Case Number: 1406367/2020

EMPLOYMENT TRIBUNALS

Claimant: **Dr C. Peters**

Respondent: **University of Bristol**

Heard at: **Bristol ET** **On:** **9 – 17 January 2023**

Before: **Judge:** **Employment Judge G. King**
Member: **Mr K. Ghotbi-Ravandi**

Representation
Claimant: In person
Respondent: Mr D. Stewart – counsel

RESERVED JUDGMENT

1. The Claimant's claim of direct race discrimination contrary to s.13 of the Equality Act 2010 is not well founded and is dismissed.

2. The Claimant's claim of harassment related to race contrary to s.26 of the Equality Act 2010 is not well founded and is dismissed.

3. The Claimant's claim of victimisation contrary to s.27 of the Equality Act 2010 is not well founded and is dismissed.

4. The Claimant's claim in respect of failure to make reasonable adjustments contrary to sections 20 & 21 of the Equality Act 2010 is not well founded and is dismissed.

REASONS

Procedure

1. At the beginning of the hearing, the Claimant explained that she needed regular breaks to actively participate in the proceedings. She requested breaks of 15 minutes every 45 minutes. These breaks were built into the hearing timetable, and increased to 10 minutes every 35 minutes in the afternoons. The Claimant said she found these helpful.

2. The Tribunal heard live evidence from the Claimant. The Tribunal also heard live evidence from Ms Blackman, Dr Crow, Dr Hawkey, Dr Burch-Brown and Prof. Schönle on behalf of the Respondent. The Tribunal was assisted by a bundle of 695 pages. Where pages of that bundle are referred to in this judgment, the page number is given in [square brackets].

Preliminary Issues

3. A preliminary issue arose when the panel and the parties discussed the issues that needed to be determined at this hearing. The list of issues that was used was that contained in the Case Management Order of 8 December 2021. The Judge took the Claimant through each of the issues that have been set out and clarified if the Claimant still wished to bring a claim in relation to each point. The Claimant confirmed she did, but at the end of the discussion, she stated there should have been one more issue included under the heading direct discrimination pertaining to race. The Claimant stated that it was her contention that the Respondent's failure to offer any reasonable adjustments was as a result of her race. She therefore wished to amend the list of issues to bring an additional claim of direct race discrimination in that the Respondent failed to offer or consider any reasonable adjustments due to the Claimant's protected characteristic of race.

4. It was the Claimant's position at this was part of her original claim. She referred to the relabelling of this claim in paragraph 80 of the Case Management Order of 8 December 2021. It appears in the Case Management Order that the Claimant had initially brought the claim of failing to offer reasonable adjustments as a claim of race discrimination, but at the preliminary hearing, this was amended to a claim of discrimination arising out of disability.

5. The Respondent was asked for its views and objected to this further claim being added. The Respondent stated that the seven-day hearing had been prepared for on the basis that it would be to hear the issues set out in the Case Management Order. The Respondent had not had the opportunity to respond to the allegation now being raised by the Claimant. The matter was not addressed in any of the Respondent's witness statements. The Respondent's position was that the Claimant had over a year in which to say that the list of issues was not correct and to ask the Tribunal to amend the list. The Claimant at no point had done so, and it was only today that she was raising this matter. If the Claimant was allowed to add this claim to the list of issues, it was the Respondent's position that an adjournment

would be needed in order for the Respondent to be able to respond to the allegation.

6. The Tribunal considered the position and understood the Claimant's point that she was attempting to bring two different claims in respect of the Respondent's failure to make reasonable adjustments. The first is that the Respondent should have made reasonable adjustments but failed to do so; this would be a claim of discrimination arising out of disability. The second claim she was to bring was that the very act of failing to offer any reasonable adjustments was due to the Claimant's protected characteristic of race and was therefore direct race discrimination.

7. The Tribunal noted that the Case Management Order [198], at paragraph 16, stated that if any party disagreed with the list of issues, then they had until 17 December 2021 to inform the Tribunal. Otherwise, the list would stand as final. The Tribunal accepts that the date of 17 December was probably a tight one for either party to comply with, but was of the opinion that if such an application had been made within a reasonable timeframe, the Tribunal would have considered any such application. No application was made to the Tribunal, and the Tribunal notes that it is only at the hearing today that the Claimant is now saying that the list of issues is incorrect. The Tribunal must deal with claims in line with the overriding objective to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

    a. ensuring that the parties are on an equal footing;
    b. dealing with cases in ways which are proportionate to the complexity and importance of the issues;
    c. avoiding unnecessary formality and seeking flexibility in the proceedings;
    d. avoiding delay, so far as compatible with proper consideration of the issues; and
    e. saving expense.

8. The Tribunal accepts that the Respondent has prepared for the hearing on the basis of the claims set out in the list of issues and has not been prepared to meet the additional claim the Claimant has set out above. If the claim was allowed to proceed, it would be in the interests of justice to allow the Respondent time to respond to this claim, which would include serving an amended Grounds of Resistance and amending witness statements. This would mean the hearing would have to be postponed and re-listed.

9. The Tribunal notes that the Claimant was represented at the time of the preliminary hearing on 8 December 2021. The Tribunal further notes that the Claimant has been in possession of the draft list of issues for over one year and has not raised any objection to the list until now. Further, there was an additional preliminary hearing on 5 October 2022. Although the list of issues was not one of the matters to be considered at that preliminary hearing, nonetheless this was an occasion where the Claimant was in front of the Tribunal, in person, and could have made any oral application to vary the list of issues. She did not do so.

10. Allowing the additional claim to be brought would not be proportional; would involve considerable delay in listing a new final hearing and would incur extra expense.

11. For the reasons set out above, the Tribunal finds is not in the interests of justice to allow an amendment at this stage in proceedings and so the list of issues stands as per the Case Management Order of 8 December 2021.

The Issues

12. The list of issues for the Tribunal to determine at this hearing were therefore as recorded in the Case Management Order of 8 December 2021, and are repeated here. This hearing was to determine liability only.

13. Time limits

    a. Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the Tribunal may not have jurisdiction.

    b. Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

        i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
        ii. If not, was there conduct extending over a period?
        iii. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
        iv. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
            1. Why were the complaints not made to the Tribunal in time?
            2. In any event, is it just and equitable in all the circumstances to extend time?

14. Direct race discrimination (Equality Act 2010 s. 13)

    a. The Claimant describes herself as black British of Guyanese Origin.

    b. Did the Respondent do the following things:
        i. On the commencement of the Claimant's employment, in about September 2016 she was told to order office furniture, however despite doing so she did not receive it until a year later, unlike her white colleagues, in particular Dr Bush. Despite attempts to progress her order she had to spend personal funds to furnish her office. Further, her nameplate

did not mention her academic title, unlike her white colleagues.

ii. In about October/November 2016 Dr Crow neglected to assist the Claimant in her application for fellowship by informing her of the extensions in time for women with children.

iii. From September 2017, the Claimant's payslips ceased to be sent to her pigeonhole. This did not happen to white colleagues.

iv. In September 2020, it was suggested to the Claimant that she consider ill health retirement, but no other work options were suggested to her. On 14 September 2020, Dr Schönle said to the Claimant that ill health retirement was the best thing for her and when the Claimant suggested that she could teach online, Prof. Schönle said it would be too stressful for her. The Claimant says that white employees would have been encouraged to return to work.

v. On 3 November 2020, the Claimant was told that work was being undertaken on her ill health retirement application (which she had not made), to which she objected and said it was not her only option. The Claimant says that white employees would have been encouraged to return to work.

c. Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant says she was treated worse than Dr Bush (for allegation 1) and/or a hypothetical comparator.

d. If so, was it because of race?

e. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

f. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

15. <u>Harassment related to race (Equality Act 2010 s. 26)</u>

a. Did the Respondent do the following things:

i. In about October 2016, the Claimant attempted to progress her furniture order with Ms Blackman and was told in the presence of SML admin staff not to make that sort of approach in the future.

ii. In about April 2018, the Claimant asked a colleague to book a visiting black lecturer a taxi, because she did not think Ms Blackman would assist a black colleague. Ms Blackman did not book the taxi and asked another administrator to remedy it. No taxi collected the lecturer.

iii. In about September 2018, Dr Crow insisted on accompanying the Claimant to a meeting to address student concerns about poor grades. The Claimant objected and dealt with the issue alone.
iv. In September 2018, after complaining to Dr Crow that Dr Salvado had commented that "Nobody gives a shit about Africa", Dr Crow contacted Dr Salvado and told the Claimant that Dr Salvado had been upset that the Claimant had complained.
v. On about 28 November 2018, Dr Crow allowed a colleague to access the Claimant's computer files, without seeking the Claimant's agreement.
vi. In about May 2018 [not 2019, as recorded in the CMO of 8 December 2021], Dr Burch-Brown disingenuously invited the Claimant to have a writing lunch, with the sole purpose of inducing the Claimant to participate in Dr Burch-Brown's project so it would benefit from having input from a black woman in a diversity-related project.
vii. In December 2019, Dr Hawkey disclosed critical and confidential information about two black people (one a colleague of the Claimant). No similar information was disclosed about white people.

b. If so, was that unwanted conduct?

c. Did it relate to the Claimant's protected characteristic, namely race?

d. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

e. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

16. <u>Victimisation (Equality Act 2010 s. 27)</u>

a. Did the Claimant do a protected act as follows:
    i. In about November 2018, the Claimant complained to Dr Crow that Prof. Schönle had asked her to job share with Dr Lingna Nafafé, who had been underperforming and she had been asked to report on him and undertake his work, because she was black. The Claimant said to Dr Crow that just being black did not mean that she could resolve the college's problems. The Respondent, at this stage, does not admit that it was a protected act.

b. Did the Respondent do the following things:
    i. The Claimant was refused advancement in the form of accelerated promotion to senior lecturer, despite being suitably qualified.

c. By doing so, did the Respondent subject the Claimant to detriment?

d. If so, was it because the Claimant had done the protected act?

17. Disability

    a. Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:
        i. Whether the Claimant had a physical or mental impairment. She asserts that following her stroke she has mental impairments affecting her cognitive function, memory and word selection. There is some effect on speech and physical ability. The Respondent accepts that the Claimant was disabled at all material times after 29 December 2019.

18. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

    a. The Respondent accepts it had knowledge of the Claimant's disability from 29 December 2019.

    b. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:
        i. To attend work in accordance with contracted hours
        ii. To attend work in person

    c. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that she was unable to attend in person, due to the stress it would cause her following her stroke and the risk to her health? Full-time hours were too great due to the stress it would cause her following her stroke and the risk to her health.

    d. Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at a disadvantage?

    e. What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:
        i. By the Claimant working online rather than in person, thereby teaching remotely
        ii. Reducing her hours

    f. Was it reasonable for the Respondent to have to take those steps and when?

    g. Did the Respondent fail to take those steps?

19. In respect of the claim of victimisation, the Respondent confirmed to the Tribunal that the Respondent disputes that what the Claimant did was a protected act, and further disputes that what the Claimant says happened took place in any event. The Respondent further confirmed that it disputes ever applying a PCP to the Claimant, and also disputes that what the Claimant says was applied would amount to a PCP. There were therefore

both evidential and legal arguments in respect of these two elements of the Claimant's claim that would need to be determined by the Tribunal.

Findings of Fact

20. The Claimant was employed by the Respondent from 1 September 2016 as a Lecturer in Latin American Cultural/ Political History. She resigned from this position on 10 January 2023 (after the second day of this hearing).

21. By a claim form presented on 3 December 2020 the Claimant brought a complaint of discrimination on the grounds of race; this was subsequently varied as set out above at the preliminary hearing on 8 December 2021.

22. The Claimant notified ACAS of the dispute on 7 November 2020 and the certificate was issued on 2 December 2020.

September 2016 – September 2017

23. When the Claimant started working for the Respondent in September 2016, she placed an order for some additional furniture during that month. Her order was for extra chairs and a coffee table so that she could meet with students in her office. She has accepted that her order was made at the beginning of the academic year, but said she was not sure if teaching had started. The Claimant states she was never told what Ms Blackman states at paragraph 6 of her witness statement; i.e. in that the University coordinates the majority of the furniture changes so that orders and removals are carried out at the same time, in order to minimise disruption, keep costs down, and maximise the furniture removal company's time. The Claimant also accepts that her office was at the top of a spiral staircase, but states that the suggestion that this would cause logistical difficulties is an excuse. She also accepts that there was decoration work to the communal areas in 2017, but says furniture could still have been delivered during the spring break.

24. The Claimant states that she had to spend her own money to provide furniture, but concedes that there is no proof of this in the bundle. She says she paid cash and probably threw the receipts away. The Claimant's claim is that Dr Bush, a white colleague, received her furniture order "straightaway". Ms Blackman says this is not correct as Dr Bush did not order any furniture during 2016. The Claimant explained cross-examination that she was referring to 2014 or 2015, as Dr Bush started two years before her. The Claimant's evidence is that Dr Bush told the Claimant that her (Dr Bush's) furniture arrived straight away, however, the Tribunal has not been provided with any evidence as to when this furniture was ordered and when it arrived. The Tribunal has no evidence on which to make a finding as to when Dr Bush's furniture did arrive.

25. The Claimant furthers states that, when she started working for the Respondent, the name on her door omitted her academic title of "Dr". The Respondent does not dispute that this has happened but says it was an admin error. The evidence of Ms Blackman is that she was not aware of any issue with the Claimant's nameplate until the start of these

proceedings. She explained that a junior member of the admin team, typically the school assistant, prepares the nameplates. This would typically be done before the new occupant moves into the room, and was simply done from a list of names. Ms Blackman states she is aware that other members of the teaching staff have also had issues with their nameplates, and this is supported by evidence of Dr Hawkey, who said the same issue happened to him, in that the "Dr." was missed off his name when he first started. The Claimant did not challenge Ms Blackman on this aspect of her evidence.

26. The Tribunal accepts the corroborative evidence of Ms Blackman and Dr Hawkey and finds that administrative errors with nameplates did occur. The Tribunal finds that the Respondent's policy of completing furniture orders over the summer break was something that applied to all members of staff. The Tribunal further finds that the fact that the Claimant's office was at the top of a spiral staircase, and the redecoration work in 2017, could reasonably be expected to cause a delay to a furniture order.

27. At paragraph 88 of her witness statement, the Claimant makes an allegation that in October 2016, Ms Blackman became hostile when the Claimant asked for an update about the furniture. The Claimant describes Ms Blackman's anger as "clear and barely reigned in" and goes on to say that, in front of two colleagues, Ms Blackman told the Claimant never to come and see her and ask for an update ever again. the Claimant says she reported this to Dr Crow. The Claimant said that she reported this incident to Dr Crow, and Dr Crow told the Claimant she would bring it up with Ms Blackman when they next had lunch together.

28. The Claimant further explained to the Tribunal that Ms Blackman treated her with 'radio silence' when dealing with requests from the Claimant. The Claimant referred the Tribunal to [237] and said this was an example of when a request from the Claimant was ignored by Ms Blackman. It is the Claimant's case that Ms Blackman did not do this to the Claimant's white colleagues. The Claimant said she could have provided more examples but was trying to limit the size of the bundle.

29. The evidence of Ms Blackman is at odds with that of the Claimant. In respect of the email at [237], Ms Blackman said that she sent the required information directly to the Claimant's estate agent, thereby fulfilling the request, but cannot recall if she replied to the Claimant directly to inform of this. Ms Blackman said that she deals with 150 members of staff, and provides the same support to everyone. Her evidence is that there are occasions when emails from members of staff are not responded to due to the constraints of time and workload. She says this happens to all staff and she did not treat the Claimant any differently.

30. Ms Blackman had no recollection of the Claimant visiting her office to discuss the furniture order. She stated she would have not considered it impolite for the Claimant to come and see her about it, and if she had done so, Ms Blackman would have given a measured response. The Tribunal was referred to other emails between Ms Blackman and the Claimant, for example [235], which the Respondent submitted show a collegiate relationship between the two. The Claimant's case is that this is

what she refers to as “email speak”, and that it does not reflect the true atmosphere.

31. The evidence of Dr Crow was that she and the Claimant have spoken generally about race, given that they share an academic interest in the subject, but Dr Crow was not aware of the level of demoralisation that the Claimant says she was experiencing at the time, nor aware of any acts of micro-aggression carried out by students or staff towards the Claimant. She specifically said she did not have any recollection of the Claimant saying she was being harassed because of her skin colour. She had no recollection of any incident with Ms Blackman being reported to her.

32. The Claimant stated in cross-examination that Dr Crow and Ms Blackman could be colluding to hide this incident. She did however accept that it was equally plausible that the incident did not happen.

33. The Tribunal is faced with two different versions of events. On balance, the Tribunal prefers the evidence of Ms Blackman and Dr Crow, as it is supporting and cooperative. The Tribunal did not see any evidence of any collusion between the two witnesses and found both to be honest and credible witnesses. The Tribunal, therefore, concludes that the incident of hostility as alleged by the Claimant did not take place.

34. At paragraph 95 of her witness statement, the Claimant makes the allegation that Dr Crow failed to tell the Claimant about an extension for the Claimant’s ERC fellowship application which the Claimant would have been eligible for. Dr Crow apparently used the extension herself in her own ERC fellowship application. The Claimant’s case is that Dr Crow, as the Claimant’s mentor, should have known the Claimant was eligible for an extension and should have told her about it. The Claimant conceded in cross-examination that such information is freely available, although she did say it is a complicated process, she accepted that the information was not exclusive to Dr Crow.

35. Dr Crow stated that she was aware of the extension and agreed that she did not tell the Claimant about it. Her evidence is that she was not aware that the Claimant would be eligible for the extension, and had no way of knowing that the Claimant was not aware of it in any event. Dr Crow reiterated that this is publicly available information, but was emphatic when she said she would never intentionally withhold information from someone for any reason. The Tribunal is satisfied that, although this may be complex information, it is information that is publicly available.

<u>October 2017 – September 2018</u>

36. The Claimant’s case is that her payslips went missing on at least three occasions. On one of these occasions, on 26 October 2017, the Claimant checked with financial services, who told her that her payslip had been sent with those of other academics. The Claimant then contacted Ms Reed in the admin team [238], and Ms Reed told the Claimant that her payslips had not arrived with the others. The Claimant believed that Ms Reed was lying as says she believed financial services more than she believed Ms Reed.

37. The Respondent's evidence, given by Ms Elliott at paragraphs 3 to 5 of her witness statement, is that payslips did go missing on occasion. The Respondent says this is down to simple human error. Ms Elliott was not able to attend the hearing as she was unwell and therefore her evidence could not be tested in cross-examination. The Tribunal has to take this into consideration when deciding what weight to give to the evidence of Ms Elliott.

38. Ms Blackman also commented on the issue with payslips in her witness statement. The Claimant asked Ms Blackman why she felt the need to do so, when payslips were nothing to do with her. Ms Blackman acknowledged the payslips were not one of her responsibilities, but explained that Ms Reed was part of the same professional services team as Ms Blackman. Ms Blackman and Ms Reed jointly managed the school assistant. It would be the school assistant who dealt with post, and this would include payslips.

39. The Tribunal finds, even though the evidence of Ms Elliott was untested, on the balance of probabilities, it is likely that items of post go missing from time to time in large organisations such as the Respondent.

40. In December 2017 (not September 2018 as recorded in the Case Management Order), a number of final-year students expressed dissatisfaction at the marks they had been given in an assignment set by the Claimant as part of the course she taught. It was the first time the Claimant had taught final-year students. The students did not complain to the Claimant but rather went to Dr Crow. This resulted in an email exchange between Dr Crow and the Claimant as to how to deal with the situation [248 – 245].

41. This also resulted in Dr Crow undertaking a review of the Claimant's unit on the shared teaching platform 'Blackboard', and also Dr Crow attending one of the Claimant's classes. Dr Crow described the unit as "very well-organised", and says "it was great" in respect of the class. Dr Crow also observed that the class had 20 students in attendance, which was nearly 100%, and that about half of them spoke and contributed to the class.

42. In her email of 17 December 2017, Dr Crow suggested to the Claimant that she might consider organising an extra revision session [246]. She also offered to accompany the Claimant in this revision session. Specifically, she said, "I'd be happy to do this with you if you like, perhaps on Monday the 15th January?".

43. The Claimant replied by email the next day, and agreed that Dr Crow should write to the students an email, and that it should be "strongly-worded to the effect that it is my unit". The Claimant said that another revision session could be done, but "I think it's best that I do it alone". The Claimant also raised the matter of race in this email. The Claimant puts forward that the students "could go after" her for being new, but "there is also the matter of my colour". The Tribunal finds that she was suggesting that the students' complaints could be racially motivated. The Claimant also says, in relation to her conducting the session alone, "Otherwise, we

risk sending the message that in some way I'm not quite up to the task".

44. Dr Crow replied to the Claimant, enclosing a draft of an email to be sent to the complaining students, and also offering if there was anything she could do to help. The additional revision session did go ahead, but Dr Crow did not attend.

45. On 16 April 2018, Ms Blackman was asked to book a taxi to meet a visiting lecturer at Bristol airport [270]. Ms Blackman confirmed during cross-examination that she did not book this, but explained at paragraph 22 of her witness statement and during cross-examination that she had not done so because she was leaving the School of Modern Languages. She did, however, delegate this task to Anne Payne [269] who did book the taxi. In the event, the taxi was booked but the driver did not see or ignored the instruction to meet the visiting lecturer in the airport and was waiting outside. As a result, the visiting lecturer did not meet up with the driver as planned and did not get to his hotel until the early hours of the morning.

46. In May 2018, Dr Burch-Brown invited the Claimant on a 'writing date', and they agreed to meet on Friday 18 May [273 – 272]. The Claimant refers to this at paragraph 99 of her witness statement, but it is agreed that the correct date is May 2018, not 2019. The idea was that Dr Burch-Brown and the Claimant would spend the day at a café for breakfast and lunch while they worked on their respective writing projects. It is the Claimant's case that this was a disingenuous invitation, motivated by Dr Burch-Brown's desire to get the Claimant to join her funding bid as a coinvestigator.

47. Dr Burch-Brown accepts that she was working on a funding bid and said the deadline was soon after the writing date. In cross-examination, she could not recall exactly when the deadline was. She suggested it was about a week afterwards. Dr Burch-Brown also accepts that she did discuss the funding bid with the Claimant and invited her to be a coinvestigator.

48. Recollections of what took place at the writing date differ. The Claimant says that Dr Burch-Brown pushed her for ideas which could be used in the project and that, despite the Claimant telling Dr Burch-Brown that she did not have time to take part, Dr Burch-Brown continued to be more insistent about the Claimant taking part to the point that she had written the Claimant's name into the funding bid as a coinvestigator without the Claimant agreeing to this.

49. Dr Burch-Brown does appear to accept that she dominated the conversation with discussion of her project, as she says at [271] "sorry we talked about my proposal so much" and "bit of a hog session for me".

50. Dr Burch-Brown's evidence is that she felt a "genuine strong connection" with the Claimant and felt that she would be a "good fit" for her project due to the Claimant's community-based background. When asked in cross-examination what she meant by a 'community-based academic', of said that her interpretation is someone who is doing research; publishing; but

not at a University.

51. There was some discussion in the hearing regarding the seniority of a coinvestigator versus a principal investigator. The Claimant, at paragraph 100 of her witness statement, says that an academic who has been the lead researcher in a prestigious fellowship is unlikely to be part of a "second-tier research team". She states that this clearly shows that Dr Burch-Brown had made an assumption, based on the Claimant's race, that the Claimant had not been a recipient of significant funding. When challenged about this, Dr Burch-Brown said that this is not how things work in her department (Philosophy), and cited an example where a world expert had been coinvestigator to a junior lead investigator.

52. When asked why she thought Claimant would be interested in her project, Dr Burch-Brown said that she understood that the Claimant was anxious about "probation", which was in fact the accelerated progression program, and that adding another grant would assist the Claimant and be beneficial to the both of them. She also referred in her statement and in her cross-examination to the Claimant's alleged dream of spending some time in a Maroon community in Brazil.

53. Dr Burch-Brown was questioned at length about other motives she might have, but was consistent in her answers that she saw the project as beneficial for both her and the Claimant. She further stated she did not need the Claimant to be a coinvestigator, and only one principal investigator was needed. She specifically denied thinking that a black female academic would assist the project. She explained in cross-examination that the other members of the project were community-based academics. One did not have a PhD and one was working towards a PhD. She further stated that the majority, but not all, of the members of the project would identify as black.

54. The Tribunal find that Dr Burch-Brown's evidence is credible and consistent. The Tribunal conclude, on balance, that the Claimant did agree to be part of the funding bid while she was at the café.

55. On the same day, once she had returned home, the Claimant sent an email to Dr Burch-Brown, withdrawing from the funding bid [272 – 271]. Dr Burch-Brown replied by email and said "Absolutely, I completely understand! No problem at all". The Claimant states that Dr Burch-Brown has not in fact removed the Claimant's name from the application, and it is still there two years on. There is, however, no evidence of this for the Tribunal to conclude this is in fact the case. Dr Burch-Brown confirmed her answers to cross-examination that she did not actually progress the funding bid as she submitted it out of time.

56. On 9 September 2018, the Claimant sent a text message to Dr Crow. In this message, she stated that a colleague, Dr Salvado, had made a comment to her in relation to her BA fellowship application. Dr Salvado is reported to have said "nobody gives a shit about Africa" [294].

57. Dr Crow replied to this message two days later. In her reply, she states that she had only just seen the message. She was asked under cross-

examination if this was correct, and had the real reason being because she had wanted to meet Dr Salvado and discuss the comment before she replied to the Claimant. Her evidence was this was not the case, and she maintained that she had only seen the message on 11 September. The Tribunal accepts her evidence on this point, and finds that she did not see the message on the day it was sent.

58. Dr Crow then met, by chance, with Dr Salvado because of a children's swimming class they both attended. The Tribunal accepts that this meeting was not planned. Dr Crow said there was a "spontaneous" conversation with Dr Salvado in which his comment to the Claimant was mentioned. Dr Crow then informed the Claimant about this meeting by text message [297]. Dr Crow describes Dr Salvado as "gutted he upset you" and offered to tell the Claimant about what happened at a prearranged breakfast meeting on Friday 14 September.

59. The Claimant then replied on 12 September [298] saying that it was "unfortunate" that Dr Crow had spoken to Dr Salvado and told him about the comment. She confirmed her attendance at the breakfast meeting. Dr Crow replied, telling the Claimant not to feel bad, but acknowledging that she should have asked the Claimant before saying anything to Dr Salvado. She reiterated "it just came up impromptu".

November 2018 – December 2019

60. The Claimant asserts that in November 2018, Dr Crow allowed a teacher to access the Claimant's computer files. This is set out at paragraph 98 of her witness statement and in paragraph 14 of her amended particulars of claim [159].

61. Dr Crow's evidence is at paragraph 24 of her witness statement. The Claimant agreed when questioned that she was referring to an incident when a student, who had originally been one of her tutees, had their assessment for the module 'Making of the Hispanic World' marked by another tutor. The email exchange regarding this is at [331].

62. The Tribunal accepts that the student assessment was uploaded to the teaching platform known as 'Blackboard', and that this platform could be accessed by various tutors. The Claimant accepted that files on Blackboard were open to everyone. The student's assessment was marked by Dr Camila Gonzalez, who was employed by the Respondent as a lecturer on a temporary contract between September 2018 and June 2019. There was no access to the Claimant personal computer files as the Claimant seem to initially allege, and the Tribunal accepts that Dr Crow would not have been able to access these files, or grant access to others, as she did not know the Claimant's password.

63. The Claimant states that on 29 October 2018 she complained to Dr Crow that it was discriminatory for Prof. Schönle to propose that the Claimant job share with the only other black colleague, Dr Lingna Nafafé. In particular, the Claimant says that she told Dr Crow just being black did not mean that she could resolve the college's problems. The Claimant says that this amounts to a protected act for the purposes of s.27 Equality Act

2010. She further says that, as a result of this protected act, her progression to senior lecturer by way of the accelerated progression program was blocked for the next two years by Prof. Schönle.

64. In her evidence, Dr Crow could not recall that any such conversation had taken place. The evidence of Prof. Schönle is that he was not aware of any such conversation as Dr Crow did not raise it with him, nor did he recall any such complaint being brought to his attention by Dr Kitts, who was the Claimant line manager at the time.

65. The Respondent's accelerated progression program provides an opportunity for staff to put forward a case for promotion sooner than would normally happen, if they feel ready for it. There are requirements in order to be able to apply for this program. The first is that the applicant must have completed the course known as CREATE 1. The second is that they must at least be enroled on the course called CREATE 2.

66. Prof. Schönle, as Head of School, was responsible for guiding applicants through the process, and so informed staff that they should contact him if they were interested in applying. The Claimant emailed Prof. Schönle on 1 November to advise that she was interested in applying and Prof. Schönle responded saying that he would be happy to review her documents [319-320]. An exchange of emails followed, which ended with Prof. Schönle telling the Claimant that he thought she had a reasonable chance of success [317-318]. Prof. Schönle's evidence is that at this time he was working on the assumption that the Claimant had completed CREATE 1 and was enroled on CREATE 2.

67. The Claimant was, however, at that time not enroled on CREATE 2 and had not completed CREATE 1 [628]. She contacted Prof. Schönle to request an extension for submitting the application and it was agreed that the deadline would be extended until 26 November [316-317]. On 12 November, the Claimant emailed Prof. Schönle to explain to him that she might not be able to apply for accelerated progression due to what she referred to as a "technicality related to CREATE". The Claimant was aware that she needed to be enroled on CREATE 2, but she had postponed her enrolment due to an upcoming operation. The operation and recovery time would make it impossible for her to complete the course in the 2018/19 academic year. She asked if this meant she could not proceed with her application, or if there were extenuating circumstances that could be taken into account [314-315].

68. Prof. Schönle accordingly contacted Mel Wise, Head of HR Partnering, the Claimant's extenuating circumstances could be taken into consideration. Ms Wise replied to say that, given the reason why the Claimant was unable to complete CREATE 2 within the 2018/19 academic year, an exception could be made and she could still apply for accelerated progression provided that she enroled on CREATE 2 in the 2019/2020 academic year [313].

69. The Claimant then contacted Prof. Schönle again if you days later to explain that she was due to take research leave during the 2019/20 academic year, and this would mean that it would be impossible for her to

complete CREATE 2 during that year as well. She therefore requested a further year's postponement for enroling on CREATE 2, in order that she could still apply for accelerated progression with a view to completing CREATE 2 in the 2020/2012 academic year.

70. Prof. Schönle contacted Ms Wise again regarding the Claimant's request [312]. This was considered by the Respondent's Academic Staff Development team, but it was decided that, as CREATE 2 is a mandatory requirement for accelerated progression, it was not possible to agree to the Claimant's request. The one-year exemption on medical grounds could be granted, but as research leave is an individual lecturer's choice, a further exemption could not be granted. Further, CREATE 2 is a professional practice-based course, and so a breadth of practice is required in order to completed, and it would not be possible to complete the course while on research leave.

71. As a result of this, Prof. Schönle contacted the Claimant and explained that, if she wanted to apply for accelerated progression, she would need to be enroled on CREATE 2 during the 2019/20 academic year. He set out to options for the Claimant; one being to delay her application and the other being to delay her research leave and enrol on CREATE 2 during the 2019/20 academic year [310].

72. The Claimant chose not to proceed with her application for accelerated progression.

73. Prof. Schönle was not aware at the time that the Claimant had not actually completed CREATE 1. This would have meant that her application for accelerated progression would not have been accepted in any event.

74. It is the Claimant's case that in December 2019, Dr Hawkey disclosed confidential information to her about Dr Lingna Nafafé, who is black, and Dr Hawkey's sister, who is biracial. The Claimant does not state in her witness statement what this confidential information was. Under cross-examination, she declined to comment on what this information was or why it was confidential. Dr Hawkey states in his evidence and again in cross-examination that no disclosure of this kind took place. He further states that he was not ever in possession of confidential information about Dr Lingna Nafafé, and so could not have disclosed any.

75. It is the Claimant's absolute right not to say what information was disclosed if she chooses to. The Tribunal cannot order her to repeat the alleged confidential information in open court. This does however cause a serious evidential problem for the Claimant. The burden of proof lies with the Claimant to prove a case of harassment in the first instance. If she can the balance will shift to the Respondent to provide an explanation for whatever conduct is alleged. If details of what is alleged to have been said are not provided, the Respondent is not in a position to test that information in cross-examination. The Tribunal is left with a position that the Claimant says something happened, and Dr Hawkey says it did not. The evidence is therefore 50-50, and this does not satisfy the test of the balance of probabilities. The Tribunal cannot conclude that it is more likely than not that events happened as the Claimant said they did.

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76. The Claimant suffered a stroke on 29 December 2019 while in Portugal. The Claimant was on sick leave from 3 January 2020. In the period immediately after her stroke, the Claimant's sister kept the Respondent updated on the Claimant's health [390 – 392]. In line with the Respondent's policies, the Claimant's line manager, Dr Kitts, called the Claimant on 30 January 2020 [399 – 400]. From the notes of this telephone conversation, the Tribunal accept that the Claimant became upset and that she requested the University not to contact her.

77. As a result, the Respondent took the view that it be appropriate for Cait Elliott, HR Business Partner, to liaise with the Claimant for formal matters such as fit notes. A medical note from the hospital in Portugal was issued on 3 January 2020 and sent to the Respondent by the Claimant's sister on 7 January 2020 [390]. The Claimant first provided a fit note 26 February [413] which stated that the Claimant was not fit for work for eight weeks, i.e. until 24 April. She provided another fit note on 20 April (not in the bundle) which signed her off work until 20 July 2020.

78. On 2 June 2020, Prof. Schönle sent an email to the Claimant with the subject heading "reaching out". In that email, Prof. Schönle said "we do hope that you will recover fully and that you be able to return to teaching and writing as before". He also mentions that the school had been restricted to online communication only since late March, which was due to the COVID pandemic [417]. The Claimant did not reply to this email. The Claimant also read, on 9 June 2020, a schoolwide email sent by Prof. Schönle and Dr Ailes, who was the Equality, Diversion and Inclusion Officer for the school [420 – 421]. The Claimant did reply to this email, referring to issues of racial aggression that she had experienced at work, and saying that her health team had advised her not to return to work so as to avoid psychological harm. She specific be said she could not go into further details on the subject, and requested not to be asked about it [420]. The Claimant received a reply from Prof. Schönle [420] in which he reiterated his message of 2 June that he hoped the Claimant would recover and soon be able to return to the school.

79. The Claimant's sick pay also decreased to half pay on 6 June 2020, and accordingly Ms Elliott emailed a letter regarding this to the Claimant [425]. The Claimant replied on 18 June, and asked if she could use holiday to make up her full pay. In this email she also refers to "when I talk to Occupational Health" and says that the post-stroke tests she will be having in August should confirm "whether I will be well enough or not to return to my job". Ms Elliott replied on 19 June, asking if the Claimant thought she would be well enough to return to teaching in the next term [435].

80. On 19 June the Claimant sent two emails in reply about her sick pay and regarding seeing Occupational Health [433 – 434]. In her first email she said "I can only say that I'm not in a position to do any part of my job". In her second email, she stated that "I'm going by medical advice and the fit notes and will not be in touch with OH until I know that my recovery indicates that the time has come". She further said "I am absolutely

nowhere near being able to do my job, as the fit note explains". She declined to have an appointment with Occupational Health, and so a referral to OH was not arranged.

81. There was a further email from the Claimant on 26 June [444] in which she set out her position regarding Occupational Health. She stated "With regard to OH, what I'm looking for is a note from my GP which says 'May be fit for work taking into account of the following advice.' At that time, I will arrange to speak with OH. But for as long as it says 'Unfit for work', I need not concern myself with more than facilitating my recovery during the stated period".

82. The Claimant's fit note dated 6 August 2020 showed that she was not fit for work until 31 October 2020. She sent this note to the Respondent by email dated 6 August [449]. In the email she says: "Please find attached the fit note I received after consulting with my doctor. The doctor also advised that I should contact Occupational Health so that they are aware of my progress and limitations at this stage of my recovery. Would you be able to arrange a meeting with them?".

83. The Claimant did use her 2020 annual leave entitlement in one block, as she requested, and so her contractual sick pay came to an end on 16 October 2020 [442, 460]. The Claimant emailed the Respondent on 2 September [460] to enquire whether her contract employment would automatically end when her sick pay entitlement ran out. She was told by Ms Elliott that her employment would not end and she would simply be on unpaid sick leave [460]. It was at this point that Ms Elliott asked the Claimant if she wanted Occupational Health to assess the Claimant's eligibility for ill health retirement. The Claimant replied to say she agreed that Occupational Health should assess her eligibility for ill health retirement [459 – 463].

84. On 2 September 2020, the Claimant emailed Prof. Schönle [455] to explain that she had not heard from Occupational Health and to say she had received news from her stroke consultant. She explained that "considering how impossible it seems to know when I will be able to resume my job" she was considering resigning from her position.

85. The Claimant contacted Prof. Schönle again by email on 3 September. In her email, she says "From a financial point of view, it makes sense to consider retirement over resignation". Prof. Schönle replied to say they could discuss this on 14 September. Also on 3 due to September, Ms Elliott informed the Claimant that her referral had been sent to Occupational Health and they should arrange an appointment soon. In an appointment was confirmed by email from Jane Carter, Occupational Health Service Administrator, sent on 3 September at 15:45 [457].

86. At paragraph 31 of the statement the Claimant says "a few hours after Ms Elliott first mentioned IHR to me on 2 September, I received an email from Ms Carter, an OH administrator, regarding a telephone appointment with Dr Harrison from Occupational Health for the morning of 15 September 2020". The Claimant goes on to say at paragraph 32 of her witness statement, "on the same day, Prof. Schönle invited me to a phone

conversation to be held in the afternoon of 14 September 2020. He was specific about the day and time". The Claimant further states at paragraph 33 of her witness statement that such a phone call could have been arranged for an earlier date, but Prof. Schönle deliberately requested the afternoon of 14 September as he wanted to influence the Claimant's "thinking and contribution to the OH telephone appointment on the following day" (Claimant's statement, para. 33). The Claimant refers to the email at [451].

87. The Tribunal finds this to be factually incorrect. At [452], the email from Prof. Schönle to the Claimant suggests to her that it would be "good for us to have a conversation", and asks "is that ok?". There is no mention of date or time. It is the Claimant's reply on 2 September at 19:10 which fixes the date and time. The email starts with "Monday 14th at 2pm?". Prof. Schönle confirmed that he agreed to the Claimant's time in his reply on the same day at 22:16 [451].

88. In any event, the emails regarding the conversation with Prof. Schönle were exchanged on 2 September; and the emails with Ms Elliott and Ms Carter regarding the Occupational Health meeting did not happen until 3 September. The Tribunal finds that Prof. Schönle could have had no way of knowing that an Occupational Health assessment would be taking place on 15 September, as it had not even been arranged.

89. The Occupational Health Referral Form [461 – 463] was sent to the Claimant by Ms Elliott on 3 September, to be checked before it was sent to Occupational Health [459]. The Claimant replied on the same day, saying "Yes, all the details are correct, and I don't propose adding anything".

90. At box 4 ("Reason for Referral") [462], there are a number of boxes, two of which have been ticked. The first ticked box is next to the statement "Long term sickness and absence (4 weeks or more) and opinion regarding the likelihood of recovery or return to work, adjustments and recommendations". The second is next to the statement "Assessment for the employee's suitability to meet the medical criteria for ill health retirement".

91. During cross-examination, it was put to the Claimant that this shows that the Respondent was considering both a return to work, and ill health retirement for the Claimant. The Claimant denied this, and stated that "this was not the form I had. I do not accept this was the one sent to Occupational Health". She reiterated that she did not accept the form as the genuine form. The Tribunal notes that the Occupational Health Referral Form was sent to the Claimant for checking on 3 September 2020. The Claimant therefore had the form in her possession, and could have included it in the bundle if there was a difference between the one at [461 – 463] and the one she received on 3 September. She did not do so and was unable to put forward any evidence that a different form, with only "Assessment for the employee's suitability to meet the medical criteria for ill health retirement" selected, was what was actually sent to Occupational Health. The Tribunal finds it is more likely than not that the form at [461 – 463] was the one sent to Occupational Health.

92. The meeting with Dr Harrison from Occupational Health did go ahead on 15 September. This led to a report being produced [475 – 477]. In the report, Dr Harrison stated that she would like to obtain a report from the Claimant's GP in order to find out more about the Claimant's condition, treatment and the expected prognosis.

93. Ms Elliott contacted the Claimant on 3 November to say that the Occupational Health team have received a report from her GP and are now working on completing their section of the Claimant's ill health retirement application. The Claimant replied on the same day to point out that she had not officially applied for ill health retirement, and she intended to wait to speak to Occupational Health once again once the final report was ready.

94. The Claimant's sick pay expired on 15 October 2020, and on 4 November 2020 the Claimant emailed Prof. Schönle to ask if her sick pay could be extended to the end of the year which was in line with her latest fit note [520]. Enquiries are made within the Respondent's HR department, but it was not possible to extend her sick pay [519]. The Claimant responded to Prof. Schönle and said that she was aware that ill health retirement was not her only option and that she might be able to return to work [524]. Prof. Schönle responded and agreed that they should wait to see what Occupational Health to say and having a discussion at that point [523 – 521].

95. On 17 November, Dr Harrison had another conversation with the Claimant. The Claimant expressed an opinion that she believed Dr Harrison was completing her ill health retirement paperwork without further discussion with the Claimant and the whole process had already been decided. Dr Harrison informed the Respondent of this on the same day [528]. Dr Harrison sent a letter to the Claimant on 20 November informing the Claimant that she (Dr Harrison) would be unable to complete an Occupational Health report for her but would be happy to do so in the future if the Claimant wished to re-engage. The Respondent was informed about this on 27 November [527].

96. On 2 December 2020, Prof. Schönle sent the Claimant an email [529] to try to re-establish contact as the Respondent had not heard from her since 15 November [522]. She did not reply, and Prof. Schönle contacted Ms Elliott on 7 December 2020 to see if she had any contact with the Claimant [530]. The Claimant replied on 8 December to say that she had started the Early Conciliation process, which had failed, and she was now proceeding to an Employment Tribunal [531].

The Law

97. The law relevant to the issues before the Tribunal is set out below.

Time Limits

98. Section 123 of the Equality Act 2010 provides that no complaint may be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the

employment Tribunal thinks just and equitable. For the purposes of this section conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it.

99. An act will be regarded as extending over a period if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant. The concepts of 'policy, rule, practice, scheme or regime' should not be applied too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period, *Hendricks v Metropolitan Police Comr*. [2003] IRLR 96, CA at paras 51-52.

100. Where there are numerous allegations of discriminatory acts or omissions, the complainant must prove that

    a. the incidents are linked to each other, and
    b. that they are evidence of a 'continuing discriminatory state of affairs'.

    The focus should be on the substance of the complaints to determine whether there was an ongoing situation or continuing state of affairs as distinct from a succession of unconnected or isolated specific acts.

101. If the claim is presented outside the primary limitation period (that is, after the relevant three months), the Tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles:

    a. The Claimant bears the burden of persuading the Tribunal that it is just and equitable to extend time. There is no presumption that time will be extended but nor is there any magic to that phrase and it should not be applied too vigorously as an additional threshold or barrier.
    b. The Tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a Respondent to be put to defending a late, weak claim and less prejudicial for a Claimant to be deprived of such a claim;
    c. This is the exercise of a wide, general discretion and may include the date from which a Claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the Claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues. This will involve an assessment of two types of prejudice as referred to in the authorities. The first is the general prejudice that inherently follows from being required to respond to a claim which is presented out of time (the prejudice of meeting the claim). The second is the effect

upon the evidence of the delay (sometimes referred to as forensic prejudice).

d. There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account, *British Coal Corporation v Keeble* (length and reason for delay, effect on cogency of evidence, cooperation, steps taken once knew of the possibility of action).

102. The best approach for a Tribunal considering the exercise of its discretion to extend time is to assess all the factors in the particular case. These will include the public interest in the enforcement of time limits and the undesirability in principle of investigating stale issues, *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23.

Direct Discrimination

103. Section 13 of the Equality Act 2010 provides:

> S. 13.
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

104. During the hearing the Tribunal explained to the Claimant that in considering her direct discrimination complaints the Tribunal would focus on the 'reasons why' the Respondent had acted (or failed to act) as it did. That is because, other than in cases of obvious discrimination, the Tribunals will want to consider the mental processes of the alleged discriminator(s): *Nagarajan v London Regional Transport* [1999] ICR 877.

105. The Tribunal further explained to the Claimant that in order to succeed in any of her complaints she must do more than simply establish that she has a protected characteristic and was treated unfavourably: *Madarassy v Nomura International plc* [2007] IRLR 246. There must be facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long-established legal guidance, including by the Court of Appeal in *Igen v Wong* [2005] ICR 931. It has been referred to as something "more", though equally it has been said that it need not be a great deal more: Sedley LJ in *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279. A Claimant is not required to adduce positive evidence that a difference in treatment was on the protected ground in order to establish a prima facie case.

106. The grounds of any treatment often have to be deduced, or inferred, from the surrounding circumstances and in order to justify an inference one must first make findings of primary fact from which the inference could properly be drawn.

107. This is generally done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that he or she

was were treated less favourably than he or she would have been treated if they had not been a particular race, gender, religion etc: *Shamoon v RUC* [2003] ICR337. 'Comparators', provide evidential material. But ultimately, they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground, in this case race. The usefulness of any comparator will, in any particular case, depend upon the extent to which the comparator's circumstances are the same as the Claimant's. The more significant the difference or differences the less cogent will be the case for drawing an inference.

108. In the absence of an actual comparator whose treatment can be contrasted with the Claimant's, the Tribunal can have regard to how the employer would have treated a hypothetical comparator. Otherwise, some other material must be identified that is capable of supporting the requisite inference of discrimination. This may include a relevant statutory code of practice. Discriminatory comments made by the alleged discriminator about the Claimant might, in some cases, also suffice. There were no such comments in this case.

109. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some case suffice. Discrimination may be inferred if there is no explanation for unreasonable / unfair treatment. This is not an inference from unreasonable / unfair treatment itself but from the absence of any explanation for it.

110. It is only once a prima facie case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, so that the absence of an adequate explanation of the differential treatment becomes relevant: *Madarassy v Nomura* [2007] EWCA Civ 33.

111. In the Tribunal's discussions regarding the Claimant's direct discrimination complaints, the Tribunal have held in mind that the Tribunal are ultimately concerned with the reasons why each of the alleged perpetrators acted as they did in relation to the Claimant.

112. The outstanding matters relied upon by the Claimant as being less favourable treatment are set out at paragraph 14 above.

<u>Harassment</u>

113. Harassment is defined in section 26 of the Equality Act 2010 as follows:

> (1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of –
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. ...
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

114. In *Richmond Pharmacology v Dhaliwal* UKEAT/0458/08/CEA, the EAT provided guidance to the effect that an Employment Tribunal deciding harassment claims should consider in turn:
    a. the alleged conduct,
    b. whether it was unwanted,
    c. its purpose or effect and
    d. whether it related to a protected characteristic.

    As to effect in particular, at paragraph 15, the EAT made clear the importance of the element of reasonableness, having regard to all of the relevant circumstances, including context and in appropriate cases whether the conduct was intended to have that effect.

115. In *Pemberton v Inwood* [2018] EWCA Civ 564, Underhill LJ revisited *Dhaliwal* in light of the introduction of s.26 and the difference in language to the predecessor harassment legislative provisions. Underhill LJ made clear that in considering whether conduct had the proscribed effect, the Tribunal must consider both the subjective perception of the complainant and whether it was objectively reasonable for that conduct to be regarded as having that effect taking into account all other circumstances.

116. In *Tees Esk and Wear Valley NHS Foundation Trust v Aslam* [2020] IRLR 495, the EAT held that section 26 does not apply to on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be. There must be some part of the factual matrix which properly leads to the conclusion that the conduct is related to the particular characteristic.

117. The type of harassment complained of by the Claimant is "related to a… protected characteristic". The phrase is relatively wide. It allows for a looser connection between the conduct and the protected characteristic than the "because of" test in direct discrimination. It is not necessary to consider whether the alleged perpetrator would have treated someone without the relevant protected characteristic in the same way.

<u>Victimisation</u>

118. Section 27 of the Equality Act 2010 prohibits victimisation.

S. 27Victimisation
(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a)B does a protected act, or
(b)A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—

(a)bringing proceedings under this Act;
(b)giving evidence or information in connection with proceedings under this Act;
(c)doing any other thing for the purposes of or in connection with this Act;
(d)making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

119. The Claimant does not need to show a comparator but she must prove that she did a protected act and that she was subjected to a detriment because she had done that protected act. As with direct discrimination, it is not necessary for the Claimant to show conscious motivation, it is sufficient that the protected characteristic or protected act had a significant influence on the outcome.

120. In considering the burden of proof, the Tribunal referred to s.136 Equality Act 2010 and the guidance set out in the case of *Igen Ltd v Wong* [2005] IRLR 258, CA as approved in *Madarassy v Nomura International Plc* [2007] IRLR 246, CA. This guidance reminds the Tribunal that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.

121. In considering whether the burden of proof has shifted, the Tribunal should not adopt an overly mechanistic approach but rather consider whether discrimination can properly and fairly be inferred from the evidence, *Laing v Manchester City Council* [2006] IRLR 748. A Tribunal will be setting an impermissibly high hurdle, however, if it asks if discrimination is the *only* inference which could be drawn from the facts, *Pnaiser v NHS England and Coventry City Council* [2016] IRLR 170, EAT.

<u>Disability</u>

122. Sections 20 and 21 provide the law on reasonable adjustments. Section 23 is concerned with comparators.

S.20 Duty to make adjustments
(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable

Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2)...
(3) The first requirement isa requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

S.21 Failure to comply with duty
(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

S.23 Comparison by reference to circumstances
(1) On a comparison of cases for the purposes of section 13 ... there must be no material difference between the circumstances relating to each case.
(2) The circumstances relating to a case include a person's abilities if—
a. on a comparison for the purposes of section 13, the protected characteristic is disability;

123. A failure to make reasonable adjustment involves considering:
    a. the provision, criteria or practice applied by or on behalf of an employer;
    b. the identity of non-disabled comparators (where appropriate); and
    c. the nature and extent of the substantial disadvantage suffered by the Claimant.
    (See *Environment Agency v Rowan* [2008] IRLR 20, [2008] ICR 218)

124. In *Newham Sixth Form College v Sanders* [2014] EWCA Civ 734 is was confirmed that "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot ... make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP".

125. A 'provision, criterion or practice' is a concept which is not to be approached in too restrictive a manner; as HHJ Eady QC stated in *Carrera v United First Partners Research* UKEAT/0266/15 (7 April 2016, unreported), "the protective nature of the legislation meant a liberal, rather than an overly technical approach should be adopted'. In this case the ET were found to have correctly identified the PCP as 'a requirement for a consistent attendance at work"

126. The Tribunal will need to consider a pool of comparators; has there been a substantial disadvantage to the disabled person in comparison to a non-disabled comparator? *Archibald v Fife Council* [2004] UKHL 32, [2004] IRLR 651, [2004] ICR 954: the proper comparators were the other

employees of the council who were not disabled, were able to carry out the essential functions of their jobs and were, therefore, not liable to be dismissed.

127. While it is not a breach of the duty to make reasonable adjustments to fail to undertake a consultation or assessment with the employee (*Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664), it is best practice so to do. The provision of managerial support or an enhanced level of supervision may, in accordance with the Code of Practice, amount to reasonable adjustments (*Watkins v HSBC Bank Plc* [2018] IRLR 1015)

128. The adjustment contended for need not remove entirely the disadvantage; the DDA says that the adjustment should 'prevent' the PCP having the effect of placing the disabled person at a substantial disadvantage *Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10, [2011] EqLR 1075: when considering whether an adjustment is reasonable it is sufficient for a Tribunal to find that there would be ‘a prospect’ of the adjustment removing the disadvantage—there does not have to be a ‘good’ or ‘real’ prospect of that occurring. *Cumbria Probation Board v Collingwood* [2008] All ER (D) 04 (Sep) – “it is not a requirement in a reasonable adjustment case that the Claimant prove that the suggestion made will remove the substantial disadvantage”

129. The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly. *Lincolnshire Police v Weaver* [2008] All ER (D) 291 (Mar): it is proper to examine the question not only from the perspective of a Claimant, but that a Tribunal must also take into account “wider implications” including “operational objectives” of the employer.

130. Regarding employer's knowledge, *Gallop v Newport City Council* [2013] EWCA Civ 1583, [2014] IRLR 211 confirms that a reasonable employer must consider whether an employee is disabled, and form their own judgment. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the Tribunal (*Jennings v Barts and The London NHS Trust* UKEAT/0056/12, [2013] EqLR 326).

131. When considering whether a Respondent to a claim “could reasonably be expected to know” of a disability, it is best practice to use the statutory words rather than a shorthand such as “constructive knowledge” as this might imply an erroneous test (*Donelien v Liberata UK Ltd* UKEAT/0297/14). The burden, given the way the statute is expressed, is on the employer to show it was unreasonable to have the required knowledge.

132. The EHRC Code gives examples of adjustments which may be reasonable, which include:

    a. making adjustments to premises;
    b. allocating some of the disabled person's duties to another worker;

c. transferring the worker to fill an existing vacancy;
d. altering the worker's hours of working or training;
e. assigning the worker to a different place of work or training or arranging home working;
f. allowing the worker to be absent during working or training hours for rehabilitation, assessment or treatment;
g. acquiring or modifying equipment;
h. providing supervision or other support

Deliberation

133. Applying the law to the facts as set out above, the Tribunal makes the following findings:

Direct race discrimination (Equality Act 2010 s.13)

134. Regarding 14(b)(i) above, the Tribunal finds, on the balance of probabilities, that the University's policy of completing furniture orders during the summer break was a reasonable one. The same policy applied to everyone, and so the furniture arriving in 2017 was not less favourable treatment.

135. Even if this was less favourable treatment, the Tribunal find that the explanation for the delay is a reasonable one and there is no evidence that has been put forward to suggest that this was because of the Claimant's race.

136. The Tribunal cannot accept the statement from the Claimant, at paragraph 89 of her witness statement, in which he states that "race became an issue from the start because Ms Blackman who was highly commended for being precise and diligent in her duties failed to add Dr before my name on the door sign". The Tribunal has not seen any evidence that the omission was linked to race, as the Tribunal accepts the evidence that it was an administrative error and these errors occurred to various members of staff. The Tribunal rejects the Claimant's assertion that Dr Hawkey is not the correct comparator, and that the Respondent should have shown that the same treatment did not happen to another black member of staff in order to show that the treatment was not motivated by race. The Tribunal considers Dr Hawkey is the correct comparator. The treatment the Claimant complains of, namely the nameplate being incorrect, happened to white members of staff as well as black members of staff. Further, the Tribunal accepts that the person who prepared the nameplate would have done so before the Claimant took up her position, and therefore is unlikely to have known the Claimant's ethnicity or skin colour.

137. Given the finding of fact that academic titles were missed off nameplates due to administrative errors on behalf of the Respondent, the Tribunal concludes that the omission from the Claimant's nameplate was a mistake for which the Respondent has provided a reasonable explanation, and therefore finds that this was not less favourable treatment.

138. The Tribunal therefore concludes that, even if these two incidents did amount to less favourable treatment, it was not because of the Claimant's race.

139. The Claimant's second allegation of direct race discrimination (14(b)(ii)) relates to Dr Crow withholding information from her concerning the extension to her ERC fellowship application that the Claimant was eligible for. At paragraph 95 of her witness statement, the Claimant does not specifically say that Dr Crow's actions were motivated by the Claimant's race, nor does she put forward any comparators of how her non-black colleagues would or could have been treated in such circumstances. The Tribunal nonetheless understands that it is the Claimant's case that Dr Crow deliberately withheld this information because of the Claimant's race.

140. It is therefore for the Claimant to initially establish a prima facie case that, due to her race, Dr Crow treated the Claimant less favourably than she would have treated another colleague in the same situation. The Tribunal found the, at times tearful, evidence of Dr Crow to be sincere and genuine. The Tribunal is satisfied that Dr Crow was not aware of the Claimant's eligibility for this extension, and that she had no knowledge that the Claimant was not aware of the extension. The information the Claimant needed was publicly available and the Tribunal finds that Dr Crow was under no duty to bring it to the Claimant's attention. The actions of Dr Crow do not, therefore, constitute less favourable treatment of the Claimant. Even if her actions did amount to less favourable treatment, the Tribunal is satisfied that the Claimant's race played no part in Dr Crow not telling the Claimant about the existence of the extension. This happened simply because Dr Crow was not aware the Claimant did not know about it.

141. In relation to the Claimant's claim of direct discrimination in respect of her missing payslips (14(b)(iii)), the Tribunal is unable to accept the Claimant's assertion that her payslips going missing was deliberate, nor that she was deliberately targeted because of her race. There is simply no evidence to support this allegation. The Tribunal conclude that the three missing payslips did not amount to less favourable treatment, and even if it did, it was not because of the Claimant's race.

142. The claims at paragraph 13(d) and 13(e) above, have been considered together, as there is considerable overlap between the two. The Claimant suggested in her witness statement that Prof. Schönle deliberately arranged the time to call her in the afternoon of the day before her appointment with Occupational Health in order to influence her in respect of what she would say to Occupational Health. As per the findings of fact above, this is simply not the case. It was the Claimant who suggested the date of 14 September and the time of 14:00. Prof. Schönle agreed to the Claimant's suggestion. The meeting with Occupational Health was not arranged until the day after in any event. The Tribunal therefore finds nothing untoward about the date and time of Prof. Schönle's call and considers that the Claimant's account in her witness statement is not an accurate reflection of the facts.

143. The Claimant's contention in relation to the allegation at 14(b)(iv) above is that the Respondent did not encourage her to return to work, whereas a white colleague would have been encouraged to return.

144. The Tribunal has taken note of the fit notes provided in respect of the Claimant have been included in the bundle. The most recent is dated 4 January 2022 [611], and confirms that the Claimant is not fit for work until 31 March 2022, albeit for different medical condition. The Claimant was asked in cross-examination if she had ever been fit for a return to work since her stroke. At first, she gave an answer that looking at the doctor's address on the last fit note in the bundle she believed that this was in relation to PTSD. This was not the medical reason given on the fit note, but in any event, this was not an answer to the question, and the Tribunal found her response to be evasive. When it was put to her that at no point had there been suggestions for a return to work from her GP, the Claimant gave a confusing answer, saying that she thought Early Conciliation was a way to return to work. Again, the Tribunal felt this did not answer the question. The Tribunal finds that the Claimant was signed off as medically unfit for work from the date of her stroke until the date of the Tribunal hearing.

145. A claim of direct race discrimination is based on a Claimant being subjected to less favourable treatment because of a protected characteristic of race. A comparator is important here. The comparator must be someone who does not have the Claimant's protected characteristic of race, but in all other aspects must be in the same position as the Claimant. Here, the Tribunal finds that the correct, hypothetical, comparator is a white lecture of the same rate as the Claimant who is medically signed off from work. The Tribunal must ask "would such a comparator have been encouraged to return to work?". The Tribunal's conclusion is that such a comparator would not have been encouraged to return to work, as they would be medically signed off with no suggestion of when or how a return to work could be accomplished. Indeed, for an employer to encourage an employee to return to work in such circumstances may in itself constitute an act of harassment, in that they would be going against the medical advice provided to the employee.

146. In her written submissions, the Claimant stated:

> *"when Dr Harrison, the Occupational Health doctor, wrote a report following a telephone appointment with me on 15 September 2020, she referenced the work culture as a factor for my ill health, but did not go into details about the culture.*
>
> *Unfortunately, Dr Harrison did not appear in the Respondent's list of witnesses, so I was unable to ascertain her reason for mentioning the work culture nor her understanding of its impact on my health."*

147. The Tribunal finds this to be a distortion of the facts. What Dr Harrison actually said in her report is "Prior to this, she tells me that she was managing workplace stress due to how she found the workplace culture". Dr Harrison is reporting what the Claimant had said to her. Dr Harrison

makes no objective comment on the workplace culture. The Tribunal does not accept that the report of Dr Harrison shows that, even if there had been less favourable treatment of the Claimant, that it was motivated by the Claimant's race.

148. The Claimant asserts at paragraphs 37 – 39 of her witness statement, that during the call with Prof. Schönle on 14 September, she suggested that she could teach online but Prof. Schönle "nixed that idea" by saying it would be too stressful. She claims that this was deliberate in order to belittle her, and states "both I and my medical advisers were disrespected". Again, the Tribunal finds this to be a distortion. The advice of the Claimant's medical advisers, namely that she was not fit to return to work, was being heeded and respected.

149. The Tribunal also accepts the evidence of Prof. Schönle, at paragraph 35 of his witness statement, that he offered the Claimant the option of honorary status if she did retire, which would allow her to retain access to University's library, online database and research talks. The Claimant accepted in cross-examination that this offer was made. When asked if he thought this was a cordial and constructive offer, the Claimant's reply was that she felt it was "cordial but not constructive to me". The Tribunal accepts the evidence that this was a genuine offer, and finds that the Claimant's allegation that she was being excluded from the University is inconsistent with such an offer being made.

150. The Tribunal further accepts the Respondent's evidence, which is supported by contemporaneous documents in the bundle, that the Claimant was being assessed for her eligibility for ill health retirement, rather than being told this was her only option. With regard to the Claimant's allegation that she was being forced into taking ill health retirement, the Tribunal finds that it is important to note that the granting of ill health retirement was not something that was in the Respondent's control. The decision on whether ill health retirement would be granted would be a decision for the trustees of the pension fund. The Tribunal finds the Claimant's claim is misconceived as the Respondent had no power to grant or deny ill health retirement.

151. In any event, the Tribunal accepts the evidence that the referral centre Occupational Health was to consider both eligibility for ill health retirement, and a prospective return to work, including any adjustments that may have been needed. In the event, no adjustments were considered, as it was the view of Occupational Health that the Claimant was not able to return to work. Tribunal does not agree that work was being done to compel the Claimant to take ill health retirement and so her claim at 13(b)(v) fails.

Harassment related to race (Equality Act 2010 s. 26)

152. The Claimant's first allegation in support of her claim of harassment was Ms Blackman's aggression when the Claimant approached her about her furniture order (15(a)(i)). The Tribunal's findings of fact are that no such incident took place, therefore this cannot be unwanted conduct, and therefore does not meet the test for such a claim under the Equality Act.

153. With regards to allegation 15(a)(ii), it is the Claimant's case is that Ms Blackman's failure to took the taxi requested by the Claimant for the visiting lecture was an act of harassment. The Tribunal accepts that Ms Blackman was leaving the School of Modern Languages and did not have time to book the taxi. The Tribunal finds that her delegating the task to Ms Payne was a reasonable course of action.

154. The Claimant tried to suggest in her evidence that, because she herself is black, Ms Blackman, and possibly others, assumed that the visiting lecturer would also be black, or that it was assumed that he would be black because he was visiting from Cuba. The Tribunal does not find these arguments convincing.

155. The Claimant put forward further arguments that Ms Blackman saying she was too busy was an excuse to get back at the Claimant because of an earlier dispute. It is the Claimant's position that Ms Blackman would only acknowledge requests by email if another white colleague was copied in to the email. Ms Blackman acknowledged that the email requesting the taxi booking was copied to another colleague, who was white, but says this is common practice within the University, as colleagues within departments would often inform each other about what was happening.

156. The Respondent contents that the contemporaneous emails [270 – 264] clearly establish that the taxi was booked in line with the Claimant's instructions, and that any failure to carry out the booking was on the taxi company and not the Respondent. The Claimant disputed this, and in her cross-examination said that the email trail showed that Ms Blackman was backpedalling, and that this was due to a white colleague of the Claimant being involved. The Claimant maintained that Ms Blackman was trying to embarrass the Claimant and that the email trail was Ms Blackman and Ms Payne colluding in order to provide evidence that would show that this had nothing to do with race.

157. The Tribunal found the Claimant's evidence here to be confusing and contradictory. The Tribunal is satisfied that the taxi booking was made by Ms Payne, who had the task delegated to her by Ms Blackman, and this was done in good faith. The Claimant has not shown that this was unwanted conduct related to a protected characteristic.

158. The third allegation, at 15(a)(iii), that the Claimant relies on in support of her claim of harassment is in relation to Dr Crow's offer to accompany her to a meeting with students in December 2017. It is the Claimant's contention that, as Dr Crow is a specialist on race, her offer to accompany the Claimant to the meeting was something she never should have proposed. During cross-examination, the Claimant alleged that this offer was a method by which Dr Crow put the feelings of students above those of the Claimant. She further alleged that in order to achieve "closure" for the students, Dr Crow was "imposing herself" on the Claimant in order to demonstrate to the students that the Claimant was incompetent. In her witness statement at paragraph 96, the Claimant states that she was "forced to remonstrate" with Dr Crow in order to stop

her attending the meeting.

159. In her statement and under cross-examination, Dr Crow specifically denied any intention of attempting to show that the Claimant was incompetent. She explained that her offer to accompany the Claimant to the meeting was an offer and nothing more. She maintained that she thought it was "absolutely" a good idea, but that she respected the Claimant's decision to hold the meeting alone. She further said that she agreed with the Claimant's assessment that it could have sent the wrong message to the students had she accompanied the Claimant to the meeting.

160. The Tribunal found Dr Crow to be an honest and reliable witness. The Tribunal has carefully looked at the email correspondence [248 – 245] and finds that there is nothing there that can be construed as anything other than a genuine offer to support the Claimant. Further, the Tribunal could find no evidence that the Claimant had to "remonstrate" with Dr Crow regarding the meeting. It is clear that the Claimant sent a polite, concise, and structured email setting out her reasons why she felt Dr Crow should not accompany her. Dr Crow then replied with an equally polite email accepting the Claimant's decision and offering any further support if needed. The Tribunal does not find that this amounted to unwanted conduct, and even if it did, the Tribunal is satisfied that the Claimant's race had nothing to do with this incident

161. In assessing the Claimant's claim of harassment in relation to the comment made by Dr Salvado regarding her BA funding application (15(a)(iv)), is important for the Tribunal to remember it is not looking at whether this comment was racially motivated or made with racial intentions. The Claimant's claim is that Dr Crow's handling of the situation amounted to unwanted conduct; was motivated by the Claimant's race; and have the purpose or effect of creating a hostile or degrading environment for the Claimant.

162. The Tribunal accepts that Dr Crow acknowledges, and indeed did so at the time, that she should have asked the Claimant before saying anything to Dr Salvado. The Tribunal is satisfied with the evidence of Dr Crow that the meeting with Dr Salvado was unplanned, and that the topic of his comment came up by chance. The Tribunal accepts that, even though Dr Crow was at this point no longer the Claimant's mentor, this still existed a close relationship between them, and this is why the Claimant had gone to Dr Crow to explain how this comment had made her feel. The Tribunal also accepts that this comment did have a marked effect on the Claimant, and she was being honest and genuine in her text message to Dr Crow when she said that she felt "depressed" by the comment.

163. It is important, however, for the Tribunal to divorce the issues of how the comment, whether it was racially motivated or not, made the Claimant feel; and whether Dr Crow's subsequent handling of the issue was motivated by the Claimant's race. Dr Crow has been honest in her view that, on reflection, she should have handled the situation differently. The Tribunal is satisfied, however, that Dr Crow's motivation had been to see

the issue resolved, and that she thought that by both colleagues knowing the feelings of the other, this might be achieved. The Tribunal is satisfied that her handling of the matter, although unwanted conduct in the eyes of the Claimant, was not motivated by the Claimant's race.

164. In relation to the allegation of harassment in respect of Dr Crow allowing a colleague to access the Claimant's computer files (15(a)(v)), the Tribunal found the Claimant's claim to be unclear and confusing. The Claimant accepted that this in fact related to a student assessment which was on the common teaching platform. The Claimant's case appears to be based on the response of Dr Crow to the Claimant's email [331] in which Dr Crow says "Thanks for flagging". The Claimant said she found it strange and suggested that Dr Crow's use of the word "flagging" meant that the marking of the assignment by another tutor should not have happened.

165. The Tribunal does not accept that there is anything unusual about the use of the word "flagging" and that Dr Crow was simply thanking the Claimant for bringing the matter to her attention. The Claimant accepted when questioned that student assessments were not confidential and that students changing tutor groups or having their assignments marked by another tutor was something that happened occasionally. There is nothing in the that could leave the Tribunal to conclude that this amounted to unwanted conduct or that it was in any way related to the Claimant race.

166. In respect of the writing date allegation at 15(a)(vi), the Tribunal found Dr Burch-Brown to be a credible witness. Her answers given under cross-examination were consistent with the evidence of her witness statement. The Tribunal finds that she did hold a genuine belief that the Claimant was interested in her project, and believed the project would be mutually beneficial for both of them. Even if this belief was misguided or incorrect, the Tribunal can find no evidence that this was a "disingenuous" invitation, or that Dr Burch-Brown viewed the invitation as an opportunity to degrade or belittle the Claimant due to her race. For Dr Burch-Brown to "hog" the conversation when talking about her funding bid may have been viewed by the Claimant as unwanted behaviour, but there is nothing to suggest this behaviour had the purpose or effect of creating the hostile environment described by s.26 of the Equality Act, and the Tribunal does not consider any view to the contrary could be reasonable held.

167. With regards to the allegation at 15(a)(vii), given the Tribunal's findings of fact that the alleged disclosures of confidential information said to have been made by Dr Hawkey did not take place, the Tribunal cannot conclude that any act of harassment occurred. There was no unwanted conduct related to the Claimant's race.

Victimisation (Equality Act 2010 s. 27)

168. It is not necessary for the Tribunal to make a determination as to whether the request for the Claimant to job share with Dr Lingna Nafafé was motivated by the Claimant's race. If the Claimant was "making an

allegation (whether or not express) that A or another person has contravened this Act" then it would be sufficient for her conversation with Dr Crow to be considered a protected act.

169. There is, however, an evidential question as to whether this alleged protected act took place, and if so, was Prof. Schönle aware of it? Even if Prof. Schönle was, the Claimant must show that her protected act "had a significant influence on the outcome", i.e. on her application for accelerated progression.

170. Dr Crow had no recollection of the Claimant making such a protected act and the evidence of Prof. Schönle is that he was not aware of any such allegations being raised with him either by Dr Crow or Dr Kitts. The Tribunal finds on balance that Prof. Schönle was not aware of the Claimant having made any protected act. Even if he has been, the evidence before the Tribunal that the Claimant was not eligible for accelerated progression is compelling. She had not completed CREATE 1, nor was it possible for her to enrol on CREATE 2 within the required timeframe.

171. The Claimant conceded in cross-examination, albeit reluctantly, that she did not meet the eligibility criteria for accelerated progression. It is the Claimant's case that other members of staff who also failed to meet the criteria were put forward for accelerated progression, but there is no evidence of this before this Tribunal. The Claimant further agreed that she did not wish to postpone her research leave, and therefore the Tribunal finds it was her choice not to proceed with her application. Prof. Schönle did not block the Claimant's application, and so the Tribunal concludes that the Claimant was not subjected to a detriment by the Respondent. The Claimant's claim in respect of victimisation therefore fails.

172. During the course the hearing, the Claimant attempted to say that she had made a further protected act in her 'Academic Review Form Dec 18 Nov 19' [334], which was completed between the Claimant and her line manager, Dr Kitts. This had never been raised as an issue prior to the hearing, and the Tribunal refused the Claimant permission to rely on this as evidence of a further protected act. If the Tribunal had been minded to allow the Claimant to do so, it would not have altered the Tribunal's decision set out above. The Claimant was simply not eligible for accelerated progression and any protected act contained in the Academic Review Form did not affect this.

Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

173. In assessing the Reasonable Adjustments claim (Equality Act 2010 ss. 20 & 21), the Tribunal must first consider, "Did the Respondent apply the following PCPs to the Claimant?"

a. To attend work in accordance with contracted hours
b. To attend work in person

174. The Respondent confirmed at the beginning of this hearing that it raised both factual and legal arguments here. The Tribunal has considered the disability discrimination claim in light of the findings of fact and conclusions drawn above. The Claimant's assertion that the Respondent did apply the above PCPs to her seems to the Tribunal to be difficult to reconcile with her contention as part of her direct racial discrimination claim, that the Respondent suggested no other work options to her and told she should consider ill health retirement. The Claimant says as part of the list of issues that white employees would have been encouraged to return to work. There is no factual evidence that the Respondent ever applied either of those PCPs to the Claimant.

175. Ms Elliott did not attend the hearing due to being unwell, and so her evidence could not be tested in cross-examination. Nonetheless, the Tribunal accepts the evidence at paragraph 15 of her witness statement, in which she says her use of the words "return to teach" in her email at [435] was a general term which he was using to mean 'return to work', which would include teaching, research, administration. The Tribunal finds that the use of the words "return to teach" is on balance likely to be synonymous with 'return to work' in an academic environment such as where the Claimant worked.

176. The Claimant has contended, at paragraph 26 of her witness statement, that she was advised by her GP that she could return to teaching on a part-time basis, and this is why she requested a meeting with Occupational Health on 6 August 2020. The Claimant accepted that there is no evidence in the bundle that her GP made the suggestion and the Tribunal notes that her fit note dated 6 August says the Claimant is not fit for work. The box next to 'you may be fit for work taking account of the following advice:' is not ticked and the wording is struck through. The suggested reasonable adjustments in the box underneath are also un-ticked and struck through. The Tribunal finds that the fit note is unequivocally clear in saying that the Claimant was not fit for work and there is no suggestion that the Claimant could return on a part-time basis.

177. In cross-examination, the Claimant said that her email of 6 August [449] was her way of telling the Respondent that she wished to return to work, as her GP said she could work part-time, and so she wanted reasonable adjustments put in place for her. The Tribunal does not agree that the email can be read in such a way. The email says "The doctor also advised that I should contact Occupational Health so that they are aware of my progress". The Claimant's previous fit note had signed her off as not fit for work, and the fit note of 6 August confirmed the Claimant was still not fit for work. She had, therefore, not made any progress, and it is entirely reasonable to read the email as this is what she wanted Occupational Health be aware of. The email also said that the Claimant wanted Occupational Health to be aware of her limitations. She does not set out that she has made any improvement, and there is no update on her limitations from her previous email, in which she said it was her intention to "Focus solely on recuperating". As far as the Respondent was aware, both the Claimant's wishes and the advice of her GP was

that she was unable to work. The Tribunal finds that is not reasonable for her email of 6 August to be interpreted in the way the Claimant suggests.

178. The Tribunal also notes the Claimant's responses to questions in cross-examination on this point. The Claimant said that her GP felt it was up to Occupational Health to suggest reasonable adjustments. She said reasonable adjustments cannot come from the GP and must come from Occupational Health. The Tribunal finds that this is completely at odds with her statement in her email of 26 June [444] in which she says "With regard to OH, what I'm looking for is a note from my GP which says 'May be fit for work taking into account of the following advice.' At that time, I will arrange to speak with OH. But for as long as it says 'Unfit for work', I need not concern myself with more than facilitating my recovery during the stated period".

179. The Claimant repeatedly said in cross-examination that the fit notes from her GP did not go into details, and that any suggestion of reasonable adjustments for her to return to work should come from Occupational Health. The Tribunal accepts that the GP's fit notes are written in very in broad terms, but rejects the second part of this proposition. The GP fit notes specifically have a box next to a statement saying "you may be fit for work taking account of the following advice:". Underneath is a box with for further statements that can be selected; these are "a phased return to work"; "amended duties"; "altered hours"; and "workplace adaptions".

180. It is the Tribunal's view that these are broad examples of reasonable adjustments that a GP can suggest might be beneficial to a patient. If the Claimant's GP had been of the opinion that the Claimant could have returned to work, the GP could have ticked any number of these boxes. Without even an indication from the GP, it would be impossible for Occupational Health to know what adjustments should be investigated. Furthermore, if a GP indicates that a patient is not fit for work, the Tribunal sees no duty on a Respondent to investigate what adjustments, if any, should be made for a prospective return to work.

181. The Respondent was also guided by the Occupational Health report of Dr Harrison. In response to the question: "Is the individual fit or likely to become fit to undertake their full role?" Dr Harrison's comments were:

Dr Peters is medically unfit to undertake her full job role currently due to cognitive problems as a result of the stroke that she had in December 2019, which affects her memory, word finding and the ability to focus and concentrate. Her symptoms are worse if she is under stress or pressure or the tasks are more complex. She becomes fatigued easily.

Her symptoms do seem to be gradually improving but I am unable to say whether she will recover enough from the stroke to be able to return to work.

182. The Tribunal finds it is clear from the report of Dr Harrison that Occupational Health did not consider that the Claimant was in a position

to return to work, and Occupational Health were therefore not in a position to put forward any recommendations for adjustments.

183. It is, of course, possible that an employer could commit an act of direct discrimination of not encouraging a recovering employee to return to work, based on that employee's race, and still apply PCPs for the employee to attend work in person and in accordance with contracted hours which put the Claimant at a substantial disadvantage due to disability. In the Tribunal's view, however, that is not the position in this case.

184. Firstly, this is at odds with the Claimant's contention that the Respondent made no attempt to encourage her to return to work. If the Respondent did apply either of those PCPs, it would be in direct contrast to the allegation in the Claimant's direct race discrimination claim. Secondly the Tribunal notes that from late March 2020, the COVID pandemic meant that institutions such as the Respondent were working remotely anyway and there was no requirement for staff to attend in person. Thirdly, the Claimant has not been able to point to any evidence that these PCPs were in fact applied to her. Finally, without the support of medical evidence and the recommendations of Occupational Health, a return to work, be it on reduced hours or not, was not possible. It was not supported by the Claimant's medical adviser nor by Occupational Health.

185. For the reasons set out above, the Tribunal finds that the PCPs were not applied to the Claimant, and as such the Claimant's claim in respect of a failure to make reasonable adjustments fails.

186. At the beginning of this hearing, as explained in paragraphs 3 – 11 of this judgment, the Claimant wished to make a further claim that the Respondent's failure to make reasonable adjustments was motivated by the Claimant's race. This was how the Claimant's claim was originally pleaded in her ET1, before the reasonable adjustments claim was, in the Tribunal's view correctly, relabelled as a claim of disability discrimination.

187. The Claimant's application to restore her original claim as an additional claim was refused for the reasons set out at the beginning of this judgment, however the Tribunal does feel it is appropriate to comment on this allegation. The Tribunal is of the view that such a claim would have to be brought under s.13 Equality Act as a claim of direct discrimination. The Claimant would have to show that any failure to make reasonable adjustments was less favourable treatment and that she was treated worse than someone who did not share her protected characteristic of race; she would then need to show that this different treatment was because of her protected characteristic.

188. Even if the Claimant had been permitted to bring this claim within these proceedings, the Tribunal would have found that the claim would have failed for the same reasons as set out above. There was no failure to make reasonable adjustments because the Claimant simply remained unable to return to work. There was no obligation on the Respondent to make reasonable adjustments while the independent medical evidence confirmed that the Claimant was not fit for work. The Tribunal would have

concluded that the Respondent was correctly following the medical advice and its actions were not motivated by race.

Time Limits

189. The Claimant's claims having failed on their merits, it is not necessary for the Tribunal to consider the time limit issued arising from Section 123(3) of the Equality Act 2010 (*Fuller V London Borough of Redbridge* [2013] UKEAT 0084 13 1207).

Employment Judge G. King

Date: 3 February 2023

Judgment sent to the Parties: 17 February 2023

FOR THE TRIBUNAL OFFICE