Practice on Grievance Procedures, then the Tribunal still retains a discretion whether to adjust the award and as to the amount of the adjustment, depending on what is just and

equitable in the circumstances. The relevant circumstances are those related in some way to breaches of the Code of Practice.

193. In *Acetrip v Dogra* UKEAT/0016/20/VP (EAT 18 March 2019) His Honour Judge Auerbach recognised that there was a punitive element to an adjustment award under this section:

> "the Tribunal is not simply compensating a claimant for some additional readily identifiable or quantifiable loss that he has suffered. The adjustment is bound, to a degree, to be reflective of what the Tribunal considers to be the seriousness and degree of the failure to comply with the ACAS Code on the employer's part."

194. In the same case, HHJ Auerbach noted that "in a case where the underlying award is of a significant amount, the Tribunal needs to take into account [the absolute value of a percentage uplift] as a relevant consideration" (paragraph 99). In *Banerjee v Royal Bank of Canada* [2021] ICR 359 Lord Summers indicated that in cases where there was a risk that the overall award would be disproportionate, it would often be appropriate to hear evidence on quantum before deciding on the appropriate percentage. "In some cases detailed evidence would be critical" (paragraph 6).

195. In *Slade v Biggs EAT 0297/19* (EAT, 1 December 2021) Griffiths J said that the discretion given to the Employment Tribunal by statute is very broad, both as to whether there should be an uplift at all and as to the amount of the uplift. The top of the range "should undoubtedly only be applied to the most serious cases", but such cases do not have to be classified additionally as "exceptional" (paragraph 70).

196. Griffiths J set out a four-stage test to assist employment tribunals in assessing the appropriate percentage uplift for failure to comply with the ACAS Code (at paragraph 77):

> (1) is the case such as to make it just and equitable to award any ACAS uplift?
> (2) if so, what does the tribunal consider a just and equitable percentage, not exceeding although possibly equalling, 25 per cent?
> (3) does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings in discrimination claims? If so, what in the tribunal's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?
> (4) applying a 'final sense-check', is the sum of money represented by the application of the percentage uplift arrived at by the tribunal disproportionate in absolute terms? If so, what further adjustment needs to be made?

197. He added that the "statutory question is the percentage uplift which is "just and equitable in all the circumstances", and those who pay large sums should not inevitably be given the benefit of a non-statutory ceiling which has no application to smaller claims." (paragraph 77).

CONCLUSIONS

Contractual terms

198. The first issue to decide is to identify the terms of the Claimant's contract. We find that the Grievance Policy was incorporated into the contract. The document headed "Contract of Employment" includes a heading "Grievance" and states that "the Grievance Procedure which applies to you can be found on the HR Services website". This was sufficient to expressly incorporate the Grievance Procedure into the Claimant's contract. It is apt to be a contractual term.

199. We do not find that the Promotions Procedure formed part of the Claimant's employment contract. There is no specific reference to this document within the "Contract of Employment". Whilst the contract states that "your other terms and conditions of employment are set out on the HR Services website", there is no evidence this particular Procedure was included on that website in a manner indicating it was part of the employment contract. The wording of the Promotions Procedure itself does not state it is intended to be part of the employment contract. There is insufficient evidence of previous custom and practice to indicate that the Promotions Procedure had been treated as having contractual force so as to become part of the Claimant's employment contract.

200. For the same reasons as in relation to the Promotions Procedure, we do not consider that the Staff Appeal Policy formed part of the Claimant's employment contract. We do not consider that the reference to this Policy within the Grievance Procedure itself was sufficient to incorporate that Policy as setting out additional contractual terms. In this regard, the Grievance Procedure says "Please refer to UEL's Staff Appeal Policy for guidance on how the staff member's grievance will be dealt with" [101]. This reference to "guidance" indicates that the contents of the Staff Appeal Policy do not themselves have contractual force in the context of a grievance appeal.

201. Even though the Promotions Procedure and the Staff Appeal Policy did not form part of the Claimant's employment contract, the extent to which the Respondent has complied with their requirements is potentially relevant to whether there has been a breach of the implied term of mutual trust and confidence.

202. The Claimant also argues that the Promotions Policy had contractual status as an incident of the implied term of trust and confidence – ie having published a crucial, formal procedure on which employees relied, the Respondent had to follow the same. We accept that the extent to which there are failures to follow the Promotions Policy will impact on the relationship of trust and confidence, such that either by themselves or in combination with other failures this may amount to a breach of the implied term. We do not agree that any failure to follow the Promotions Procedure is itself a breach of the implied term.

Constructive dismissal

203. The Tribunal summarises its factual findings on the various matters which the Claimant alleges are part of a course of conduct amounting to a breach of the implied term of mutual trust and confidence, and sets out it conclusions on their impact, objectively speaking, on trust and confidence:

(1) The Respondent did misstate to the Claimant's referees the particular position for which the Claimant was applying, by wrongly indicating that the Claimant was applying for the role of Reader rather than Professor. When this error was noted it was quickly remedied. We are not persuaded that the mistake disadvantaged the Claimant in relation to contents of the references provided or would have had any substantial impact on trust and confidence.

(2) The Respondent did provide the Claimant's referees with a very tight timescale for returning their references. We have found that the Respondent's Promotions Procedure did not require references from the Claimant's nominated referees at this point. However, having asked the Claimant's referees for a reference on his promotion potential, the tight timescale and the absence of a cogent explanation why such a tight timescale was necessary would have given the impression that the Respondent was not affording the Claimant every opportunity to support his promotion application with strong references. The Claimant was not told that his references would only be considered at a later stage of the process, if applicable. The tight timescale afforded to his referees would have had some impact on the Claimant's trust and confidence in the Respondent as his employer. The Claimant's application does not appear to have been prejudiced by this failure, because references from referees nominated by the Claimant were not required by the Promotions Procedure at this point; and those obtained prematurely were not shared with the members of the College Panel.

(3) The Respondent did not provide the Claimant's referees with the criteria for promotion or a copy of the Claimant's personal statement. These documents were specified in the Promotions Procedure as documents that should be forwarded to referees to assist referees in preparing references. Whilst the Claimant's application was not in fact prejudiced by this failure to provide the criteria to the Claimant's two named referees because the references were not used at the College Panel stage of the process, it was an indication that the Respondent was not following its published procedure in the way it went about obtaining references. By depriving referees of potentially relevant information that might provide further evidence of his promotion potential, this again would have had a negative effect on trust and confidence. This failure was repeated in September 2019 when a further pair of referees were contacted, again nominated by the Claimant, to comment on the strength of the Claimant's promotion prospects.

(4) The Respondent did not obtain two external references from referees nominated by the Head of School at the point before the College Panel discussed the Claimant's application. On balance, we have concluded that this was not required by the Promotions Procedure before the College Panel discussion and decision took place. However, the ambiguous way in which the Promotions Procedure is drafted meant that it could readily be interpreted, and was interpreted by the Claimant, as a requirement that needed to be satisfied at the College Panel stage of the process. However, because there was no failure to comply with the Promotions Procedure in this respect, we do not find that, objectively speaking, this failure had any impact, objectively speaking, on trust and confidence.

(5) Dr Weston was a member of the College Panel considering promotion applications for promotion to Professor, in her role as Head of School. This created at the very least the perception of a conflict of interest, in circumstances where Dr Weston was herself a candidate for promotion being considered by the same panel (albeit that she was not present when her own application was discussed). A later internal investigation report commissioned by the Respondent, primarily focussing on other matters, considered that her participation "obviously created a conflict of interest". That report concluded that recusing herself from consideration of her own application "did not cure the essential problem" [525]. Whilst the extract from the investigation report did not spell out the conflict of interest, we find that her presence on the panel potentially advantaged Dr Weston's own application as a result of her working with the other panel members to assess applications from other candidates. It gave the other panel members further evidence of her abilities in relation to criteria D – contribution to administration/academic management - which they might have had regard to, even if only subconsciously, in considering her promotion application. Her refusal to recuse herself entirely from considering any Professorial promotion applications potentially disadvantaged the Claimant in circumstances where there appears to have been some comparison between the scoring given to different candidates for the role of professor, as is apparent from the overall comment made on the Claimant's feedback spreadsheet – "this candidate scored lower than others being considered. Not recommended …" [225]. The College panel was apparently comparing the Claimant's scoring with the scoring given to other candidates, which would have included Dr Weston. The feedback spreadsheet was shown to the Claimant during the feedback meeting with the Claimant. This would have reinforced the perception of a conflict of interest in the composition of the College Panel considering his application. When coupled with the Respondent's apparent evasiveness in addressing the Claimant's repeated questions about a potential conflict of interest in the composition of the panel, this undermined trust and confidence in the Respondent as his employer.

(6) There was no breach of the Promotions Procedure in failing to include any subject matter expert in the Claimant's field on the College Panel. The Claimant had no reasonable expectation there would be such an expert present. As a result, objectively speaking, this did not have any impact on trust and confidence. In any event, we do not find that this was a matter which the Claimant had in mind at the time of his resignation, because this allegation was not contained in the table of complaints raised by the Claimant's solicitors prior to his resignation.

(7) The Respondent did not provide the academic at St Andrews with a copy of the Promotions Procedure, including the criteria for promotion. This would have enabled that person to tailor their comments to the specific criteria in use at the Respondent, even if some of the criteria were of more general application. If the Promotions Procedure required this for references from referees nominated by candidates, it would be an appropriate step to take in this ad-hoc process. No good reason has been provided as to why this was not done. The Claimant realised shortly after he was given the outcome of the independent assessment that these promotion criteria had not been provided. Learning of this omission would have reduced his trust and confidence in the Respondent as his employer.

(8) Given the disparity in university ranking between St Andrews and the Respondent, it was inappropriate to ask the academic if they would offer a Professorship to the Claimant at their institution. The Claimant realised this question had been asked of the referee, which he regarded as an inappropriate question (as shown by point 12 in the table produced by his solicitors [561]), although he did not know the extent of the disparity because he did not know the identity of their academic institution as this was not disclosed to him. He was aware that there were differences between old and new (post 1992) universities in terms of their criteria for academic promotion. This was therefore a feature that reasonably had an impact on his trust and confidence in the Respondent, albeit it would have had a bigger impact had he realised the extent of the disparity.

(9) On receipt of the comments from the academic at St Andrews, Mr Gregory and Professor Brown effectively treated these comments as determinative. No panel was convened to discuss the implications for the Claimant's promotion application, as had been envisaged when such a process was first suggested to the Claimant. There was no analysis done of the Claimant's strengths and weaknesses, comparing the favourable assessment of the two further references obtained from the names suggested by the Claimant against the negative comments from the external assessor. In her written closing submissions, Respondent's counsel accepts that "the Professor's opinion was, in one sense, treated as determinative because it did not provide [the] ringing endorsement" that Professor Brown required (paragraph 57). Given the way in which the process outcome was presented to the Claimant, it appeared that the

views of the external assessor had led to his promotion application being rejected. In the email to the Claimant recording the assessor's views, there was no reference to any panel discussion or decision in which these views were a factor but not determinative. Again, this apparent failure to follow the previously announced process would have adversely impacted on trust and confidence.

(10) There was a culpable delay in acknowledging and accepting the Claimant's appeal lodged on 25 September 2019. Apart from an automated response, the Claimant had received no acknowledgement until 3 October 2019. On that date he was offered the opportunity to have his promotion application considered by a promotions panel, which he was told would bring the appeal to an end. The appeal itself was not acknowledged. In response, on the same day, he reiterated that he wanted the appeal to be dealt with under the UEL Staff Appeal Policy. By 8 October 2019 there had been no acknowledgment, and there was a further chasing email, also sent to Mr Curtis. It was only on 10 October 2019, over two weeks later, that there was a specific response from Mr Gregory to his email lodging an appeal. It focused entirely on his request that the promotion decision be reconsidered and did not address the aspects of the appeal raising procedural concerns. As a result, the Claimant emailed the Board of Governors directly, on 11 October 2019, understandably stating he had "experienced a lack of appropriate action from the relevant University authorities" [437]. This delay in accepting his appeal or explaining why there was a delay in doing so, would have further undermined the relationship of trust and confidence.

(11) It was only on 18 October 2019, that the Claimant was told that his 25 September 2019 appeal would be dealt with as an appeal brought under the Staff Appeal Policy. This was made clear to the Claimant by Mr Curtis on 18 October 2019. As a result, the Claimant had a legitimate expectation (though no contractual entitlement) that the process set out in the Staff Appeal Policy ought to have been followed. If the Respondent was choosing to depart from that process, he should have been told this and a reason given for doing so. Despite the delay to that point, it then took more than six weeks to put the papers before a Member of Board to seek their decision. The Respondent did not tell him why there was a particular difficulty in convening the governors necessary, beyond saying that Governor availability was difficult. This delay would have further undermined the relationship of trust and confidence.

(12) The effect of the Respondent's policies was that the 25 September 2019 appeal was in part an appeal to the Board of Governors made under Appendix D of the Grievance Policy, even though the appeal did not so identify itself. Appendix D sets out the process to be followed where the original grievance was "against … a Director of Service and it was not resolved to the staff member's satisfaction at the informal stage". The

grievance was in part a grievance against Peter Gregory, who as HR Director was a Director of Service. Such grievances proceed directly, under Appendix D, to the UEL Appeals Panel. This appears not to have been appreciated either by the Claimant or by the Respondent. Having permitted the Claimant to proceed by this route, this route ought to have been followed in accordance with the Staff Appeal Policy. That means the appeal should only have been rejected on the initial review if it did not comply with the terms of the Appeal Policy. Insofar as the Claimant was asking the Appeals Panel to consider an appeal against the decision to refuse his promotion, then Ms Withey correctly rejected an appeal on this basis – no right of appeal was contained in the Promotion Procedure, or in the subsequent ad-hoc process. However, insofar as the appeal was against the outcome of the informal process to resolve his grievance against Mr Gregory and the procedural concerns he had about the operation of the Promotions Procedure in his case, this was a proper basis for the appeal. It ought to have been considered by an Appeals Panel of the Board of Governors, given that this is the procedure required by the Staff Appeal Policy. Criticisms upheld in relation to the handling of the 2018/19 promotions round could have prompted the Governors to suggest ground rules for future promotions rounds. We find that the reason why this aspect of the appeal was not progressed was because the Respondent was "going through the motions", attempting to limit the extent to which the Board of Governors considered any procedural failings – as shown by emails on 13 and 14 November 2019 detailed above. It was wrong for Mr Gregory to be involved in an appeal process that was complaining about his own conduct; and wrong for Ms Withey's outcome to refer these procedural complaints back to Mr Gregory himself to be dealt with in an "appropriate process" rather than referred to an Appeals Panel to be considered on their merits. Both the Respondent's failure to address the substance of the Claimant's complaints at Board level, and Ms Withey's decision to refer them back to Mr Gregory himself would have significantly undermined trust and confidence.

(13) In her email of 3 December 2019, Ms Withey said she would ask "the University's Human Resources Director [ie Mr Gregory] to advise you of the appropriate process by which a complaint can be dealt with". Despite this, there was no communication from Mr Gregory until his email on 10 December 2019. The delay is in part explained by Mr Gregory's attendance at hospital with his wife on 5 December 2019, albeit that was not known to the Claimant at the time. More significantly, Mr Gregory's email on 10 December 2019 did not identify any "appropriate process" for dealing with his unresolved procedural complaints. It was silent on the point. There was no further communication from Mr Gregory on this issue until after he had received a letter from the Claimant's solicitors on 18 December 2019. This failure to follow up on the point raised by Ms Withey for over two weeks would have further undermined trust and confidence.

(14) We do not criticise the Respondent for failing to place the Claimant's case for promotion before the specially convened promotion panel, when they met on 5 December 2019. We find that this was not realistic given the late stage at which he changed his mind to clarify he wanted the matter considered by the Panel. He only clarified he wanted his case considered by the Panel at 14:37 on 5 December 2019. Previously he had stated he did not want his case considered by this new Panel, in particular in an email on 13 November 2019. Mr Gregory attempted to communicate the Claimant's newfound willingness for his promotion case to be considered by the Panel as soon as he could. Mr Gregory was attending hospital with his wife, and so not checking his emails as frequently as he would have done normally. By the time Mr Gregory had attempted to pass on the message to the Promotions Panel, the Panel had finished for the day. Reconvening such a Panel would inevitably take time, and we do not criticise the Respondent for failing to rearrange this before receiving the first letter from the Claimant's solicitors on 18 December 2019. At that point, the Respondent was entitled to focus on the contents of these letters, rather than reconvene a Promotion Panel. It did offer to reconvene the Panel in its written response to the Claimant's solicitors, to be told by them on 3 January 2020 that such an offer would not be accepted until the issues raised in the 20 June 2019 appeal and in the 25 September 2019 appeal had been addressed.

(15) By the time of the Claimant's resignation, over five weeks had passed since the Claimant's solicitors had listed the alleged procedural breaches in table form. The table had been sent on 23 January 2020. Although there had been a holding email on 13 February 2020 this had not provided any timescale for completing the task but was noticeably vague on that issue. It said that "we are still reviewing the table of comments … and aim to come back to you in due course". Assessed as at the date of the resignation, this further delay in explaining and justifying the Respondent's stance, viewed in the light of the Claimant's previous unsuccessful attempts to get the Respondent to address the procedural failings, further undermined the relationship of trust and confidence. It contributed more than a trivial extent to the overall conduct, and so constituted the last straw for constructive dismissal purposes.

204. We find that the cumulative effect of the eleven incidents at sub-paragraphs (2), (3), (5), (7), (8), (9), (10), (11), (12), (13), and (15) on the relationship of trust and confidence was to destroy or seriously damage the Claimant's trust and confidence in the Respondent as his employer. Objectively speaking, this was a reasonable result of the Respondent's treatment. It was therefore a breach of the implied term of mutual trust and confidence, and a fundamental breach of his employment contract.

205. In addition, we find that there was a breach of the implied term that an employer will reasonably and promptly afford a reasonable opportunity to obtain redress of any grievance. Whilst the Claimant was offered the opportunity to have his case reconsidered by a Promotions Panel, he was not offered the opportunity to have his procedural concerns about the previous processes addressed. These had been raised since the grievance in May 2019 and were still unresolved by the date of the Claimant's resignation.

206. We do not consider that, by the time of his resignation, the Claimant had waived his entitlement to rely on either breach as a basis for alleging constructive dismissal. Throughout the period from May 2020 onwards, he was complaining about the process that had been followed in considering his promotion application. These complaints had been reiterated at the time of his initial appeal against the decision to refuse him promotion, and his subsequent second appeal in September 2020. These complaints culminated in correspondence from the Claimant's solicitors raising the Claimant's concerns through that formal channel. Having instructed solicitors and submitted a detailed table listing all the Claimant's concerns on 23 January 2020, it cannot reasonably be inferred from the five-week gap until his resignation that he was no longer complaining about his past treatment, particularly in the light of the unsuccessful steps he had previously taken to raise the same concerns. At the time, he was waiting on a response from the Respondent to the procedural concerns raised by his solicitors. He was not 'letting bygones be bygones'.

207. We accept that a significant reason for the Claimant's resignation was in response to this conduct. His resignation was therefore a constructive dismissal.

Protected disclosure detriment

First disclosure – Grievance on 24 May 2019 **[257]**

208. The first alleged protected disclosure is the Claimant's grievance lodged on 24 May 2019, set out on the Respondent's Formal Grievance Form. This lengthy document was expressed to be against "Peter Gregory and the Promotions Panel of the College of Professional Services". It complained about the process that had taken place in the most recent promotion round. The grievance disclosed information. It disclosed specific information about the respects in which he considered that there had been failings in the Promotion Procedure. The Claimant genuinely believed that there had been a breach of a legal obligation, namely his own contract of employment. He had identified specific respects in which there had been failures to follow the requirements set out in the Promotions Procedure. We find he believed that the Promotions Procedure formed part of his employment contract. His grievance expressly stated he had an "overwhelming fear that my contract was being breached" [257].

209. Although we have concluded that the Promotions Procedure did not form part of the Claimant's contract of employment, we consider that the Claimant's belief that it

was part of the contract was a reasonable belief. A belief can still be a reasonable belief even if it is wrong. The Claimant's contract of employment makes it clear it is not an exhaustive statement of all the terms and conditions. Cross reference is made to other procedures which are available on the HR Services' website. The contract includes the wording "Your terms and conditions of employment are determined in accord with the Articles of Government". The document acknowledges a role for trade unions in being consulted regarding changes to the terms and conditions of employment and adds "Any changes agreed with the Trades Unions will automatically be incorporated into your contract of employment. Details of … your other terms and conditions of employment are set out in the HR Services website". Given these phrases, it is clear that the document headed "Contract of Employment" did not contain an exhaustive list of contractual terms. In any event, given the extent of the procedural failings he was alleging, it was reasonable for him to believe that this was a breach of other terms of his contract, even if he did not specifically know about the implied term of mutual trust and confidence.

210. At the time he lodged his grievance, the Claimant genuinely believed that it was in the public interest to raise his concerns by way of a grievance. The first page of his grievance alleged "failures to implement a clear set of criteria and the overall lack of transparency which has accompanied the process" [257]. The outcome sought was not limited to reconsideration of his own case. It extended to revision of HR procedures for promotion to Reader or Professor including "consultation with all members of staff about the process" [264] as well as the development of a precise Academic Promotion Appeals Procedure. He knew of at least eight colleagues who were aggrieved about their treatment in this particular promotion round. He considered the HR promotion procedures were potentially relevant to all members of staff, given he asked for consultation with all members of staff.

211. Applying the potentially relevant factors identified in *Chesterton v Nurmohamed*, we find this belief in the public interest was a reasonable belief.

(1) In relation to the first factor, the numbers affected, the operation of the Promotions Procedure for promotion to Reader or Professor potentially impacted on all academic members of staff within the University. It impacted not just those considering applying for promotion to these positions but also those whose workload or line management might be influenced by those who were promoted.

(2) As to the second factor, the nature and the extent of the interests affected, it concerned the fairness of the process that applied to applications for promotion to Professor, which is an important badge of academic standing. If the way the Promotions Procedure was being applied was not promoting those candidates that deserved promotion to Reader or Professor, then this would directly impact negatively on the Respondent's reputation. As the Promotions Procedure itself recorded, a Promotions Panel must:

> "interpret their terms of reference widely and in full generality in order to safeguard the reputation of the University and also the standing of its Professors or Readers as persons of outstanding academic achievement".

Whether the Promotion Procedure was being applied fairly would also impact the reputation and standing of those members of staff who were already Readers and Professors, and of the students who were being taught by them. In addition, as a university, the Respondent was in receipt of public funds in part to pay the salaries of its academic staff. Failing to promote the best candidates was potentially a misuse of those public funds.

(3) On the third factor, the extent of the wrongdoing, the Claimant was alleging a series of breaches of the process, including a conflict of interest. The presence of Dr Weston on the panel created a potential conflict of interest for all candidates from the Claimant's College. It was not clear to the Claimant whether his other criticisms of the process in his case were replicated for other candidates, thereby potentially having a wider application than to his own particular case.

(4) As to the identity of the alleged wrongdoer, the Claimant was blaming Peter Gregory, the Director of HR Services, as well as the Promotions Panel and the Head of School, Dr Carrie Weston. These were senior individuals within a large organisation with a significant sized relevant community of employees and students.

212. Therefore, the Claimant's belief in the public interest was a reasonable one.

213. Having considered each of the statutory elements that must be present to amount to a protected disclosure, we conclude that the grievance amounted to a protected disclosure because each required element was present.

Second disclosure - Written appeal notice dated 25 September 2019 [306][376]

214. This appeal attached the original grievance dated 24 May 2019 at Appendix A. As a result, it repeated the same protected disclosure made in the original grievance.

215. The appeal contains further disclosures of information. There was disclosure of information regarding the questions that were put to the academic who had the role of external assessor; that the assessor was not provided with the Respondent's Promotion Procedures; and it was alleged that his case for promotion was turned down based on the negative view of this person alone.

216. In lodging this appeal, the Claimant still had the same genuine belief he had when lodging his initial grievance, namely that the way the Promotions Procedure was conducted was a breach of his employment contract. For the reasons given above, this was a reasonable belief.

217. We also find that, at the point where he lodged this document, the Claimant believed that there was a breach of the grievance procedure. His case for appeal stated: "both my formal grievance and the consequent ad hoc review have exposed a range of issues in relation to fairness and equal opportunities" [380]. However, we have not been shown any reference in the documents or in the Claimant's witness statement to him having any belief at the time he lodged his appeal dated 25 September 2019 that a breach of the grievance policy was also a breach of his contract of employment. Therefore, we do not find that he believed that there had been a further breach of a legal obligation in relation to the handling of the grievance procedure.

218. The covering letter at [376] establishes that the Claimant had a genuine belief that disclosure was in the public interest. In the third paragraph he wrote that the "2018/2019 promotions process has raised serious concerns regarding fairness and equal opportunities at the [Respondent]". The sequence of the end of the first sentence of that covering letter is also significant – "appeal against the poor handling of the 2018/2019 promotions round and the rejection of my promotion to Professor". From this it appears, and we find, that his first concern was with the process as a whole rather than with his own failed application. Further references are made to matters of public interest at the top of page 380 – "the perceived preferential treatment raises serious concerns regarding fairness and equal opportunities"; and in the final paragraph in which he states he looks forward to his appeal hearing in which he will present his "case and concerns regarding fairness and equal opportunities".

219. Therefore, the Tribunal's conclusion is that this second disclosure was also a protected disclosure.

Third disclosure: Email to Board of Governors dated 11 October 2019 [437]

220. The Tribunal concludes, on the balance of probabilities, that this communication with the Board of Governors attached the appeal documents he had lodged on 25 September 2019. This is because it states in the email "On 25 September, I submitted my appeal documentation in accordance with the UEL Staff Appeal Policy to Mr Peter Gregory, Head of HR Services". As a result, it attached a document that amounted to a protected disclosure, for the reasons already given. It therefore incorporated a document that disclosed information which in the reasonable belief of the Claimant showed breach of a legal obligation (namely his mistaken but reasonable understanding of the scope of his employment contract), and which was in the public interest (for reasons already given above).

221. At the time of this communication to the Board of Governors the Claimant believed that there was a breach of regulation 1.3 of the Staff Appeal Policy. He said so in his email to Board Members – "incompetence and procedural irregularities, involving miscommunication, conflict of interest and submission of incomplete documentation on behalf of the University of East London (regulation 1.3 of the Staff Appeal Policy)". He also referred to the obligations of the Head of HR

Services under regulation 3.1 on receipt of an appeal, and Mr Gregory's response "which seemed to ignore both my appeal and the procedure outlined in the UEL Staff Appeal Policy".

222. Again, there is nothing in the documents or in the Claimant's witness statement indicating that he believed at the time of his email to the Governors that breaches of the Staff Appeal Policy were breaches of a legal obligation, whether of his own personal contract of employment or otherwise. Therefore, we do not find that the Claimant believed that this was a further breach of a legal obligation. However, he still believed that there was a breach of his employment contract in the original respects set out in the May grievance, and this was a reasonable belief for the reasons already given.

223. Given the nature of the alleged breaches, we find he believed that they were in the public interest. He said in his email: "as such, the 2018/19 promotions process has raised serious concerns regarding fairness and equal opportunities at the University". This was a reasonable belief for the reasons already given – it concerned the manner in which the Respondent dealt with promotion applications and with complaints about the promotions process, which in turn impacted on the wider reputation of the Respondent. We note that the Claimant chose to copy his Board email into both his UCU application and his Branch Chair.

224. Therefore, the constituent elements are present for the communication to the Board of Governors to be a protected disclosure. We find it was a protected disclosure even though it was not expressed as such.

Detriment

225. The Claimant argues he has suffered detriments for making protected disclosures in the following respects:

> 4.1.1 The Respondent failed to properly deal with the alleged protected disclosures that were made by the Claimant initially on 24 May 2019 in the written grievance.
>
> 4.1.2 The Respondent's continual delay in addressing the series of alleged protected disclosures over a period of some nine months.

226. The Respondent's case, as set out in the Agreed List of Issues, is that the Claimant's treatment did not amount to a detriment. The Respondent says it addressed the issues raised by the Claimant in the way it did in order to address the Claimant's concerns as it saw them, to find a pragmatic solution to the concerns raised by the Claimant, whilst upholding the standards of its promotion process.

227. The Tribunal finds that the Respondent's response to the protected disclosures amounts to a detriment. A reasonable employee might consider the response to the matters raised in the grievance to be inadequate, and the Claimant did so. The

Tribunal repeats its findings above when considering the issue of constructive dismissal. In having his trust and confidence undermined in the respects found, the Claimant suffered a detriment.

228. In summary, the same complaints about the Promotion Procedure reasonably believed to be breaches of his employment contract as explained in his original 24 May 2019 grievance remained unresolved nine months later by time of the Claimant's resignation in February of the following year. This is despite the requirements of the Respondent's grievance procedure and despite the standards imposed by the ACAS Code of Practice. The same complaints were repeated again in writing on several occasions since the original grievance – in the 20 June 2019 'appeal'; in the 25 September 2019 second appeal; in the email to the Board of Governors on 11 October 2019; in the first letter from the Claimant's solicitors on 18 December 2019 and in the subsequent table sent on 23 January 2020. Janette Withey, the Board Member considering the second appeal under the Staff Appeal Policy, recognised that these complaints needed to be resolved but even then no action was taken until after the Claimant's resignation. Despite the protected disclosures being in part about the role of Mr Gregory, who was the subject of the grievance, Mr Gregory remained closely involved at all points of the subsequent processes.

229. Further, the Tribunal finds that there was a continual delay in addressing the protected disclosures. This delay spanned a total period of nine months, but the following periods and events within that period were significant:

(1) Mr Gregory did not address the procedural points raised in the original grievance during his informal meeting with the Claimant on 14 June 2019, focusing instead on the Claimant's frustration at the outcome of the process;

(2) Although the same criticisms were repeated in the appeal dated 20 June 2019, Professor Brown addressed only one of the points raised in that communication in her email of 2 July 2019 in allowing her appeal in part;

(3) The ad hoc process changed from a panel review of the contents of two references provided by referees nominated by the Claimant, to comments from a single unnamed academic at St Andrews which were effectively treated as determinative.

(4) There was a significant delay in acknowledging his second appeal dated 25 September 2019 and subsequently accepting that the Claimant could pursue this appeal to the Board of Governors under the Staff Appeal Policy.

(5) There was a delay in placing the second appeal papers before a Board Member and an attempt by following this initial review to avoid the issues being determined by a full panel of Governors.

(6) There was a delay from 4 December 2019 to after 18 December 2019 in providing a mechanism for addressing these procedural complaints following the conclusion of Janette Withey's involvement.

(7) There was a delay in responding substantively to the contents of the letters from the Claimant's solicitors from 18 December 2019 to the end of the Claimant's employment.

Causation

230. Can the Respondent show that the detriments were not done on the ground that the Claimant had made the alleged protected disclosures? The burden of proof is on the Respondent to show that the content of the protected disclosures, and in particular the allegations about breaches of the Promotion Procedure, the grievance procedure and the staff appeals procedure, formed no part of the reason for the treatment amounting to detriment.

231. In the absence of a good explanation the obvious inference is that the reason for the inadequate response to the Claimant's initial grievance and subsequent repeated and related procedural complaints was the content of those complaints which the Respondent was anxious to avoid investigating. We do not find that the Respondent has provided a satisfactory explanation to rebut that obvious inference.

232. The essential reason advanced by the Respondent for not addressing the Claimant's complaints about procedural failings is this – that the Claimant's focus was on securing promotion, rather than on proving there had been procedural irregularities. The Respondent argues that the Claimant's references to procedural irregularities were only a means to securing promotion, rather than as an end it itself. The Respondent argues it addressed the Claimant's main concerns by initially offering the Claimant the ad-hoc review process, and then subsequently offering the Claimant the opportunity to have his promotion application reconsidered by the University panel in December 2019. In those circumstances, it would have served no purpose to look into past procedures.

233. The Tribunal rejects this explanation, for the following reasons. Firstly, as we have found, on several occasions the Claimant made it clear that he was raising wider concerns about the promotions process, in addition to asking for his promotion application to be reconsidered. Therefore, we find it ought to have been clear to the Respondent that these concerns needed to be addressed in addition to his promotion application. It ought to have been clear to Peter Gregory when receiving the original grievance in May 2019, given he was seeking three outcomes, only one of which was for his promotion application to be reconsidered. The need to address the unresolved procedural complaints was the very reason why the Claimant was reluctant to have his case for promotion reconsidered by the December University Panel if this would bring his appeal to an end, together with its procedural criticisms. This was sufficiently clear to Ms Withey at the start of December 2019 when she referred these matters back to Peter Gregory as being "complaints".

Therefore, we reject the explanation that the Claimant was not raising these matters sufficiently clearly to merit any investigation.

234. Secondly, Mr Gregory himself was criticised for his conduct in the original grievance, as was the role of Dr Weston on the College Panel, given she was also a candidate. We find the most likely explanation for the failure to address these matters was the potential for embarrassment if the Claimant's criticisms were upheld – particularly if findings were made by an appropriately senior employee conducting the Grievance or by the Board of Governors themselves. Not only might such an outcome damage the reputation of the individuals who were subject to the criticisms, it might also undermine confidence in the fairness of the 2018/19 promotions round itself, potentially questioning the validity of appointments made as part of that process. We find it threatened to open a Pandora's Box. It explains why internal emails spoke of attempting to screen the Claimant's concerns from the Board of Governors; of "going through the motions"; and why there was mocking antipathy from Mr Gregory and others to the Claimant given the matters he continued to raise.

235. Having rejected the Respondent's explanation for the treatment, we are conscious we not bound to accept the explanation advanced by the Claimant. For the reasons given above, our conclusion is that the treatment was materially influenced by the content of the Claimant's protected disclosures.

Protected disclosure detriment – conclusion

236. Therefore, the Claimant's protected disclosure detriment complaints succeed.

Automatic unfair dismissal: Section 103A ERA 1996

237. We have found that there were several aspects of the Respondent's conduct that cumulatively destroyed or seriously damaged the relationship of trust and confidence. The common thread uniting most of these factors was that the Respondent did not address and resolve the Claimant's complaints about what he regarded as significant procedural failings.

238. The Respondent's explanation for not addressing and resolving the Claimant's complaints about what he regarded as significance procedural failings is the same as in response to the protected disclosure detriment claim.

239. For the same reasons as given in relation to the protected disclosure detriment claim we reject that explanation. We remind ourselves that we need to find the sole reason, or the principal reason for the conduct that destroyed the relationship of trust and confidence, namely the failure to address and resolve the Claimant's complaints about procedural failings. We conclude that the principal reason for the conduct which amounts to a constructive dismissal was the contents of the Claimant's protected disclosures. They were a potential embarrassment to Mr Gregory in particular and to the Respondent in general and threatened to

undermine the legitimacy of decisions taken as part of the 2018/19 promotion round.

Wrongful dismissal

240. The wrongful dismissal claim stands or falls with the constructive unfair dismissal claim. Given we have found that the Respondent was in fundamental breach of contract, and that the Claimant's employment was summarily ended with his resignation, the Claimant is entitled to recover his notice pay. At the time his employment ended, his notice period was three months. Therefore, he is entitled to recover three months' notice pay.

REMEDIES

Basic award

241. The parties agree that the appropriate calculation for the unfair dismissal basic award is £6,300, being 12 year's service x 1 week's pay at the applicable maximum rate of £525.

Compensatory award - Loss of earnings

242. Since the date of his resignation, the Claimant has made extensive applications for alternative roles until he secured a full-time role at the start of the 2020/21 academic year. The Respondent criticises the focus of these applications during the period from March 2020 as being unsuitable. It is argued that the majority were either at a level above that at which the Claimant was employed by the Respondent or were for entirely different roles, operating in different sectors. As a result, the Respondent's case is that the Claimant has failed to mitigate his loss.

243. The burden is on the Respondent to show that there has been a failure to mitigate his loss during this period. We do not accept that it has discharged that burden. The Claimant had resigned from a teaching position at a UK academic institution midway through an academic year. The Tribunal is not persuaded that the Claimant is likely to have been able to secure a permanent position at such an establishment starting before September 2020 at an equivalent level of seniority. The Respondent has not persuaded us that there were any roles within the Claimant's specialist area seeking to recruit academic staff at the Claimant's level with a start date before September 2020. It would not have been reasonable for him to apply for roles as a Lecturer or Senior Lecturer given his more senior status as a Reader. Further, shortly after his resignation the Covid-19 Pandemic had a significant impact on tertiary education, restricting face to face teaching and threatening a substantial existing source of funding from overseas students. This would have made UK universities more reluctant to take on senior academic staff unless there was a clear business case for their recruitment. Finally, the Claimant was ill during this period, with his symptoms impacting on his ability to obtain the sleep he

needed and concentrate effectively. This is dealt with below under the heading "Personal Injury".

244. The Tribunal rejects the Respondent's assertion that the Claimant would have secured suitable paid academic work had he registered with agencies. The Respondent has advanced no specific evidence on this point.

245. With effect from 1 October 2020, the Claimant was appointed Professor of International Relations at Necmettin Erbakan University, in Turkey. The Respondent also argues that the Claimant has failed to mitigate his loss in accepting this given that the salary for the role was substantially lower than his salary with the Respondent. Unable to obtain any other equivalent position at a UK university in his specialist area, we consider it was reasonable for the Claimant to accept the position in Turkey. In terms of academic status, this role represented a promotion, in that it accorded him the title of Professor. Having started this role in October 2020, the Tribunal does not consider it would have been reasonable for him to have left this role within the 2020/21 academic year in order to mitigate his ongoing partial loss of earnings. In circumstances where he had already resigned from one institution within the academic year, it would not be sensible in career terms for him to resign from a second institution during the following academic year, particularly having only started the role a few months earlier. Despite this, he continued applying for UK-based jobs. Therefore, we do not find that there was a failure to mitigate in accepting this role and continuing in the role during the 2020/21 academic year.

246. During the academic year 2020/21, the Claimant performed his teaching duties at the University of Ankara from his home in London. This is because all the teaching and other duties he was required to undertake was capable of being done remotely, given restrictions on in-person teaching in response to the Covid-19 Pandemic. Given his partner's work commitments in London, he maintains it was reasonable for him to continue to live in the same place, particularly where there were existing or potential travel restrictions imposed in response to the Pandemic. Again, we reject the Respondent's contentions that the Claimant has failed to mitigate his loss in failing to travel to Turkey, where living costs would be lower. The Respondent has not directed the Tribunal to any authorities indicating that there can be a failure to mitigate in failing to move to a different country so that living expenses are substantially cheaper than they were at the time of dismissal. In any event, this would not have been a reasonable step here, given the ongoing uncertainty prompted by the pandemic, his partner's work commitments in London, and the fact that the Claimant was starting a new and unfamiliar role that could be performed remotely from London.

247. The Claimant's evidence was that he would be moving to Turkey for the 2020/21 academic year so that he can continue to perform the role as required by his current employers. He is required to carry out face to face teaching. Little evidence has been adduced as to the specific impact of moving to Turkey on his personal monthly living expenses, other than general evidence that the cost of living is 65%

cheaper in Turkey than in the UK. This and other financial matters (such as the extent of the Claimant's anticipated income from temporary work, and the extent to which the Claimant is entitled to claim for the cost of returning to the UK to visit his partner) is a matter which may be capable of agreement. If not, they will have to be determined when the Tribunal reconvenes to determine the remaining remedy issues.

248. We do not consider that the Respondent is liable for any ongoing financial losses after the end of the 2021/22 academic year. At that point, the Claimant will have worked in his current role for two years with the status of Professor. With his academic track record from that institution, and the status of Professor, he ought to be able to successfully apply to UK universities and obtain a role from the start of the 2022/23 academic year attracting at least the salary he would have received had he continued as a Reader employed by the Respondent. Therefore, he is not entitled to any further loss of earnings at that point.

249. The Claimant received some income from temporary work in the sum of £14,915 for which he gives credit. Subject to that credit, the Claimant is entitled to recover full loss of earnings for the period until the end of September 2020, and a partial loss of earnings for two further academic years thereafter, until August 2022.

Compensatory award – loss of statutory rights

250. The Tribunal considers that the appropriate sum to award for loss of statutory rights is £400.

Injury to feelings

251. In considering the award for injury to feelings, we bear in the mind that we are compensating the Claimant for the injury to feelings flowing from the protected disclosure detriments. We are not, in terms, compensating the Claimant for any injury to feelings flowing from the automatically unfair dismissal. That said, we are entitled to assess compensation for losses flowing from dismissal where, as here, detriment has led causally to dismissal but is separate from the dismissal itself (*Timis v Osipov* [2019] ICR 655). We also bear in mind that we have found that the Respondent's conduct seriously damaged the relationship of trust and confidence in additional respects apart from the protected disclosure detriments. We are only to compensate the Claimant for injury to feelings caused by this detrimental treatment relating to protected disclosures, rather than all the conduct which destroyed or seriously damaged the relationship of trust and confidence.

252. The injury to feelings award should reflect the prolonged period of treatment in which his whistleblowing complaints were not addressed. Given that the Respondent's inadequate response to his whistleblowing led ultimately to his resignation it should also reflect the impact on the Claimant's feelings of ending his employment with the Respondent and the need to find alternative work.

253. The middle *Vento* band applicable for claims presented on or after 6 April 2020 spans from £9,000 to £27,000 (Third Addendum to Presidential Guidance). We consider that the appropriate award falls a little above the midpoint of the middle band. The figure we award is £20,000. In coming to this figure, we do not include compensation for personal injury, which we have addressed separately. It is appropriate to do so, where as here, there is specific evidence as to personal injury, even though Mr White invited us to make a global award for both heads of damage together.

Personal injury

254. There is sufficient medical evidence to assess the extent of the personal injury caused by the way the Claimant was treated, and to place a financial value on this treatment by way of a separate award. We bear in mind that some of the injury may also have been caused by treatment which was not the result of the protected disclosures. However, we have no basis on which we can sensibly apportion one from the other. Therefore, on the limited evidence advanced, we find that the injury caused was an indivisible injury (see *BAE Systems Limited v Konczak* [2017] EWCA Civ 1188)

255. Symptoms started before the first protected disclosure [618]. Those symptoms cannot be included within symptoms resulting from protected disclosure detriments which are properly the subject of compensation. The symptoms increased in intensity from mid July 2019 when he first consulted his GP. By that stage the Claimant was only sleeping for 5 hours intermittently and had started waking with a headache, which required medication. He had also experienced some blurred vision on a temporary basis, which had resolved [618].

256. By September 2019, he was only sleeping 3-4 hours a night, which was affecting his ability to work and lecture. Although he “does not feel very low”, he was “consumed with the stress of the situation as requires a lot of mental work to sort out”. On the HAD scale his symptoms were assessed as moderate but not severe. He self-referred for CBT therapy in Barnet.

257. In October 2019, the GP records note that it is his perception of the Respondent’s unwillingness to engage with the regular appeals procedure that is affecting his symptoms.

258. By January 2020, it was the stress, the sleepless nights and headaches that were noted as ongoing problems which made him feel he “will have to resign and claim constructive dismissal”. He was prescribed sleeping pills. In March 2020, shortly after his resignation, he felt that diarrhoea at the end of February 2020 was due to anxiety.

259. In June 2020, he was referred to a psychologist, who noted that he had a high degree of anxiety and a marked depressive thinking frame. The psychologist noted that “his mental suffering had been intense at times, and some of his worries

genuine and unremitting". She recorded impaired concentration, exhaustion and mood swings.

260. In July 2020, he discussed with his GP whether he should be prescribed an antidepressant. At that point, he was diagnosed with mixed anxiety and depressive disorder. By August 2020 he had been prescribed sertraline, an antidepressant. In September 2020 the daily dose of sertraline was increased from 25mg to 50mg. He was having good days and bad days. As at the end of August 2020, he was in the middle of a course of CBT. His treating psychologist noted that he still had 2/3 days a week where he had debilitating anxious episodes, although his depressive thinking had improved. His quality of sleep remained variable and he was regularly taking zopiclone, a sleeping pill.

261. Counselling and Cognitive Behavioural Therapy continued in February 2021. Although he had improved, he had some persistent anxieties, his sleeping was impaired and he continued to have low mood. Although his psychologist had hoped to discharge him, she had asked for further CBT sessions to be provided [745]. There are no medical records supporting ongoing symptoms thereafter. Therefore, we find that the Claimant had just under two years' worth of symptoms as a result of the effects of the protected disclosure detriments.

262. The Judicial College categorises psychiatric injury into different brackets, depending on the severity. The moderate bracket is expressed in the following terms:

"While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good. Cases of work-related stress may fall within this category if symptoms are not prolonged."

263. The Judicial College Guidelines for injuries falling within this bracket, indicate an award between £5,500 and £17,900 including the 10% *Simmons v Castle* uplift. We award the Claimant £12,500, just above the midpoint of this bracket.

264. In so doing, we have taken care to ensure that there is no double recovery given the potential for overlap between the injury to feelings award and the personal injury award. We consider that a total award for both heads of loss of £32,500 is appropriate and justified by the evidence.

ACAS Uplift

265. The Claimant's position is that there has a significant failure to comply with the ACAS Code of Practice on Grievance Procedures. By contrast, the Respondent contends that there has been no failure to follow the guidance.

266. Both parties briefly addressed the question of the ACAS uplift in their closing submissions. However, they did not specifically address the issue of proportionality. This is unsurprising given that the hearing largely focused on the issue of liability. Arguments as to remedy were canvassed much more briefly than they would have

been had this been a freestanding Remedy Hearing. The overall potential size of any award was unclear, particularly in circumstances where there was no argument whatsoever on the issue of pension loss.

267. We have decided therefore, in keeping with the guidance in the caselaw, that it would be premature for us to reach a concluded view as to the appropriate percentage adjustment at this point. That issue can be revisited at a Remedy Hearing once the total of any pension loss award has been quantified.

268. However, as the point was fully covered in the evidence and in submissions, we do make findings as to whether there has been compliance with the ACAS Code of Conduct on Grievance Procedures. We find that there has been a failure to comply with the ACAS Code of Conduct in the present case in these respects:

(1) The Claimant had lodged a complaint on a 'Formal Grievance Form' complaining about his application for promotion to Professor and about wider concerns about the fairness of the process followed, as well as about the way Peter Gregory had responded to his requests for information about Dr Weston's role on the panel. Although the grievance procedure states that "a formal grievance will not normally be accepted where no prior attempt has been made to resolve the issue through informal means unless there is a strong reason for doing so", the Claimant's formal grievance was never rejected. It therefore needed to be determined in accordance with the ACAS Code of Practice on Grievance Procedures, notwithstanding the informal meeting held with Peter Gregory.

(2) In accordance with the Code of Practice, the Respondent ought to have invited the Claimant to a formal grievance meeting to discuss his grievance with a manager who is not the subject of the grievance ie someone other than Mr Gregory. That meeting ought to have been held without unreasonable delay. In breach of the Code of Practice, no such meeting was held.

(3) The Respondent was given a further opportunity to hold such a formal grievance meeting when the Claimant reiterated his grievances in his 'appeal' document dated 20 June 2019. Yet again, no grievance meeting was held. The Claimant was told in writing that his 'appeal' was partially upheld, but the email outcome to this 'appeal' process did not consider all of the matters raised by way of complaint.

(4) The Respondent attempted to address one aspect of his grievance with creating an ad-hoc process to reconsider the merits of the Claimant's promotion application through external assessment.

(5) However, even if the ad-hoc process was intended to address one aspect of the Claimant's grievance instead of holding grievance hearing, namely his complaint about the failure of his promotion application, it was clear from the

wording of the Claimant's 20 June 2019 appeal that he also wanted his procedural issues investigated and acknowledged.

(6) As stated above, the 25 September 2019 further 'appeal' made under the Staff Appeals Policy was effectively a request for a grievance hearing before a Panel of Governors under Appendix D of the Grievance Policy, given the complaint was about a Director of Service, namely the HR Director Peter Gregory. Whether this is characterised as a restatement of the original grievance or an appeal against an earlier stage in the grievance process, there ought to have been a grievance hearing to consider the procedural complaints that the Claimant was raising. This was not done and there was no decision on the Claimant's procedural complaints.

(7) The written outcome from Janette Withey redirected these unresolved matters to Mr Gregory, who was in part the very subject of the complaints.

(8) By offering to have the Claimant's promotion case reconsidered by a University Promotions Panel, the Respondent was attempting to address one aspect of the Claimant's grievance, albeit that the briefing note from Professor Brown provided to the Panel was negative about his promotion potential.

269. In the light of these matters, the Tribunal finds there was a significant failure to comply with the ACAS Code of Conduct on Grievances at Work. Having regard to the extent of the failures, it would be appropriate to make a percentage uplift to the compensation awarded. The Tribunal considers that the starting point for assessing the amount of the percentage is towards the higher end of the range. It will not fix the percentage until the remainder of the sums awarded have been quantified, to avoid the amount of the uplift being disproportionate.

Interest

270. The Claimant's Updated Schedule of Loss claims interest as follows: "Interest at a rate of 8% on all heads of payment: £21,786" [871]. The basis on which 8% has been chosen was not explained in the Updated Schedule nor in submissions. The Counter Schedule makes no concession in relation to this head of claim.

271. There is no express provision for making an award of interest for delayed payment where an award is made for a right conferred by the Employment Rights Act 1996. Although Mr White has argued that it would be just and equitable to increase the awards made here for delayed payment, in accordance with the discussion on this point in *Melia v Magna Kansei* [2005] EWCA Civ 1547, we are not persuaded that this is an appropriate case to do so. Whilst the loss of earnings started in March 2020, for the period since October 2020 the Claimant has only suffered a partial loss of earnings. It is not unusual in a case of this kind for remedy issues to be determined rather later than the 18 months from dismissal to the Final Hearing.

Therefore, we do not make any adjustment to the sums awarded for delayed receipt.

Grossing Up

272. The issue of the extent to which the award needs to be 'grossed up' to take account of the tax payable on sums in excess of £30,000 will need to be determined at a future hearing. Given that the Claimant is currently resident in Turkey, this may complicate the tax position further. Submissions will need to address this issue.

DISPOSAL

273. Given our conclusions in relation to the various complaints advanced, there will need to be a Remedy Hearing to quantify the consequences of our conclusions on matters of principle, and to determine issues of pension loss, unless the parties agree that remaining issues can be dealt with on paper.

274. I will ask for a 1-hour telephone Preliminary Hearing to be listed after 1 March 2022 to identify the remaining issues to be determined, and to give any necessary directions for further evidence or submissions on those issues. If the parties consider a further Remedy Hearing is necessary, that can be listed before the same Tribunal Panel on dates convenient to the parties.

Employment Judge Gardiner
Dated: 22 December 2021