EMPLOYMENT TRIBUNALS

Claimant: Dr M Migliorato

Respondent: University of Manchester

HELD AT: Manchester **ON:** 4, 5 and 9 May 2016, 7-9, 11, 21, 25, 28-30 November 2016, 1, 2, 5-8, 13-16 and 19 December 2016 and (in the absence of the parties) 23-25, 26 and 27 January 2017 and 22 and 23 March 2017

BEFORE: Employment Judge Horne

Members: Ms F Crane
Mr B McGaughey

REPRESENTATION:

Claimant: In person
Respondent: Dr E Morgan, counsel

RESERVED JUDGMENT

1. In this judgment, "the Schedule" means the document headed, "Scott Schedule", a copy of which is attached to this judgment. Allegation numbers refer to the corresponding row in the Schedule.
2. The following parts of the claim are dismissed on withdrawal:
   2.1. Allegation 21, except that the claimant still maintained that he made a protected disclosure to Professor Esmail;
   2.2. Allegations 17 and 23, so far as they related to the motivation of Professor Brown;
   2.3. Allegation 41; and
   2.4. Allegation 44, so far as it was alleged that Professor Jackson was motivated by race.

3. Allegation 48 is struck out on the ground that it is not actively pursued.
4. In respect of Allegation 1 (so far as it related to the conduct of the fiancé, "J"), Allegations 2-5 and Allegation 24 (so far as it related to the conduct of Professor Halsall), the tribunal has no jurisdiction to determine the complaint of direct race discrimination. The claim was presented after the expiry of the statutory time limit and it is not just and equitable for the time limit to be extended.
5. In respect of the remaining allegations, the respondent did not discriminate against the claimant because of race.
6. The claimant made protected disclosures as described in Allegations 14, 18, 21, 30, 35, 40 and 47. The remaining alleged disclosures were not protected.
7. The respondent did not subject the claimant to any detriment on the ground that he made any protected disclosures.

REASONS

COMPLAINTS AND ISSUES

1. By a claim form presented on 25 February 2015 the claimant raised the following complaints:
   1.1. direct discrimination because of race, contrary to sections 13 and 39 of the Equality Act 2010 ("EqA"); and
   1.2. detriment on the ground of protected disclosures, contrary to section 47B of the Employment Rights Act 1996 ("ERA").
2. The claim form itself was accompanied by a three-page document headed, "Details of Claim". In 12 paragraphs, the document conveyed the essence of the claim with general assertions. It was alleged that "members of staff" had made "derogatory" and "stereotypical" comments; the "grievance process and outcome was discriminatory" and "during the internal processes", "false evidence was presented against the Claimant and there was a failure to disclose all available evidence". The "Public Interest Disclosure claim" was "pursued on the basis that [his] grievance was a Protected Disclosure", but this was immediately followed by reference to "disclosures" in the plural. There was no explanation of which of the grievances was alleged to amount to a protected disclosure. Detriments were described in broad terms such as "failing to be promoted", "being subjected to unfair and discriminatory internal processes", "disregarding and undermining the claimant". Where there were more concrete examples, words such as "including" and "for example" made clear that the list was non-exhaustive.
3. At a preliminary hearing on 21 May 2015, the parties agreed to an order that the claimant provide further particulars of his complaints. This was ordered to be delivered to the respondent by 3 July 2015.
4. On 3 July 2015, the claimant delivered to the respondent a schedule ("the Schedule") of alleged protected disclosures, detrimental acts and less favourable treatment. The respondent then added to the Schedule by listing the issues in relation to each allegation. We took the issues for determination to be those listed in the respondent's version of the Schedule, which **we attach** to this

judgment. The issues were further clarified in written further and better particulars supplied by the claimant and the respondent's document in response.

5. In his claim form, the claimant identified his protected characteristic as being his "Nationality" and the fact that he is "Italian". By contrast, the Schedule referred to his being "from the Mediterranean area", "from Italy" and "not from the UK". These phrases suggested to us that the claimant was relying on his national origin rather than his nationality. The case put by the claimant in cross-examination was based sometimes on his "nationality" and at other times on his "Italian extraction". The respondent did not appear to object to these concepts being used interchangeably and we decided to allow the claimant to rely on them both. Accordingly, where, in these reasons, we refer to the claimant's race, we mean both his nationality and national origin.

6. During the course of the hearing, the claimant withdrew the following allegations:

   6.1. Allegation 21, except that the claimant still maintained that he made a protected disclosure to Professor Esmail;

   6.2. Allegations 17 and 23, so far as they related to the motivation of Professor Brown;

   6.3. Allegation 41; and

   6.4. Allegation 44, so far as it was alleged that Professor Jackson was motivated by race.

7. In his final submissions, the claimant, without formally withdrawing Allegation 48, accepted that "it cannot be pursued". We therefore struck it out on the ground that the claimant was not actively pursuing it.

8. The respondent raised a procedural objection in relation to every one of the claimant's allegations in the Schedule apart from Allegation 2. It was the respondent's case that these allegations required an amendment to the claim form, to which the respondent objected. This argument was advanced in relation to allegations that were plainly included in the original Details of Claim, as well as those which were not expressly mentioned. Regrettably, at no point did the respondent appear to have given any thought to a more nuanced argument. The parties agreed that this procedural point should be determined at the conclusion of the evidence. We call it "the July 2015 amendment dispute".

9. To the Schedule there needs to be added a further allegation introduced by the claimant's then solicitors in an e-mail to the tribunal of 20 August 2015. We did not assign this a separate number. Rather, we took this to be the detail of Allegation 50. The claimant explained during final submissions that it was an allegation against Professor Keith Brown and that the less favourable treatment and/or detrimental act complained of was the "final decision" in relation to his application for promotion to the role of Senior Lecturer. There is a dispute ("the August 2015 amendment dispute") as to whether this allegation, too, requires an amendment to the claim.

10. A further argument over the need for amendment arose once the parties had exchanged their written final submissions. It was the respondent's position that the claimant in his written submissions had sought to expand his claim beyond the allegations in the Schedule. The respondent objected to the claim being further amended in this way. This procedural objection we termed "the

December 2016 amendment dispute". There were many facets to it, set out in paragraphs 4.1 to 4.33 of the respondent's supplemental written submissions.

11. When considering the December 2016 amendment dispute, we came across some further attempts to change the basis on which the claim had been put in the Schedule. Though the respondent had not drawn them to our attention, we considered, using our own initiative, whether an amendment would be required. We call these "the own initiative amendments" and return to them in our conclusions.

12. There were also some allegations, which, whilst they appeared in the Schedule, were not put to witnesses. Even though some did not feature in the December 2016 amendment dispute, we had to consider whether it would be fair to allow the claimant to proceed with them.

EVIDENCE

13. We considered documents in an agreed bundle which we marked CR1, which eventually ran to page 2,974. Various pages were added during the course of the hearing with the agreement of the parties. Some were inserted into the bundle by being given appropriate page numbers. Others we identified separately, and some might say idiosyncratically, as follows:

    13.1. A red file containing documents relevant to the evidence of Mr Adam Bridge.

    13.2. C2 – an organogram produced by the claimant.

    13.3. C3 - a 32-page collection of documents relating to the complaint by Adnan Badawood.

    13.4. C4 – a document produced by Dr Nasser headed, "Guidelines for the operation of Disciplinary and Grievance processes" to which a set of statistics was attached.

    13.5. C5 – a page from the electronic diaries of Louise Jordan and Professor Bailey

    13.6. C6 – academic appeal letter from Adnan Badawood and attached annotated decision.

    13.7. R1 – a set of statistics produced by Mrs Heaton.

    13.8. R2 – an e-mail thread culminating in an e-mail from Professor Halsall to Rachel Spilsbury on 6 May 2016.

    13.9. R3 – an e-mail from Ms Sawicki summarising complaints made by Dr Benazar.

    13.10. R4 – the reserved judgment and reasons in case 201282/2013 *Beattie v. University of Manchester.*

    13.11. A 108-page report from the Universities UK Taskforce headed, "*Changing the Culture*".

14. During the course of the oral evidence, we had to intervene to resolve over 50 disputes as to the admissibility of evidence and of questions to witnesses. The parties did not ask for any written record to be made of the tribunal's ruling on these points. Two disputes, however, took on greater prominence, such that, on our own initiative, we thought it right to record our decisions here:

14.1. The claimant invited us to rule as inadmissible any expression of opinion by Mr Bridge. We declined to do so, adding that the claimant's concerns would be taken into account in deciding what weight to attach to his evidence.

14.2. The claimant asked Dame Sue Ion to reveal the name of the legal advisor who had provided advice to her and to others. The respondent objected on the ground of legal professional privilege. We upheld the respondent's objection.

Reasons for these decisions were given orally at the hearing. Neither party asked for written reasons at the time. Written reasons will not be provided unless a party makes a request in writing within 14 days of the sending of this judgment to the parties.

15. We heard oral evidence from 19 witnesses. Here are our impressions of them, in the order in which they were called:

15.1. The claimant spoke with conviction and had an undoubtedly genuine sense of grievance. He was unfailingly polite to the tribunal, but when asking and answering questions, his tone of voice, volume and accompanying facial expression, would from time to time betray strong emotion and a difficulty in seeing events dispassionately. On occasion the claimant's recollection of events was markedly different from the accounts of different witnesses (for example Professor Brown and Mrs Field) who, on any view, had gone out of their way to help the claimant. In deciding whether to rely on the claimant's evidence, we could not ignore the evidence in relation to the factual dispute about his knowledge of material on his computer. The claimant vigorously and consistently denied having known about any material from pornographic websites having been on his laptop. On the strength of Mr Bridge's evidence, we found the claimant's denial hard to accept. That led us to take a cautious approach to other aspects of his evidence where it was in dispute.

15.2. Dr Nasser appeared to us to be a man of honesty and integrity. He had relatively little to say about events that directly involved the claimant. We were not able to attach much weight to his generalised opinions about the respondent's practices. He sought to underpin his views by reference to statistics which he produced. When we attempted to explore those statistics, his answers showed little understanding of them.

15.3. Mr Bridge's evidence impressed us. He demonstrated, to our minds, an expert knowledge of how data is acquired, stored, encrypted and retrieved. We have some sympathy with the claimant's arguments about the quality of the instructions given to Mr Bridge and the blurring of the line between unilateral and joint instruction. Nevertheless, we were satisfied that Mr Bridge understood at all times his duty to the tribunal and that his conclusions were independently reached and soundly based. We should add that, in accepting his conclusions, we did not place any weight on the fact of Mr Bridge having been treated, at an earlier stage in the case, as having been jointly instructed. It was the substance of his evidence, and not his status, that caused us to agree with his opinion. The claimant raised a further ground for discrediting Mr Bridge's evidence. In written questions to Mr Bridge, the claimant invited him to perform an experiment that would prove an assertion made in Mr Bridge's report. (The assertion was an explanation of how thumbnail images of Adobe employees could have been

present on the claimant's laptop, as an alternative to the claimant's theory that he had inherited a second-hand hard drive from Adobe). Mr Bridge raised with the tribunal that the time and cost associated with this experiment would be disproportionate to its value. It was the claimant's case that Mr Bridge was trying to wriggle out of doing the experiment because he knew that it would not prove Mr Bridge's point. We disagreed. Mr Bridge had independent reasons for concluding that the claimant's laptop was unlikely to have contained a pre-owned hard drive used by an Adobe employee. It was entirely proper of him to alert the tribunal to a question that might not serve the overriding objective.

15.4. We found Miss O'Neill to be a credible witness. We have no doubt at all that she was doing her best to investigate very serious allegations conscientiously and delicately with a challenging complainant, working alongside a lead investigator who was inexperienced in conducting investigations. She left us with a very clear sense of the awkward situation in which she found herself when, during the course of the investigation, a confidential tip-off meant she had to consider taking a step (taking the claimant's laptop) for which there was no defined procedure, and which led to an upsetting scene in the faculty human resources office. We would not want it thought that we approve of every step that Miss O'Neill took in the investigation, but our criticisms do not lead us to doubt her honesty.

15.5. Professor Halsall's evidence appeared to us, in all but one respect, to be clear and credible. His account of the claimant's alleged remark about contraception struck us as spontaneous and compelling. Our difficulty in accepting Professor Halsall's evidence was when he attempted to explain his message which included the phrase, "Latin mentality". In his witness statement, he told us that he used the phrase to highlight the contrast between the forensic approach between Roman law and the English common law. In cross-examination, he stated that he had been trying to refer to the different processes of investigation English and Italian universities. To us, these explanations seemed implausible and did not fit easily into the surrounding message exchange. When he tried to dismiss the remark as being part of "a late-night, drunken conversation", he was rightly reminded by the claimant that, where Professor Halsall had been at the time, it was the middle of the afternoon.

15.6. We accepted Mrs Heaton's evidence, in the sense that we believed she was doing her best to tell us the truth. There were parts of her reasoning with which we disagreed, which we explain in some detail below.

15.7. Professor Coombs we thought to have given fairly straightforward evidence and we believed he was telling us the truth. We did disagree with one opinion expressed by him: unlike Professor Coombs, we did not think that Professor Bailey had provided adequate reasons for his decision during the disciplinary meeting. This piece of evidence did not, however, cause us to call his honesty into question.

15.8. We were able to place a substantial amount of reliance on the evidence of Mrs Field, whose evidence was clear and consistent, and who was acknowledged by the claimant to have gone out of her way to help him.

15.9. Professor Gibson's evidence seemed fairly straightforward to us and we were able to accept it.

15.10. We found a contrast between Professor Hamilton's evidence to us and his comments made during the investigation meeting on 23 September 2012. His oral evidence to the tribunal was measured and he made appropriate concessions when tested about the accuracy of previous statements he had made. We felt the need, however, to exercise care in relation to his evidence as a whole. This was because he had demonstrated, on 23 September 2012, a tendency to make damaging assertions about the claimant without checking to ensure that those assertions were accurate.

15.11. We thought Professor O'Brien was doing his best to tell us honestly how he had investigated the allegations relating to the material found on the claimant's laptop and the conclusions he had reached.

15.12. Our impression of Professor Bailey was that of a busy senior manager who did not have time, and did not want to make time, to address all of the claimant's concerns. He had a clear idea of his remit and was not prepared to allow a "circus".

15.13. Professor Brown's evidence was not seriously challenged by the claimant. He demonstrated by his actions a clear concern for the claimant's welfare. We were able to trust his version of events.

15.14. Professor Esmail's evidence passed without serious scrutiny by the claimant and we were able to accept it in full.

15.15. Professor Webb we found to be entirely honest and believable. Whilst we found aspects of her investigation which in our opinion could have been better handled, we had no difficulties in accepting her evidence.

15.16. Dame Sue Ion's evidence we found to be honestly given and objective. At times she did not demonstrate command of sufficient detail to be able to answer the claimant's questions satisfactorily. Dame Sue would on occasion resort to broad-brush explanations such as "we considered all the evidence" without explaining her actual thought processes. This may have been due to the fact that her outcome letter, whilst being balanced and pithy, did not contain the level of detail that would refresh her memory when it came to the finer aspects of her reasoning.

15.17. There was no real challenge to Mr Conway's evidence and we accepted it in full.

15.18. Professor Jackson gave evidence in a self-assured manner. From time to time we formed the impression that he was trying to argue his (or the respondent's) case, rather than do his best to answer the questions he was being asked. We thought it appropriate to scrutinise his evidence more closely than that of other witnesses.

15.19. Dr Barker seemed to us to have very little axe to grind. He explained clearly and simply what his role was and why he took the steps that he did. We believed his evidence.

16. Dr Pal's witness statement gave an account of an incident (the claimant's encounter with Professor Bailey on the stairs) about which there was already a clash of oral evidence that had been tested by cross-examination. We not think it would be safe to give any weight to Dr Pal's untested evidence in relation to that issue.

17. We did not attach any weight at all to Louise Jordan's witness statement. Her evidence was controversial and had not been tested under cross-examination. On the other hand we did not draw any adverse inference from her non-attendance. We accepted the respondent's explanation that Mrs Jordan was on long-term sick leave.

FACTS

Background

18. The respondent is an internationally-renowned university with approximately 40,000 students at any one time. It is the product of a merger between Manchester Victoria University and UMIST. It is the largest employer in the North of England, with some 10,000 employees. It attracts students and academic staff from approximately 180 countries around the world. In July 2015 it was awarded the Race Equality Charter Mark Bronze Award.

19. Approximately 2,500 of the respondent's staff are citizens of European Union countries other than the United Kingdom. This figure is derived from a recent consultation exercise carried out by the respondent about the impact of Brexit on EU nationals.

20. The respondent has a Board of Governors, consisting of professional and lay members. One of the lay members is Dame Sue Ion.

21. The most senior academic position in the University is the President. This office is supported by the Deputy President who, during the time with which this claim is concerned, was Professor Rod Coombs. The President and Deputy President lead a team of Vice-Presidents with various responsibilities. Amongst them are Professor Luke Georghiou, Vice President for Research and Information and, until 2014, Professor Aneez Esmail, Vice-President for Social Responsibility.

22. The claimant has been employed by the respondent since 1 March 2007 in the Faculty of Engineering and Physical Sciences ("EPS"). On 1 March 2012 he was promoted to the role of Lecturer. He remains in the respondent's employment and now holds the role of Senior Lecturer.

23. The EPS Faculty has approximately 2,000 employees. The respondent monitors their ethnicity. Between 2011 and 2015, the ethnic profile of the EPS staff as a whole has been between 16-17% Black and Minority Ethnic ("BME"), 64-67% White British and 16-20% White Other. BME and White Other employees are over-represented within EPS compared to employees of the University as a whole. There is no breakdown between white employees of different countries of origin.

24. The most senior manager is the Dean. From 2009 until April 2015 that role was held by Professor Colin Bailey, who also held the role of Vice-President. (Since 1 January 2015, Professor Bailey has been the Deputy President and Deputy Vice-Chancellor.) Professor Flint acted up as Dean between April 2015 and June 2015, when Professor Schröder took the position substantively.

25. The EPS Dean is supported by a Senior Management Team, consisting of the Heads of Schools and 5 Associate Deans, each with a specific portfolio (such as social responsibility, teaching and learning, internationalisation, and external affairs). Between 2011 and 2015, BME employees have been slightly under-represented among the Senior Management Team, with only 10% of its number

fitting that demographic. White British senior managers have made up between 71-74% of the team, slightly lower in percentage terms than the White British University staff population. Between 16-19% of Senior Managers belong to the White Other category, and in this respect they over-represent the University population, which has been 12-15% White Other.

26. Each Faculty has its own dedicated Human Resources (HR) function. At the relevant times, the Faculty Head of HR for EPS was Mrs Susan Field. Reporting to her was a team of Human Resources Partners, including Mrs Anne O'Neill, Mr Philip Ashcroft and (between 2006 and October 2014) Ms Louise Jordan. There was also at least one Human Resources Officer on a lower grade. The Faculty HR office is situated in the University's Sackville Street Building. It consists of a number of private rooms all opening onto a large open-plan office.

27. Mrs Field reported to Mrs Karen Heaton, Director of Human Resources. Mrs Heaton's grandfather is Italian. In turn, Mrs Heaton reported to Mr Will Spinks, the Registrar, Secretary and Chief of Operations. The Deputy HR Director was Mr Andrew Mullen.

28. The EPS Faculty is divided into 9 Schools, each with its own management structure. The claimant worked in the Electrical and Electronic Engineering ("EEE") School, based in the respondent's Sackville Street Building. The Head of School for EEE was Professor Andrew Gibson at all relevant times until June 2012, when Professor Gibson left to become Head of the Mechanical and Civil Engineering ("MACE") School. From June 2012 Professor Brown (also Associate Dean for Teaching and Learning) was the Head until 13 September 2015.

29. Within the EEE School are a number of Research Groups. One of these is the Electronic Materials and Devices ("EMD") Group. At the start of the claimant's employment, was called the Micro-electronics and Nanostructures Group ("M&N"). Its Head was Professor Missous until he was replaced by Professor Bruce Hamilton in March 2009. Professor Hamilton became Deputy Director of the Photon Science Institute ("PSI") in 2010, but remained Head of EMD until August 2014 when he was appointed as Acting PSI Director. Also employed within the EMD Group was Matthew Halsall, who was appointed to Professor in 2011 and to Head of the EMD Group in August 2014 and Dr Leszek Majewski amongst others.

30. In approximately 2008, the EEE School introduced a new MSc course in Nano-electronics. The Course Director was Professor Missous. In October 2009, Professor Missous stepped down as MSc Course Director to take a year's sabbatical leave. The claimant took on the Course Director responsibility during Professor Missous' absence.

31. Because this claim includes allegations that Professors Hamilton and Halsall made assumptions about the claimant based on stereotypical attitudes towards Mediterranean men, we thought it relevant to consider what actual experience these individuals had of working alongside people from Southern Europe and, in particular, Italy. Here is a brief summary:

    31.1. Professor Hamilton worked regularly with the Italian National Science Funding Agency in reviewing major research proposals. He helped to organise and deliver an Enrico Fermi Physics Summer School in Italy. He has long-standing and continuing collaborations and/or joint research funding with three Italian academics.

31.2. Professor Halsall's main overseas work has been in North America and the Low Countries, but he has collaborated with research groups in Marseille and Aix-en-Provence. Whilst in France he worked with a number of academics from Italy. He has worked alongside the Italian director of Jodrell Bank Observatory. How close that working relationship was is unclear. Professor Halsall did misspell his name, but that says little about how they got on with each other.

Data governance

32. As one might expect, the respondent stores a vast amount of individuals' personal data and is subject to the requirements of the Data Protection Act 1998. Being a public body, it also has obligations under the Freedom of Information Act 2000. Each year the University Records Management Office handles approximately 150 Data Subject Access Requests and 400 Freedom of Information requests. The Records Management team consists of two Records Officers (one of whom is Ms Mary Clare), reporting to the Records Manager, Mr Carter. In turn, Mr Carter reports to Mr Martin Conway, Deputy Secretary and Head of Governance.

Policies and procedures

33. The University is regulated by a series of internal Statutes and Ordinances.

34. Statute XIII, Part III, paragraph 9, was headed, "Grounds for Disciplinary Action". The grounds include:

> "(c) conduct of a kind judged to be inappropriate or unacceptable on the part of a holder of the post held by the member of staff, such as (but not confined to … (ii) …improper use of University…property or equipment;

35. Ordinance XXIV set out the Misconduct Procedure, which can lead to sanctions up to and including a final written warning, and the Serious Misconduct Procedure, which contemplates dismissal.

36. Paragraph 9 of the Misconduct Procedure provides that disciplinary action will be taken by the "Disciplinary Manager", who must be the member of staff's Dean of Faculty or one of a number of other senior managers. It is for the Disciplinary Manager to appoint an Investigating Manager, who must not be a Human Resources Manager. By paragraph 10, the Investigating Manager must "undertake such enquiries as s/he deems to be appropriate".

37. Statute XIII, Part VI, paragraph 19 delegates to the Board the power to make a grievance procedure. This is to be found in Ordinance XXVIII, which set out the framework of a procedure for informal resolution, followed by a more formalised grievance procedure in two stages. The Ordinance was supplemented by a more detailed document produced by Human Resources. The relevant version of that document for our purposes was dated July 2013. Relevant extracts include::

> "
>
> 1.1 The provisions of this procedure are in accordance with arrangements relating to grievances as set out in ACAS guidelines …"
>
> …

1.6 Managers who are involved in dealing with grievances should consult with Human Resources at all stages in the procedure.

…

1.9 All grievance meetings and hearings will take place in private. All persons involved in the proceedings or receiving reports of the proceedings will keep their nature and content confidential except as required by law or for the purpose of taking advice.

…

4.9 The complainant will be invited to a grievance meeting, which will normally take place no more than ten working days following receipt of the written grievance.

…

13.1 The grievance procedure cannot be used to complain about the outcome resulting from another procedure. Dissatisfaction with these events should be progressed under the appeals process relating to that specific procedure. This does not, however, prevent an individual from bringing a grievance about the manner in which the procedure is being or has been undertaken.

38. Regulation VIII sets out the respondent's detailed Public Interest Disclosure Procedure. Paragraph 5 of the Procedure reads, relevantly:

> "The procedures are not intended to replace or provide alternatives to remedies or procedures that already exist and are appropriate to the circumstances. For example, allegations of injustice or discrimination made by one member of staff against another should be dealt with under the appropriate grievance procedures…"

39. In November 2007 the HR Department issued a written Academic Leave Policy and associated Academic Leave Procedure. According to the rubric it was "the responsibility of the Head of School… to recommend applications for academic leave to the Dean for approval." An appeal lay to the Vice-President for Research.

40. The respondent had a written Dignity at Work ("DAW") Procedure. Amongst its provisions were the following:

40.1. A definition of bullying:

> "Bullying is offensive, intimidating, malicious or insulting behaviour involving the misuse of power that can make a person feel vulnerable, upset, humiliated, undermined or threatened…
>
> …Bullying may include, by way of example:
>
> …
>
> (d) inappropriate and/or derogatory remarks about someone's performance;
>
> (e) abuse of authority or power by those in positions of seniority…

40.2. At paragraph 23, the DAW Procedure provided that "making false or unsubstantiated allegations with malicious intent could, if proven, lead to disciplinary action being taken, up to and including dismissal or expulsion"

40.3. The DAW Procedure provided a mechanism for complaints of bullying and harassment to be investigated. If a party to the complaint was dissatisfied with the investigating officers' decision, the policy entitled that party to request a review. Paragraph 60 explained the remit of the reviewing officer:

> "60. The Review Officer will then review the case on the basis of the documentation provided with the request for a review and that held by the Investigating Officers and their decision. The Review Officer may decide to seek further information from those concerned if he/she deems necessary. If the Review Officer concludes that the case has not been handled fairly or properly, he/she will decide on an appropriate course of action, which may include:
>
> - specific action to resolve the matter; or
> - referral for a new investigation."

41. Allied to the DAW Procedure was a Dignity at Work and Study ("DWS") Policy. It included an obligation that "Every effort should be made to keep matters confidential to those who are directly involved."

42. Another policy document issued by HR, this time in November 2009, was the Consensual Relationships Policy. Paragraph 4.1 strongly warned academic staff of the dangers of entering into sexual relationships with students, because of "serious difficulties rooted in unequal power, and hence choice, of the people concerned". Students involved in a sexual relationship with a staff member who did not consider their involvement to be truly consensual were given the right of complaint under the Dignity at Work and Study Policy.

43. The respondent at all times had a written Equality and Diversity Policy.

44. The respondent had a written Stress at Work Policy. Paragraph 5.1 stated, there it is recognised that some legitimate, unavoidable and reasonable management interventions can be stressful for the employees concerned. In such situations the University will continue its current practice of acting in a way to minimise the stress involved."

45. In 2008, HR issued IT Security Policies including a Computer Usage Policy. It contained the following provisions:

45.1. This document sets out the activities that are either acceptable or not acceptable to the University while users make use of the IT systems... All users are expected comply with this policy and appropriate sanctions may be enforced should any user be in breach of this policy. The policy statements should be ready in conjunction with the attached guidance notes.

45.2. Files downloaded from the internet … must be treated with the utmost care to safeguard against … inappropriate material.

46. The Guidance Notes, issued at the same time, defined "inappropriate material" as including "material which could be considered offensive eg material of a sexual [or] pornographic… nature".

47. In December 2012, HR issued a policy entitled, "Acceptable Use of IT Facilities and Services Procedure for Staff". As at the beginning of December 2012, this policy had been approved by the Respondent's Risk and Emergency Management Group, but was still in the process of collective consultation and, as such, had not been formally adopted by HR. The rubric defined quotes an acceptable use" as including "the creation, transmission or display of any material which… Contains offensive, obscene or indecent images, data or other material". It also made provision for internal monitoring and auditing. Quotes whether a reasonable grounds to suspect an instance of misuse or abuse of any of these services,… The Director of Human Resources… may grant permission for … the monitoring of use of … the Internet…"

48. It is common ground that there was no written procedure, in either the 2008 or 2012 policies or elsewhere, concerning the seizure of computer equipment. In particular, there was nothing that prescribed how, or in what circumstances, the respondent could remove University-owned equipment from an academic member of staff to whom it had been issued.

Academic promotion and reward

49. The respondent had a formalised process for deciding on promotion applications from academic members of staff. In the first instance the application would be considered by the School where the academic worked (in the claimant's case, the EEE School). The School Promotions Committee (SPC) would examine the application and give it a grade from A to D across various competencies in the role, such as teaching and learning, research, knowledge transfer and leadership. Grade A meant that the candidate clearly met the criteria for promotion. A "B" grade signified that the criteria were marginally met. Grade C meant that that the candidate had marginally missed satisfying the criteria. If a candidate received a "D" grade it meant that the candidate was clearly not ready for promotion.

50. Following a recommendation (even at Grade C) by the SPC, the application would be passed to the Faculty Promotions Committee (FPC). In the EPS Faculty, at the relevant times, the FPC was chaired by the Dean, Professor Bailey. The FPC would undertake essentially the same scoring exercise as carried out by the SPC. Having done so, it would make a binary recommendation for the application to be either approved or declined. As a matter of form, the final decision on the application was for the University Promotions Committee (UPC). In practice, however, the FPC's recommendation would always be implemented.

51. At the same time as deciding on promotions, the FPC would also consider whether a candidate who had missed out on promotion should instead receive Reward and Recognition of Exceptional Performance (RREP). A typical RREP award was an accelerated increment on the academic staff pay spine.

Working relationships

52. Part of the claimant's role included tutoring first-year undergraduate students. He went out of his way to help them and built up a reputation (according to a later petition) as an affectionate, caring, generous and supportive tutor. In 2011 Professor Gibson sent the claimant a Christmas card recognising the claimant's "exceptionally hard work" in this area.

53. The claimant admired and worked well with Professor Missous. Professor Hamilton's working relationship with Professor Missous, on the other hand, was

much more strained. We were unable to get to the bottom of the precise reasons behind these difficulties, but whatever they were, the tremors were felt throughout the EEE School. Professor Gibson perceived a "schism", broadly divided into supporters of Professor Missous and those of Professor Hamilton.

54. The claimant struck a personal friendship with Professor Halsall. They talked freely, not just in relation to work, and sometimes in bawdy fashion. Two examples illustrate the claimant's lack of inhibition in conversation with Professor Halsall:

    54.1. In December 2009 or 2010 (we did not need to decide which year), whilst on a train journey, the claimant showed Professor Halsall images on his personal laptop. These images included photographs of a woman. The claimant told Professor Halsall that he knew the woman concerned. (In a later investigation, this woman was later believed, rightly or wrongly, to be the same woman of whom photographs were discovered on the claimant's laptop, and to whom we refer as "A"; it is possible that these photographs were actually of a different woman, whom we shall call "Z".) The claimant and Professor Halsall use different language to describe the woman in the photographs. According to the claimant's evidence to us, she was photographed in "seductive poses" which were "not pornographic at all". Professor Halsall's evidence was that they were "explicit", "naked", "definitely more graphic than Page Three" and had made him turn away in embarrassment. It may be that these are just differences in point of view. To the extent that they clash, we prefer the version given by Professor Halsall.

    54.2. In an e-mail exchange on 10 November 2011, Professor Halsall listed a number of famous physicists including the German Chancellor Angela Merkel. In reply, the claimant quoted the former Italian Premier Silvio Berlusconi, describing Chancellor Merkel as an "unfuckable fatarse". His following word, "Classy!" may have implied some criticism of Snr Berlusconi, but it was the claimant who, in the first place, introduced the comment into a conversation that was about physicists, not about Snr Berlusconi.

55. Initially the working relationship between the claimant and Professor Hamilton was good. On 3 November 2009 the Professor Hamilton completed the claimant's if and Performance and Development Review (PDR). Professor Hamilton reported glowingly on the claimant's record of research and publication. The claimant did not share the same level of banter with Professor Hamilton as he did with Professor Halsall, although they did have a relatively relaxed and informal manner of communication, evidenced by an e-mail exchange on 21 February 2011. It is the claimant's case that, in the summer of 2011, an academic called Peter Carrington from Lancaster University visited the Faculty, following which relations between Professor Hamilton and the claimant deteriorated. Professor Hamilton's perspective was different: that there was no change until some time in 2012 when the claimant allegedly made a remark about a student's contraception. These events happened a long time ago and there is little contemporaneous documentary evidence. This made it hard for us to determine when, or precisely why, the working relationship got worse. We are sure that there was some personal dislike and rivalry between Professors Hamilton and Missous and that the claimant was known to support the latter of those two adversaries. There was no open hostility, as Professor Hamilton's later support for the claimant shows. Where precisely their relationship stood between those two extremes is difficult to pinpoint with precision, because of the reliance

on impressions formed by witnesses giving oral evidence. Our task of evaluating such evidence is made more difficult by the passage of time.

56. Professors Hamilton and Halsall were good friends. They met socially about once per month. When, in early 2012, Professor Halsall separated from his wife, the claimant offered Professor Halsall his spare room. Professor Halsall declined and stayed for a few weeks with Professor Hamilton instead.

57. Professor Bailey and Professor Hamilton knew each other, but not particularly well. Up to April 2013, the two of them had had approximately five one-to-one meetings. As Deputy Director of the PSI, and as director of a cross-school MSc course in Renewable Energy, Professor Hamilton attended regular group meetings at which Professor Bailey was present.

The claimant's laptop

58. In March 2010 the claimant was issued with a University laptop. He was free to use the laptop for his own private purposes, within the confines of the University's policies.

59. We pause here to consider a highly vexed question. In the light of the evidence available to us, did the claimant use his computer for the purpose of viewing pornographic images? We record our finding at this point because it helps to explain what the claimant was thinking at various times, in particular the times at which he allegedly made protected disclosures. Though not determinative, it also has some bearing on the question of what remarks, if any, the claimant made about protecting pornography on his laptop.

60. Having considered the evidence, our finding is that the claimant did knowingly allow pornographic images to be both downloaded and stored on his computer at some time between November 2011 and October 2012. Our reasons, briefly, are as follows:

    60.1. The laptop had only two active user accounts. One was the administrator account which was used at the time of configuring the computer and was not used to browse the internet. The other user account was the claimant's user account, "mbessmm6".

    60.2. It was possible that others beside the claimant could have used the laptop under username mbessmm6. In oral evidence, however, the claimant confirmed, "I can vouch for anybody else who used the computer that they are not responsible for the thumbnails".

    60.3. It was highly unlikely that any pornographic images were on the laptop before the respondent acquired it. The claimant suggested that this might be an explanation. In support he drew our attention to thumbnail images on the hard drive of employees of the software company, Adobe. The thumbnails were time-stamped with dates earlier than April 2010. We agree with Mr Bridge's opinion, however, that the hard drive was not likely to have been owned or used by Adobe at any time.

    60.4. Recovered browsing history for the laptop shows that, on 15 February 2012, 12 April 2012 and 5 May 2012, a user logged in as mbessmm6 used Mozilla Firefox to view multiple pages on an adult website containing the name "StupidCams". On 12 October 2012 the same user account used Firefox to search the internet using the search term "stupid cam". The claimant has suggested that the web pages could have been opened by

malware without the claimant's knowledge. We accept Mr Bridge's evidence that this explanation is "highly implausible". Malware would have no need to enter search terms into a search engine in order to gain access to a website. It would also have no need to write the browsing history into Firefox's records.

60.5. The mbessmm6 profile folder contained an archive file with the extension ".rar" (known as a "RAR file"). Within the RAR file was a folder called "pics" containing:

60.5.1. a sub-folder bearing a person's name, which we will simply describe as "Folder A";

60.5.2. 21 picture files which were considered by Mr Bridge to be pornographic; and

60.5.3. a "Thumbs.db" file containing scaled-down thumbnail pictures. The thumbnails were viewed by the respondent's IT Security department and considered to be pornographic.

60.6. The claimant accepted that he had created Folder A and populated it with a number of photographs of a woman (to whom we refer as "A") with whom he had had a "virtual affair". In the pictures the woman was naked. Some of these photographs showed the woman's genitals. Folder A appeared twice on the hard drive: once within the RAR file and once within the folder "workfunction" within My Documents. The contents of Folder A in its "workfunction" location were, essentially, encrypted versions of the images in Folder A in the RAR file.

60.7. A number of encrypted files were found elsewhere on the laptop. From the file addresses, it was Mr Bridge's opinion that some of the encrypted files were work-related and some were clearly pornography. The same encryption software was used to encrypt the work files, the pornographic files, and, importantly, the contents of Folder A.

60.8. Mr Bridge's opinion was that the creation of Folder A and the use of encryption software "indicates that the User has encrypted pornographic pictures and it is therefore reasonable to assume that the User was aware of the material." During cross-examination of Mr Bridge, the claimant was reminded that had the opportunity to challenge this aspect of Mr Bridge's report. He declined to do so, saying that he lacked the necessary expertise.

61. In November or December 2011 the claimant's laptop was encrypted with University-issued software called Truecrypt. The programme of encryption became compulsory in early 2012. On 25 January 2012, a departmental meeting took place to discuss encryption of University computer equipment. The roll-out of encryption continued until approximately April 2012. Professor Hamilton's evidence is that, shortly after the January 2012 meeting, the claimant said to him something along the lines of "at least one good thing has come of it – my stash of porn is even better protected now…as is everyone else's". The claimant strenuously denies that such a conversation took place. This is a difficult dispute for us to resolve. We have no doubt that Professor Hamilton learned, from one source or another, that the claimant had images on a laptop which had been considered by somebody to be pornographic. We do not think that Professor Hamilton just made up the idea of there being pornography on the claimant's computer. It would be a surprising coincidence if he had done so: as we have

found, the claimant did knowingly use his University laptop to view pornography. As for Professor Hamilton's source, he may well have heard about the pornography from Professor Halsall following the conversation on the train. It is possible that, in addition, Professor Hamilton learned about it (as the respondent contends) from some jocular remark made by the claimant. We have our doubts as to whether the conversation happened as Professor Hamilton describes it, because of the possibility of there being a strained working relationship at that time. But, as we have stated, that is only a possibility: the passage of time has made it hard to determine what the state of their relationship was in early 2012. Trying to find, after 5 years, whether the claimant did mention pornography to Professor Hamilton, and in what terms, is more difficult still.

Student S

62. In 2009, a female, Iranian-born student, to whom we will refer as "Student S", started her PhD course within the EEE School. The claimant was Student S's academic supervisor. At some point in 2011, Student S formed a relationship with "J", who worked as a temporary member of staff in the Mathematics Faculty, based in the Alan Turing Building.

63. Student S's PhD did not progress well. The claimant was unimpressed with the quality of her research. Shortly after 29 September 2011, she underwent her second year *viva* examination. The claimant accompanied her. Professor Halsall was the internal examiner. During the course of the meeting there was a heated exchange between the claimant and S in front of Professor Halsall. (A few weeks later, Student S sent the claimant a message referring to him "furiously taking the flash memory out of my hand so that Mathew Halsall noticed that…")

64. Immediately after the *viva*, the claimant and Professor Halsall had a conversation about Student S. During the conversation, the topic turned to Student S's relationship with her new partner. There is a clash of evidence as to what happened next. Professor Halsall's evidence is that the claimant told Professor Halsall that Student S was using contraception and that he knew because he had asked her. The claimant's version, as later given to Professor Jackson, was that he had said to Professor Halsall, "Let's hope she is aware of contraception!" In oral evidence, the claimant told us that he had added, ironically, "Maybe you should ask her!" Because of the passage of time, we cannot make a positive finding about the claimant's precise words. One fact, evidenced by Professor Halsall, is no less vivid for the passing of the years. This was Professor Halsall's reaction to the claimant's contraception remark. He was shocked and appalled. Whether the claimant meant his remark ironically or not, Professor Halsall did not take it that way. He thought it was inappropriate for the claimant to be discussing contraception with a student.

65. This brings us to another point of dispute. Did the claimant make a similar remark to Professor Hamilton? Here, we have our doubts. This is not just a dispute about the claimant's precise use of words, but whether they had any conversation about a student's contraception at all. Again, we have to allow for the possibility that the working relationship in November 2011 had deteriorated to the point where such a conversation was unlikely. As we have already observed, such a finding would itself be fraught with difficulty because of the age of the dispute. Another possible scenario is that Professor Hamilton heard about the contraception remark from Professor Halsall. We found it difficult to decide

whether this possibility was any more likely than Professor Hamilton's account, which was that the claimant had told Professor Hamilton directly.

66. By November 2011, the claimant suspected that Student S's second-year report, submitted in September 2011, had not actually been prepared by Student S herself.

67. On 28 November 2011 the claimant was discussing data with Student S when J walked into the office and accused the claimant of being a poor supervisor and talking to his girlfriend the wrong way. The claimant told J that he had no right to be in the room. During the course of the exchange, J asked the claimant which country he came from. It is very hard for us to pin any particular meaning to this question. It was not set in context for us and the incident occurred over 5 years ago. It may have been a racist slur about the claimant's Mediterranean, or non-British, origins. Another possible explanation is that J was trying to highlight the claimant's lack of awareness of the family and cultural pressures facing Iranian students studying overseas. Be that as it may, the claimant reported the incident to security and then made a separate report by e-mail to Professor Gibson the same evening. His e-mail made no mention of J's question to him about his country of origin. The main thrust of the e-mail appeared to be "to avoid further incidents or confrontations". Professor Gibson has no recollection of having received the security report. This may be because his name was misspelled in the report, resulting in it not being sent to the correct person, or because Professor Gibson has simply forgotten about it.

68. Professor Gibson replied later that evening. He gave the claimant some advice about his future dealings with Student S and sought to reassure him not to worry about the complaint from J. The claimant did not reply to Professor Gibson's e-mail and did not chase him for any further action. Later, in a statement provided on 14 August 2012, the claimant repeated that he had "agreed not to pursue the matter further…"

69. We pause here to take stock of Allegation 1. So far as the allegation is levelled against Professor Gibson, we are quite satisfied that his lack of further action was not motivated in any way, consciously or subconsciously, by the claimant's race. The reason why Professor Gibson did not investigate J's allegedly racist remark was because the claimant did not tell him about it and did not ask him to investigate. Professor Gibson believed he had responded to the claimant's satisfaction as the claimant never chased him for any further action. So far as the allegation is based on J's conduct, we have found it difficult to assess J's motivation because of the delay and the lack of context.

70. On 30 November 2011 the claimant attempted to arrange a meeting with Student S, which prompted Student S to complain to Dr Geoff Baines, responsible for EEE School Admissions and Graduate Education, and Mrs Sheila Knowles, Student Welfare Officer. Student S met Ms Knowles on 2 December 2011 and complained of the claimant inappropriately shouting at her and humiliating her in public and about him touching her hair. She asked to be jointly supervised by Professor Halsall and the claimant, with Professor Halsall being the main point of contact. Dr Baines agreed to the proposal on 5 December 2011. The following day, Student S invited the claimant, along with other University friends, to her home for a meal.

71. Following the change in supervision arrangements, Student S's PhD continued to be bedevilled by problems. She damaged an expensive spectrometer. Some of

her computer equipment was moved in January 2012. This prompted an e-mail conversation between Student S and Professor Hamilton from 25 to 27 January 2012. Student S complained about the quality of the claimant's supervision. Professor Hamilton proposed to escalate her concerns to Professor Gibson (the head of EEE School). Student S's next e-mail referred to the claimant's "inappropriate behaviour with me" and suggested, obliquely, that the claimant had "sexually harrased" her (with original spelling). Professor Hamilton resolved on a remedial programme which included moving Student S to the PSI and formally designating Professor Halsall as Student S's supervisor.

72. On 26 March 2012, Student S requested a meeting with Professor Gibson. In response to a query about the purpose of the meeting, Student S informed Professor Gibson that it was about a case of "serious misconduct, accompanied by a huge inadequacy of supervision, carried out by a bully supervisor", namely the claimant.

Professor Beattie

73. Meanwhile, in the Faculty of Medical and Human Sciences, an entirely unrelated investigation was in progress. The subject was Professor Beattie, a well-known psychologist from Northern Ireland. One of the matters of concern was inappropriate financial management. This allegation was considered by the Internal Control Accountant, Laurence Clarke. Between 1 and 19 March 2012, Mr Clarke liaised with a number of colleagues. Most of them have no connection whatsoever to this claim, but one of them was Mrs Heaton. Mr Clarke arranged for Professor Beattie to bring his laptop into the University so that it could be investigated. Mrs Heaton was aware that this had occurred. Nobody within the EPS Faculty, and particularly, nobody in EPS Human Resources, knew of the arrangements that had been made. Professor Beattie was later dismissed and his dismissal was eventually found by an employment tribunal to be unfair. Nowhere in the 49 pages of reasons for the tribunal's decision is there any suggestion that Professor Beattie faced any allegation of inappropriate material on his laptop.

The first promotion application

74. On 29 March 2012 the EPS FPC considered the claimant's promotion application. The SPC had already examined the application and given the claimant an overall grade of "B". According to the SPC's narrative comments, the claimant's case for promotion was "clearly met". The FPC disagreed. In their opinion, the claimant "did not meet the criteria for promotion and would benefit from developing progress across all promotion criteria."

Escalation of Student S's allegations

75. On 10 April 2012, Student S e-mailed Professor Gibson again, accusing the claimant of "harassment (sexual)" and "intimidation (ie bullying)". Professor Gibson sought advice from Ms O'Neill (Faculty HR Partner) and referred Student S to the Dignity at Work (DAW) Policy. Over the next few weeks, her e-mails gave mixed messages: on the one hand she continued to criticise the claimant's "mercenary" actions, "bad and inappropriate ways" and "mental/sexual harassment"; on the other hand she asked to resume working with the claimant for the theory chapter of her thesis. In an e-mail to Professor Hamilton on 16 May 2012, Student S appeared to resort to blackmail: "Please make sure that I'll receive a PhD by the end of a fully well defined well planned course from now,

otherwise he must pay for whatever it takes for me to get my PhD sorted out in other circumstances or he will be in trouble." Professor Hamilton forwarded the e-mail to Dr Baines and Professor Gibson. Between them they pondered an appropriate response. In the course of the exchange, Professor Hamilton observed: "I think it is important to make clear to [Student S] that we can[']t go on using these negotiations as a negotiating platform. I am nervous that Max is not in the picture though, I guess he has the right to be." The agreed response reminded the claimant of the DAW procedure and warned of the possible consequences of making serious unsubstantiated allegations. He invited Student S to a meeting to discuss the matter. At J's request, J attended too.

76. On 18 June 2012, Student S submitted her formal DAW complaint. Broadly speaking, the complaint was divided into two themes:

    76.1. "abusive and incompetent supervision"; and

    76.2. "sexual harassment and coerced furtive affair/sexual abuse".

77. The narrative text of the complaint was clearly drafted by Student S's partner. Under the heading of sexual harassment, the complaint outlined a number of "major (non-penetrative) sexually abusing events". These ranged from stroking Student S's hair in public to "indecent nudity and ejaculation". One incident was alleged to have taken place at Student S's home in August 2011. Student S alleged that's the claimant had "coerced compliance through total control of a very vulnerable girl from Iran using his control of her visa, her income, her PhD…and the lack of knowledge of the norms of our society".

78. The written complaint concluded with a list of witnesses. Amongst these were Professor Hamilton and Professor Halsall.

79. Student S's complaint was forwarded to Mrs Janet Watson, Faculty Officer for appeals, discipline and complaints. She passed it to Dr Rodger Edwards to decide if there was a case to answer. Dr Edwards interviewed Student S on 20 June 2012. He then interviewed the claimant on 27 June 2012. The claimant was accompanied by Dr Roger Walden. As well as being a representative of the University and College Union, Dr Walden was a lecturer in employment law. Dr Edwards reported on 9 July 2012. It was Dr Edwards' conclusion that the complaint should go forward to a full investigation. The allegations of sexual harassment would be referred to human resources. Issues concerning the claimant's supervision of the student would be separately investigated by Professor Brown (who had recently replaced Professor Gibson as Head of School) under a different procedure.

Investigation of Student S's complaint

80. On 26 June 2012, in response to a request from Dr Walden, Mrs O'Neill outlined the allegations under investigation. These included "Inappropriate behaviour towards [Student S] and "Sexual harassment of [Student S].

81. On 12 July 2012, J sent to Mrs Watson an e-mail attaching a further statement in relation to Student S's sexual harassment complaint. The statement substantially changed the tone of the allegation. Whilst maintaining that the claimant bullied Student S in relation to her studies, he rowed back from the assertion that the claimant had coerced her into sex. Rather, he painted a picture of a consensual sexual relationship initiated by the claimant, to which Student S had, albeit reluctantly, agreed. Physical intimacy had started during an academic

conference at the University of Surrey in July 2011. Student S was in the claimant's bedroom discussing her work when he started undressing himself and caressing her.

82. The sexual harassment investigation was assigned to Professor Ann Webb and Mrs O'Neill (Faculty HR Partner). Professor Webb had not investigated a complaint of this kind before. Mrs O'Neill was relatively more experienced. We are satisfied, however, that Professor Webb used her own independent the course of the investigation.

83. On 17 July 2012, Professor Webb and Mrs O'Neill met with Student S. When asked about J's e-mail of 12 July 2012, Student S agreed with its contents. She added that the claimant was not "a rapist or forceful, his behaviour was of a different nature."

84. On or about 23 July 2012, Professors Halsall and Hamilton has a long discussion about the progress of Student S's PhD. On 24 July 2012, Professor Halsall sent Professor Hamilton a colourful e-mail. It began, "Bloody typical, max swans off and leaves me in charge of this student…" The final paragraphs read, "the question is why the hell should i be doing this for max!!?? i'll tell you what, i'll do it, whilst writing to grant proposals, supervising 5 students and 3 post-docs sorting out the mess his libido has created etc etc…rant over…" Professor Hamilton did not reply.

85. We have asked ourselves, for the purpose of Allegation 2, why Professor Halsall referred to the claimant's "libido". We have looked in particular for facts from which we could conclude that he was influenced by the claimant's race. This exercise is not easy. Professor Halsall's subsequent comments could conceivably support such a conclusion. On the other hand, the context of the e-mail shows that Professor Halsall believed that the claimant had been sexually attracted to Student S. He had some basis for suspecting an inappropriate relationship, not least the claimant's comment about Student S's contraception. Any preconceptions about the claimant's general interest in sex are more likely to have come from the conversation on the train than from any stereotypical attitudes about Mediterranean men.

86. Student S was interviewed again on 13 August 2012. She described the University of Surrey conference in detail. On the final night, she said, she had gone to the claimant's room voluntarily, taking her laptop. The claimant had started kissing her and they both ended up semi naked. Student S stated that she felt uncomfortable, but that she had stayed with the claimant for most of the night. She clarified the date of the incident at her home as being 11 August 2011. On that occasion, she said, the claimant had undressed her and tried to have sex with her, but she eventually managed to had to deter him. The notes of the meeting, relating to the discussion of this particular incident, include the following passage: "When asked if she thought she might be raped, [Student S] stated that she did not think [the claimant] would have gone this far…" A further email from Student S herself on 13 August 2012 alleged another incident on the way to Leeds in August 2011 in which the claimant "took the liberty of kissing and feeling my body". The overall impression of Student S's evidence at that stage was one of reluctant consent to her supervisor's determined advances.

87. On 14 August 2012, Mrs O'Neill and Professor Webb and interviewed the claimant. He strongly denied the allegations. In relation to the alleged incident on 11 August 2011, the claimant stated that he could not have visited Student S's

home that evening because he had been witnessed by a student, Mr Monteverde, leaving Manchester by train that afternoon. According to the notes of the interview, the investigators did not inform the claimant about J's statement of 12 July 2012. At the interview the claimant submitted a lengthy written statement which maintained his denial in simple terms: the alleged incidents did not take place. The allegations were motivated by blackmail. If anything, according to the claimant's statement, Student S had been "stalking" him. She had hugged his arm as he was leaving a University building, which he had reported to Professor Gibson and another witness. On one occasion she "threw herself onto my chest while crying and left my shirt wet". He defended his wording and tone of e-mails to Student S (and in particular the use of the word, "dumb") on the ground that Student S had failed to follow his instructions.

88. The investigation coincided with an exciting opportunity for the claimant. On 24 August 2012, Professor Zhong Lin Wang, who had an international reputation in the field of piezotronics, gave a seminar at the PSI. Afterwards, over dinner, Professor Wang offered the claimant a visiting professorship in Beijing. The claimant was keen to accept.

Professor Hamilton's interview

89. On 3 September 2012, Professor Webb and Mrs O'Neill interviewed Professor Hamilton. The interview was noted and the record later typed. Neither version was shown to the claimant until long after the investigation had concluded. Like the other witnesses, Professor Hamilton was assured that the information he gave would be kept confidential. Professor Hamilton started with a measured account of how Student S's complaints had begun. He mentioned occasions when he had heard the claimant and Student S shouting at each other. He expressed a low opinion of Student S's abilities, using words such as, "incompetent", "computationally illiterate", and "did not have the faintest idea". He gave examples of the way in which Student S and J were progressing the complaint and the careful steps he had taken to avoid compromising his line management responsibility for the claimant.

90. What Professor Hamilton said next has attracted so much concentrated criticism from the claimant over the years that it is necessary to set out the record of this part of the interview almost in full:

> "[Professor Hamilton] is only aware of two problems with [the claimant] in the past. One was an Indian PhD student (male) that [the claimant] fell out with and he went back to India and submitted his thesis. [Professor Hamilton] was required … to sort out an external examiner as if he were the supervisor. [Professor Hamilton] is not aware of the nature of the falling out. The second problem was with a PhD student who left abruptly about a year ago but [Professor Hamilton] only found out about this later, the gender of the student is unknown.
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> [The claimant] is currently director of first year students and so is currently line managed by the Head of School so [Professor Hamilton] has never done a PDR with [the claimant].
>
> [Professor Hamilton] stated that it is usual practice to have students in your office for discussion. [Professor Hamilton] stated that [the claimant's] door was normally closed. In [Professor Hamilton's] opinion, [the claimant's] attitude towards students is dreadful although it upset him to say so.

> [Professor Hamilton] believes that [the claimant's] attitude towards sex and females is like stepping back 50 years. It is not something you get these days. He made sleazy, smutty, dirty observations; if it is just the way he operates. For example he once told me that Student S had got a boyfriend and that he told her that she should be on the pill, taking contraceptives. That is nothing to do with me or him. In my mind I was shocked – he makes me feel like I need to take a shower.
>
> About six months ago he popped into my office for a chat, he was complaining about involved with his laptop that now the [respondent] had encrypted it his laptop was ten times slower than it used to be. But then he said that at least one good thing has come of it - his stash of porn is even better protected now – courtesy of the [respondent], as is everybody else's! I said "no Max, that's not right", I reacted like it was distasteful but should have been onto it, it could have been a joke though, with hindsight I should have done something but I'm not the IT police, he did not show me anything. Although nothing would surprise me, he has a reputation in the school not with the guys but the girls in the admin office called him "Dirty Max" - I have no evidence about this – it is just honestly how I feel, I don't like it, it does not happen every day but it does happen regularly.
>
> …
>
> [Professor Hamilton] stated that in his opinion [the claimant] was not a good member of the team as he is very opinionated and his research is too focused, it has never changed since his PhD. His chances of getting his research externally funded is marginal, it was never going to go anywhere. Professor Hamilton stated that any problems he had with [the claimant] were low level such as he could tend to occupy all of the group meetings by talking too much, but his output never quite matched. [Professor Hamilton] stated that he did not hire [the claimant] and he thinks he was a poor appointment as he has not got the right breadth of interest."

91. The notes did not show what questions the interviewers had asked such as to prompt these remarks from Professor Hamilton. We accept Mrs O'Neill's evidence that they asked general questions about the claimant's language and behaviour. We think it unlikely that she or Professor Webb asked any question about the quality of the claimant's research, or indeed any question to which a comment about the claimant's research could have been relevant. In other words, Professor Hamilton's slur on the claimant's research was gratuitous.

92. Neither Professor Webb nor Mrs O'Neill challenged Professor Hamilton about his comments at the time. Nor did they think to embark on a separate investigation as to whether the administrative staff were insulting the claimant behind his back. Their main purpose was to concentrate on the investigation into Student S's allegations, which were already serious and complicated enough.

93. Before leaving the Professor Hamilton interview, we address Allegation 3. We agree with the claimant that some of the comments were inherently derogatory and insulting. In particular, we have in mind his use of the words, "dreadful", "dirty", "smutty", "Dirty Max". Other comments were expressed in measured terms, but made serious accusations, such as his account of the "stash of porn" and "on the pill" conversations. We have struggled to make findings about precisely why Professor Hamilton said these things. In particular:

93.1. It is quite possible that Professor Halsall said "dreadful", "dirty" and "smutty" because he was genuinely appalled at the claimant's attitudes towards women. He may well have come to that view having found out (from whatever source) about the claimant's remark about Student S's contraception, or from his discussions with Professor Halsall. Whether that was what Professor Hamilton had on his mind or not is hard to gauge after 4 years.

93.2. Professor Hamilton may have invented the "Dirty Max" comment, or may have been informed about it by Professor Gibson. It is Professor Gibson's evidence that it would not be surprising if he told Professor Hamilton and then forgot about it. Whether or not this is likely to have happened is something that is harder to assess now than it would have been had the claim been brought earlier.

93.3. We have already set out our analysis of the evidence as to the "stash of porn" remark. It could have been that Professor Hamilton was telling the truth, but we found it hard to make a finding either way.

93.4. The comments about the claimant's research were gratuitous, but completely unconnected to race.

93.5. We do not find that Professor Hamilton's failure to reply to Professor Halsall's "libido" e-mail makes it any more likely that Professor Hamilton was motivated on 3 September 2012 by considerations of the claimant's race.

93.6. There is evidence on the face of the interview record, and in the claimant's own history of his working relationship with Professor Hamilton, that all of Professor Hamilton's comments could have been motivated by academic rivalry and personal dislike based on the claimant's association with Professor Missous. That would have nothing to do with the claimant's race.

93.7. There is nothing inherent in Professor Hamilton's comments that suggests that they were motivated by the claimant's race. We are aware that the media have, on occasion, portrayed stereotypical views about Italian men ("Casanova", "Lothario") as being excessively amorous towards women. But there are many other stereotypical views about Italian men, many of them positive. There are also other groups of men, defined by completely different characteristics, that are associated with sexual aggression. And even amongst those who leave their preconceptions at the door, there many other reasons why a person may be stigmatised in the workplace as being "dirty" or "smutty". An employee can form a negative view of a colleague because of his words or behaviour. This may or may not be what happened in Professor Hamilton's case. It all happened so long ago that it is difficult to tell.

Other interviews and the decision to seize the laptop

94. Professor Halsall was interviewed the same morning. His interview record was also kept confidential for many months. He gave a balanced synopsis of the progress of Student S's PhD. Speaking of the *viva* examination, he recalled that there had been "tension in the room", that the claimant "was argumentative", but then they seemed to happily have a go at one another." He confirmed – in the claimant's favour – that the claimant had complained to him about Student S's failure to listen. He had never seen the claimant make physical contact with a student or shout at a student. The claimant could, Professor Halsall said, "be

quite forceful and condescending", to which Student S "argued back and would stand up for herself." He observed that the claimant had advised a first-year student that they were overweight and needed to diet. Truthfully, we find, he mentioned the claimant's remark to him about Student S using contraceptives. As a general observation, Professor Halsall mentioned that in his opinion the claimant was "over-friendly with students of both genders." In this interview, Professor Halsall was in our view trying to walk the tightrope between misleading the investigation, which he was not prepared to do, and landing the claimant in trouble, which Professor Halsall wanted to avoid if he could. This is why Professor Halsall kept to himself the incident on the train in which the claimant had shown him the naked photographs.

95. In the afternoon, the investigators spoke to Mr Monteverde and Ms Alimi who had been named as witnesses. The following day, 4 September 2012, they interviewed Professor Gibson and Dr Baines. Professor Gibson gave a balanced statement, describing the claimant as being "well thought of". Dr Baines had not heard any female staff commenting about the claimant's behaviour.

96. During the week following the round of interviews, Mrs O'Neill pondered what to do about Professor Halsall's "stash of porn" remark. It must be remembered that she, at that time, was completely unaware of the evidence that we now have about the material on the claimant's laptop. She was sufficiently concerned to consider taking the laptop for investigation. The trouble was, there was no written procedure to follow. Mrs O'Neill did not know of the arrangements Mr Clarke had made to obtain Professor Beattie's laptop. Even had she known, she would not have considered it wise to let the claimant know in advance that his laptop would be investigated. If there really was pornographic material on the claimant's computer, there was a risk that the claimant might try to delete it before the hard drive could be analysed.

97. Mrs O'Neill went to Mrs Field for advice. She told Mrs Field about Professor Hamilton's evidence, including his opinion that the claimant's "stash of porn" comment could have been made frivolously. Mrs Field agreed that the laptop should be taken for examination. Mrs O'Neill made a brief handwritten note of the next steps on a hard copy of an e-mail she had received. The e-mail referred to a forthcoming disciplinary meeting with Professor Bailey. We are satisfied that the e-mail had nothing to do with the claimant's case. There was no suggestion of disciplinary action against the claimant at that time.

98. Acting on Mrs Field's advice, Mrs O'Neill spoke to the respondent's in-house solicitor, Ms Hesp, and to Dr Paul Harness, Director of IT. The purpose of the latter conversation was to discuss the protocol surrounding removal of IT equipment. Following the conversation, Dr Harness signed a document purporting to authorise the removal of the laptop During the conversation Mrs O'Neill did not mention Professor Hamilton's reference to the possibility of a joke. We are satisfied that Mrs O'Neill did not omit this detail in order to mislead Dr Harness. As Mrs O'Neill saw it, she did not need Dr Harness' permission.

99. On 1 October 2012, Professor Webb and Mrs O'Neill interviewed Mr Pal, who confirmed the claimant's alibi for 11 August 2011. They also spoke to Mrs Knowles. The notes suggest a long and thorough interview. It did not occur to the investigators that Mrs Knowles' role sat within the "admin team" and that she might be in a position to confirm or deny that members of staff within that team called the claimant, "Dirty Max". They therefore did not ask Mrs Knowles any

questions about this unpleasant nickname. In a much later investigation, Mrs Knowles denied hearing the comment.

100. On 2 October 2012, Mrs O'Neill e-mailed Dr Joshua Zide, who had been named as a witness to the Surrey conference incident. Her e-mail contained a list of 9 relevant and fairly-worded questions. Dr Zide replied on 8 October 2012. His answers both inculpated and exonerated the claimant: Dr Zide's impression was that the claimant and Student S were behaving intimately, to the point where Dr Zide had thought to himself that "dating a student is never a good idea"; on the other hand he saw "no direct evidence" and nothing to indicate that Student S was "upset with the relationship".

101. On 9 October 2012, Mrs O'Neill exchanged e-mails with Dr Paul, Head of EPS IS Infrastructure and Operations. She asked for a member of IT staff to be present during her forthcoming meeting with the claimant so that an image could be taken of his laptop hard drive. Dr Paul's advice to Mrs O'Neill was that two members of staff should be present.

102. Student S was re-interviewed the same day. Although the notes of the interview did not record every question and answer, it is clear that Professor Webb and Mrs O'Neill asked searching questions about Student S's allegations. One area they covered was the alleged visit to Student S's home on 11 October 2012. The notes showed that they put to Student S directly that a witness had confirmed that the claimant had left the University that afternoon. According to the notes, Student S replied that she "could not be too sure about the exact date of the incident, but she confirmed that the allegations stand." Mrs O'Neill was noted to have "asked [Student S] to think about the date of the incident and requested that [she] research her diaries, emails etc … to see if she could remember exactly when the incident happened." Student S speculated that it could have occurred between 15 and 29 August 2011.

The meeting on 15 October 2012

103. The claimant was invited to attend a meeting at the Faculty HR offices, scheduled for 15 October 2012. He was informed that the purpose of the meeting was to discuss Student S's complaint. He was asked to bring his laptop with him, but was not informed of the purpose behind the request.

104. On 15 October 2012 the claimant attended the Faculty HR office suite, accompanied by Dr Walden. Ahead of the meeting, Mrs O'Neill had arranged for Mr Cottam and Dr Paul of IT Security to be present to take possession of the laptop. Her idea was that she and Professor Webb would meet privately with the claimant and Mr Walden, whilst the IT Security personnel waited inconspicuously Mrs O'Neill's office. She intended to obtain the laptop from the claimant and then hand it straight to Mr Cottam and Dr Paul.

105. Unfortunately, that was not how events unfolded. The claimant and Mr Walden arrived early for the meeting. They saw Mrs O'Neill talking to Mr Cottam and Mr Paul. The involvement of Mr Cottam and Mr Paul aroused the anxieties of the claimant and Dr Walden. They went into a meeting room with Mrs O'Neill and Professor Webb. The meeting began. Mrs O'Neill told the claimant that she had received an anonymous allegation that the claimant had pornography on his University laptop. He was asked to hand over his laptop for investigation.

106. There is a keenly-contested factual dispute as to whether Mr Cottam and Mr Paul were in the room at the start of the meeting and whether Mrs O'Neill referred

to the pornography allegation in their presence. In order to address the issues in the case we need to revisit this dispute from time to time. For convenience we call it "the Cottam/Paul dispute". For the time being we continue with the story.

107. On hearing that the claimant's laptop was to be seized, Dr Walden was outraged. His view, forcefully expressed, was that the claimant had been ambushed. The claimant experienced a feeling of panic, at one point clutching the laptop to his chest. He and Dr Walden left the room to discuss what they should do next. The meeting later reconvened. Putting aside the question of whether the IT Security staff had been in the meeting room earlier, it is common ground that by this time they had entered the room. The claimant agreed to give up his laptop. Dr Paul then explained to the claimant what would be involved in imaging and investigating the hard drive. The IT Security staff then left the room.

108. The meeting then reverted to its stated purpose. Professor Webb and Mrs O'Neill took the claimant through further details of Student S's complaint. When asked about the Leeds incident ("took the liberty of kissing and feeling my body") and about the home visit (now alleged to be between 15 and 29 August 2011) the claimant stated that these could not have happened as he was on holiday between 12 August and 15 September 2011. Without identifying her source, Mrs O'Neill read from Professor Hamilton's interview record, mentioning the claimant's alleged remark about contraception. The claimant denied having made the remark. In his later annotations to the minutes, he added that he vaguely remembered that the topic had come up in conversation with Professor Halsall. As the claimant recounted it, he had said to Professor Halsall, "I hope she knows what contraception is. Maybe I should ask her!" He implied that, in its context, his remark to Professor Halsall had been sarcastic.

109. After the grievance meeting had concluded, the claimant asked to speak about his laptop. At this time he incorrectly believed that Mrs O'Neill's anonymous informant was Professor Halsall. The claimant outlined his theory that Professor Halsall might have blamed the claimant for the breakdown of his marriage. The claimant reported having witnessed Professor Halsall in a compromising position with a student shortly before Professor Halsall and his wife separated. (There is no need for us to decide whether any love affair between Professor Halsall and the student happened or not). He went on to explain why this was relevant. He volunteered that about two years previously (August 2010 to February 2011) he had had a "virtual affair" with a woman whom he named. This woman was A. There were, he said, a few pictures of A on his laptop which, "whilst not indecent, did show nudity". Stepping outside the timeline for a moment, we know, of course, that photographs of A were later found in Folder A. Back in the meeting, the claimant acknowledged that he should not have kept the photographs on his laptop. He added that he had shown some photographs of a woman to Professor Halsall whilst on a train. Reasonably in our view, the investigators believed that the photographs shown to Professor Halsall were the photographs of A. The minutes therefore gave the impression that the claimant was talking about one set of photographs throughout the meeting. Corrections to the minutes subsequently passed back and forth with tracked changes. The claimant maintained that the images shown to Professor Halsall were of a different woman altogether: Z, not A. The end result was a disagreement, recorded on the face of the minutes, about the identity of the woman the claimant had been referring to.

110. In the meantime, Dr Paul and Mr Cottam took an image of the claimant's hard drive. The laptop was returned to the claimant at about 3.00 pm.

111. The experience of 15 October 2012 deeply wounded the claimant. As he put it, "something broke in me that day that I have since never managed to repair. It was as if they had pulled the soul out of my body and ripped it to shreds." The next day was his 40th birthday, but he was unable to celebrate it and cancelled his birthday party. For the next three or four weeks, the claimant felt too ill to work and was signed off sick by his general practitioner. For her part, Mrs O'Neill was also upset that the meeting had not gone according to plan. Though not nearly as badly affected as the claimant, she was nevertheless observed by Mrs Field immediately after the meeting to be "visibly shaken".

112. By 1.00 pm on 15 October 2012, Mrs O'Neill had composed herself sufficiently to think about the next step in the investigation. She e-mailed Professor Hamilton, letting him know that the claimant believed it was Professor Halsall who had tipped off the investigators about the claimant's "stash of porn". Wishing to avoid escalation of tension within the research group, Mrs O'Neill asked Professor Hamilton if he would be prepared to waive confidentiality so that the claimant could be informed that it was Professor Hamilton who had provided the information. Professor Hamilton replied that he wished his statement to remain confidential. His email made clear that he and Professor Halsall had discussed the issue of pornography on the claimant's computer. (We were unable to make a reliable finding as to when or how this discussion had taken place). He added, "I will ask [Professor Halsall] to confirm this to you." Mrs O'Neill replied briefly. She did not comment on Professor Hamilton's proposal. When, much later, the claimant discovered this thread of emails, he was naturally concerned that Professor Hamilton appeared to be telling Professor Halsall what to say to the investigation. Like the claimant, we are somewhat surprised that Mrs O'Neill did not warn Professor Hamilton not to interfere. That said, we do not find her omission to be sinister. Whilst falling short of best practice, Mrs O'Neill was clearly attempting in this e-mail thread to protect the interests of the claimant as much as those of anybody else.

113. At 1.35 pm the same day, the claimant e-mailed Mrs O'Neill to own up to further material on his laptop. He disclosed that he had a copy of the French film, *Histoire d'Ô,* which in his view was "not grossly indecent in any way". It is undisputed that this film gained notoriety in the 1970s for its sexual content, but was shown on British terrestrial television long before the claimant's e-mail.

114. On 19 October 2012, Dr Paul gave a decrypted version of the image of the claimant's hard drive to Tony Arnold, IT Security Coordinator, for investigation.

A bad-tempered conversation

115. In early October 2012, Professor Halsall began a two-month sabbatical trip to Canada. On 22 October 2012, Professor Hamilton e-mailed Professor Halsall to alert him to the fact that the claimant suspected Professor Halsall of saying that he had seen images on the claimant's computer. Professor Halsall, of course, knew the claimant's suspicions to be incorrect, but was irked by being wrongly alleged to have "shopped" the claimant. At 9.14pm BST (mid-afternoon for him) Professor Halsall sent a curt email to the claimant, setting the record straight. A more intemperately-worded e-mail two minutes later implied that the claimant had spread rumours about Professor Halsall having had an affair with a student. The claimant replied, denying both Professor Halsall's accusation of rumour

mongering and his own suspicion that Professor Halsall had returned the favour to him.

116. The conversation continued for 47 minutes using live messaging on Skype. The threads are not easy to follow. Messages appear to dance in and out of different topics: whether the claimant was to blame for Professor Halsall's grant application; Professor Halsall's encounter with a student at a conference; whether the claimant had told any of his colleagues about it; the effect of the incident on Professor Halsall's miserable divorce; and the identity of the anonymous informant against the claimant. Part way through the conversation, the following messages were exchanged:

> Claimant: so what? It wan not Bruce [Hamilton] either that tried to land me in the shit
>
> Professor Halsall: max, stop trying to second guess. You have the latin mentality of what have people seen. The anglo-saxon view is that something happened, what is it and what did the person think they were doing when it happened. I have just agreed to hand my ex £250k of assets out of £350k just to fuck off…
>
> Claimant: I know. but matthew as I said this came from her, not any of my colleagues. it has to…and as I said im really sorry I doubted you.

117. As the conversation went on, the language became more graphic and course and the topics more personal. The claimant did not show any sign of having taken offence at the "Latin mentality" remark.

118. Once the Skype conversation had finished, Professor Halsall, by now in a thoroughly bad temper, sent a further e-mail to the claimant. He blamed the claimant for a failed grant application ("you fucked it for me") and added a personal attack on "Mo" (who we take to be Professor Missous), stating "he has nothing – just failed dreams and a nasty vicious streak".

119. In his evidence to us, Professor Halsall attempted to explain what he meant by the phrase, "Latin mentality". As we have already indicated, his explanations were unconvincing. We had to ask ourselves what to make of his evidence. It seemed to us that Professor Halsall was trying to reconstruct his thought processes in a way that was more palatable to us, and also possibly to himself, than his actual thoughts at the time of the Skype conversation. But what, if anything, was he trying to hide? What considerations were either consciously or subconsciously playing on his mind at the time? We found these questions difficult to answer. The confused nature of the conversation makes it hard to put the remark precisely into context. Oral evidence about the context was unreliable. This, we believe, is at least partly due to the fact that the conversation happened over 4 years ago.

120. Another question on which we found it difficult to make findings of fact was whether the claimant perceived Professor Halsall's remark to be in any way detrimental to him. He did not show any sign to Professor Halsall of having taken offence during this very frank conversation between friends. He did not complaint about it at any time over the following 12 months. We do not exclude the possibility that he took some offence, but any evidence in this regard is based purely on reconstruction over a long period of time. It is not reliable enough for us to make a finding about it.

The Student S investigation continues

121. On 23 November 2012, Professor Webb and Mrs O'Neill interviewed Dr James Sexton, who had shared a house with Student S at the time of the alleged home visit by the claimant. The following day, Mrs O'Neill e-mailed detailed questions to Siavash Soleymani Babadi about, amongst other things, the University of Surrey conference.

122. On 6 November 2012 Mrs O'Neill sent Mrs Webb a draft report into the Student S complaint. We accept Professor Webb's evidence that, by that time, she and Mrs O'Neill had had extensive discussions and had jointly reached a decision. Their conclusion was that Student S's complaint should not be upheld. Professor Webb returned the draft report three days later with her comments.

Mr Arnold's report

123. In the meantime, at some point between 19 October and 9 November 2012, Mr Arnold set about looking at the claimant's laptop hard drive. Using a forensic tool called *Foremost,* he searched for any content that could be an image. *Foremost* did not discriminate between deleted and undeleted files.

124. The results of the search were summarised in a report dated 9 November 2012. According to the report, the search revealed:

124.1. "At least several hundred images", some or all of which had been deleted, and which "could be deemed pornographic" and

124.2. The Thumbs.db file in which there were at least four thumbnail images which "could be deemed pornographic".

125. Some time during the week prior to 12 November 2012, Mr Arnold spoke with Mrs O'Neill to discuss his findings. During the conversation he mentioned that there was evidence that some images had been deleted at about 9.30am on 15 October 2012, that is, just before the laptop was seized. When Mrs O'Neill read the written report, she noticed that there was no reference to this having occurred. She queried the point on 12 November 2012. Mr Arnold clarified that his earlier comment had been mistaken.

126. At 5.41pm on 12 October 2012, Mr Arnold's report was sent to Mr Spinks, the Registrar, in accordance with Ordinance XXIV. Mr Spinks' function, at that stage, was to decide whether the claimant should be dealt with under the Misconduct Procedure or Serious Misconduct Procedure. It is not clear how this may have occurred, but it appears that Mr Spinks might have been wrongly informed that the claimant had deleted files on the morning of the 15 October 2012 meeting. Whether, and however, Mr Spinks came by that wrong information, Mrs Field acted quickly to disabuse him. She sent an urgent clarification e-mail on the morning of 13 October 2012. After a number of further queries passing to and fro, Mr Spinks decided that the Misconduct Procedure would be adequate to meet the seriousness of the case.

The Student S investigation report

127. By letter dated 13 November 2012, the claimant was informed that Student S's grievance had not been upheld. The full report was attached. Its 8 pages of dense type carefully weighed the evidence and explained their opinion that the allegations of sexual harassment were not well founded.

128. Criticism of particular passages of the report has permeated through layers of grievances, so we must set them out in some detail:

128.1. The first detailed allegation to be addressed was the Surrey conference incident. Relying extensively on Dr Zide's evidence, they decided not to uphold the complaint, preferring the claimant's version to that of Student S.

128.2. Dealing with the home visit allegation, the investigators addressed the possibility of the incident having occurred on the date that Student S originally gave (11 August 2011) and between the dates she finally gave (15 to 29 August 2011). They concluded that the incident could not have occurred on either set of dates. Witness evidence proved that the claimant was elsewhere.

128.3. The general, undated, allegations of touching Student S and inappropriate language towards her were not upheld. They found that unwelcome attention of this kind was inconsistent with Student S's own conduct and was unsupported by any independent witnesses.

128.4. The investigators were unable to make a decision as to whether the Leeds incident had occurred. They were prepared to accept that Student S might have made a mistake about the date – it was common ground that that the claimant had been to Leeds on 2 August 2011 – but there were no independent witnesses.

128.5. The final, and most controversial, paragraph of the report read as follows:

> "However, two witnesses stated that [the claimant] mentioned [Student S's] contraception to them. One witness stated that [the claimant's] general attitude and language when discussing women and sex was old fashioned. These statements raise concerns which need to be addressed either by [the claimant's] line manager or Head of School as appropriate."

129. We know that the two witnesses to which the paragraph referred were Professors Hamilton and Halsall. The letter did not identify them.

130. One of the questions we ultimately have to determine is whether to allow the claimant to amend Allegation 6 so as to accuse Professor Webb or Mrs O'Neill of discrimination. So that there is no doubt, we are in any event quite satisfied that neither of these investigators were consciously or subconsciously motivated by the claimant's race in their decision to include the final paragraph in their report. The comments in the Web/O'Neill final paragraph were not racially stereotypical. Professor Webb and Mrs O'Neill had no preconceived notion that the claimant, or Italian men in general were sexist or amorous. Their questions to witnesses, so far as we were able to discern them, and their balanced treatment of the evidence in their report, suggests to us that they were rigorous in seeking out the truth about Student S's allegations and were not affected by stereotypical views. The claimant's case is that, because of his race, Professor Webb and Mrs O'Neill wanted to "get him" on one allegation or another; when the evidence drove them to dismiss Student S's complaint, they contrived to ensure that he was disciplined for something else, namely the pornography allegation. We disagree. If the investigators had been bent on finding the claimant's conduct to be inappropriate, it would have been more straightforward, and within the remit of their investigation, to find that there had been an inappropriate and undeclared

consensual encounter between the claimant and Student S at the Surrey conference. Independent evidence from Dr Zide that could have supported such a finding. That they interpreted the evidence the other way demonstrates to us that they went about their task objectively.

The disciplinary investigation and the claimant's informal grievance

131. Following Mr Spinks' decision, Professor Bailey, EPS Dean, was informed of the need to begin a misconduct investigation. Professor Bailey appointed Dr Tim O'Brien as investigator. Dr O'Brien, who has since been promoted to Professor, was the Associate Director of the Jodrell Bank Centre for Astrophysics and associate Dean for Social Responsibility. This was to be his first disciplinary investigation. Mrs Field allocated Ms Louise Jordan, HR Partner, to assist him.

132. During the day on 16 November 2012, Mrs Field and Mrs Jordan exchanged e-mails in an attempt to map out the different stages of the disciplinary process and to identify the appropriate role holder to conduct each stage. The disciplinary hearing was to be conducted by the Dean of EPS and, if the claimant appealed, the appeal would be heard by the Dean of another faculty. The claimant invites us to conclude from this conversation that Mrs Field and Mrs Jordan had predetermined the outcome of Dr O'Brien's investigation. We disagree. In our experience it is quite common at the outset of an investigation for Human Resources managers to anticipate possible routes through the disciplinary process and what level of seniority of manager is required.

133. Mrs Field prepared a letter dated 16 November 2012 informing him of the need for a formal investigation. By this time, the claimant was back at work, but his teaching duties had been temporarily removed. Out of concern for the claimant's welfare, Mrs Field thought it best to deliver the letter to him in person. She therefore telephoned the claimant and arranged to meet him in his office. On entering the claimant's office, Mrs Field noticed that the claimant appeared "ashen and trembling". She gave him the letter and sought to reassure him that he did not face dismissal. Upon reading the letter the claimant became angry. He told Mrs Field sincerely that he believed himself to be the victim of a witch hunt and that Mrs O'Neill was "out to get him". He put it to Mrs Field that she had the power to put a stop to the misconduct investigation, to which Mrs Field replied that she had no choice but to allow the investigation to continue. Though there is some disagreement about the claimant's precise words, it is clear that the claimant was heavily critical of Mrs O'Neill's decision to seize his laptop and told Mrs Field that an informal written complaint would follow. Mrs O'Neill had, he said, acted on a hearsay allegation that was untrue. He added that he did not want to get Mrs O'Neill into trouble. There was a discussion about the impact of the ongoing situation on the claimant's health. Mrs Field offered to make a referral to Occupational Health, but the claimant declined.

134. There is a dispute about whether Mrs Field discussed with the claimant the detail of the evidence uncovered by the investigation to date. It is the claimant's case that Mrs Field assured him that the images that had been found were the ones that the claimant had declared on 15 October 2012. We prefer Mrs Field's evidence that she said no such thing. It would make no sense for her to have done so. She had seen Mr Arnold's report and knew what had been uncovered.

135. For the purposes of Allegation 7, we have to decide whether, during this conversation, the claimant told Mrs Field that:

135.1. the anonymous witness' allegation (which we know to be Professor Hamilton's "stash of porn" remark); or

135.2. the witnesses' comments referred to in the O'Neill/Webb final paragraph

were racially stereotypical or otherwise motivated by race. Our finding is that the claimant did not say such a thing at this time. Had he done so, we would have expected there to be some reference to it in the claimant's informal grievance that followed three days later. We would also have expected Mrs Field to have remembered it and accept her evidence that she did not.

136. Allegation 7 also contends that Mrs Field discriminated against the claimant because of race. The only thing that Mrs Field is alleged to have done in Allegation 7 is having "referred to the Claimant's belief that he was being persecuted". To the extent that she did refer to that belief, she was not motivated by the claimant's race or any complaint about discrimination. She was simply restating what the claimant had told her.

137. On 19 November 2012 the claimant wrote to Mrs Field enclosing his informal grievance. He thanked her for her compassion during the recent meeting. His covering letter stated, "after events on October 15th I would have been entirely in my rights to proceed formally with this complaint and even to pursue this in an employment tribunal".

138. In summary, the informal grievance alleged various breaches of University policies and general breach of the respondent's duty of care, all in relation to the events of 15 October 2012. The final ground of complaint read, "Evidence acquired following breaches of procedure should be ruled as inadmissible and cannot be used in further disciplinary proceedings against the complainant."

139. When Mrs Field received the informal grievance, she spoke about it with Mrs O'Neill. Addressing the Cottam/Paul dispute, Mrs O'Neill told Mrs Field that she had only invited the IT Security staff into the meeting once Dr Walden had started posing technical questions which she could not answer.

140. Mrs Field was open with the claimant about having relayed his informal grievance to Mrs O'Neill. She did not discuss with Mrs Jordan or Dr O'Brien the claimant's informal grievance or anything the claimant had told her on 16 November 2012. Had she told them, there is no reason to suppose that she would not have mentioned that fact to the claimant too. We believe Dr O'Brien's evidence that he did not know at any time during his investigation about any of the detail of the claimant's complaint to Mrs Field, let alone any complaint to her about race discrimination. We are also satisfied that Mrs O'Neill did not tell Mrs Jordan what she had heard from Mrs Field. There is nothing from which we could infer a communication of this kind. It is clear from the bundle that, when Mrs Jordan wanted information about the claimant from Mrs O'Neill, she would make a request by email. Mrs O'Neill's replies – of which there were three on 17 December 2012 alone - suggest a scrupulous desire on Mrs O'Neill's part to document the information she shared about the claimant with Mrs Jordan. The mere fact Mrs O'Neill's and Mrs Jordan's offices were close to each other is not sufficient to support the inference for which the claimant contends, especially since it was not put to Mrs O'Neill in cross-examination.

141. On 22 November 2012, at the claimant's request, Mrs Field met with him to discuss his complaint. At this meeting, the claimant reiterated his stance that

evidence obtained from the seizure of laptop should not be used as the basis of any potential disciplinary action against him.

142. On 30 November 2012, the claimant was due to fly to China to deliver an important speech. He regarded it as the high point of his career to date. Probably either on 16 or 22 November 2012 (Mrs Field was unsure precisely when), the claimant asked Mrs Field whether, as an alternative to halting the disciplinary proceedings altogether, she might be prepared to put them on hold to allow the claimant to devote his energy to his forthcoming trip. Mrs Field did not think this would be a good idea. Based on her experience, it was her view that it would be in everybody's interest for the disciplinary investigation to be concluded as quickly as possible.

143. In the meantime, Dr O'Brien and Mrs Jordan began to investigate. By e-mail from Mrs O'Neill, they obtained unconfirmed minutes of the 15 October 2012 meeting and a joint synopsis of the origins of the investigation from of Mrs O'Neill and Professor Webb. This latter document, dated 26 November 2012, summarised the 15 October 2012 meeting in one short paragraph. It included this sentence: "[Mrs O'Neill] organised with EPS IT (Chris Paul and Ian Cottam) that they would be present at a pre-arranged grievance meeting with [the claimant] and Roger Walden". Some time later, as the claimant was preparing his disciplinary appeal, the claimant seized on these words as amounting to a confession in relation to the Cottam/Paul dispute.

144. On 29 November 2012, Dr O'Brien and Mrs Jordan met Mr Arnold and Mr Paul Kuchar of IT Security. They confirmed to Dr O'Brien that, of the "several hundred images" on the laptop, many were of different individuals and some were of sexual acts involving one or more persons.

145. Later that day, Dr O'Brien sent the claimant a formal interview invitation attaching a copy of Mr Arnold's report. The letter included the graphic description of the images given by Mr Arnold. What it did not do was to spell out what the claimant had allegedly done wrong, for example by alleging that the claimant had downloaded or knowingly stored the images. Rather, the letter simply stated that these images had been "found".

146. Mrs Jordan telephoned the claimant in an attempt to arrange the investigation meeting. Drawn into a discussion of the evidence, Mrs Jordan referred to the "several hundred images" mentioned in Mr Arnold's report. These revelations came as a shock to the claimant. Doubtless, he had been hoping that the investigators would find nothing except for the images of A and *Histoire d'Ô* which he had already declared. The news could hardly have come at a worse time for him. He was due to fly to China the next day. He had already endured the stress of an investigation lasting several months into serious sexual harassment allegations of which he had been cleared. Now, just as he was about to appear on the world stage, but he felt he was being dragged into another internal procedure.

147. The claimant immediately e-mailed Mrs Field, reminding her of "the issue of admissible evidence". His e-mail stated that "my panic attacks have just returned to haunt me" and "I hope I don't get sectioned whilst there". Mrs Field replied that if the claimant had any reservations about his current state of health, he should speak to his Head of School and reconsider his decision to travel to China. She repeated her offer of an urgent referral to Occupational Health. Her email very closely followed her written reply to the claimant's informal grievance letter. She

expressed concern about the events of 15 October 2012 and offered to meet with him "with a view to provide the reassurances you seek about such dealings in future". As for the admissibility question, Mrs Field informed the claimant that the evidence would not be excluded. Addressing the claimant's health issues, Mrs Field reminded him of the support available from Occupational Health and the staff counselling service. Disappointed with Mrs Field's reply, the claimant forwarded it to Dr Walden, adding that he might "need more specialist advice than just employment law". Despite his extremely anxious state, the claimant decided to go ahead with his China trip.

148. On 30 November 2012, Mrs Jordan made discreet enquiries into the ownership history of the laptop. This line of investigation had as much potential to absolve the claimant as it did to inculpate him. Mrs Jordan also e-mailed the claimant a copy of Ordinance XXIV and the December 2012 Computer Misuse Policy. A few days later, once it was realized that the December 2012 policy was not yet in force, the claimant was provided with the 2008 Computer Usage Policy.

149. This is as good a time as any to consider Allegation 8. The claimant's assertion that "nothing had been done" to address the claimant's health is simply incorrect. Mrs Field made numerous offers of support to him. Her supposed lack of concern for the claimant's health at this time have would have been out of step with her compassionate approach on 16 November 2012 and with her subsequent actions in January 2013 when she made an immediate of occupational health referral. What the claimant really wanted was for the disciplinary investigation to go away, preferably for ever. To the extent that Mrs Field had any power to bring this about, her decision not to exercise that power was nothing to do with the claimant's race. Nor was she motivated in any way by the claimant's criticisms of Mrs O'Neill or anybody else. Mrs Field demonstrated that had taken such concerns on board. She had no reason to punish the claimant for raising them. Her refusal to pause the disciplinary investigation was because, quite reasonably in our view, she wanted to avoid delay.

150. There is no evidence that Mrs Jordan ignored the effect of the investigation on claimant's health. She had no dealings with the claimant before 29 November 2012. There is nothing to suggest that Mrs Jordan deliberately timed her telephone call to the claimant so that he would get bad news just as he was leaving for China. Moreover there are no facts from which we could conclude that her decision to arrange the meeting with Dr O'Brien, or anything else she did, was in any way influenced, consciously or subconsciously, by the claimant's race. Despite not having heard from Mrs Jordan, we are satisfied that she did not know about the criticisms that the claimant made to Mrs Field about Mrs O'Neill. Such criticisms did not therefore enter into her mind.

151. The investigation meeting took place on 11 December 2012 following the claimant's return from China. Present in the room, besides the claimant, were Dr O'Brien, Mrs Jordan and Dr Walden. According to the agreed minutes, the following things were said, amongst others:

151.1. Dr Walden expressed concern about the claimant's physical and emotional wellbeing. The claimant repeatedly said, "I cannot take it" and at one point stated that he had had suicidal tendencies. Dr O'Brien and Mrs Jordan shared their view that it was in nobody's interest for the case to go on for a long time and the investigation should proceed.

151.2. The claimant indicated his intention to raise a grievance against a member of staff in relation to the Student S investigation. Mrs Jordan replied that if the grievance was related to the disciplinary investigation, the latter would halt so that the grievance could be dealt with first.

151.3. Dr Walden commented that continuing to question the claimant "could be considered bullying and harassment". He confirmed, however, that the claimant would continue to answer questions. At no point did Dr Walden ask for the meeting to be adjourned or suggest that the investigation could be conducted without meeting with the claimant.

151.4. Midway through the meeting, when the claimant raised some technical questions, and Dr O'Brien indicated that these questions would be referred back to IT Security, the claimant complained that this would "take forever". As recorded in the minutes, "He stated that he would give up his right to defend himself if this went on." Mrs Jordan attempted to talk him out of this course of action and advised him to speak to Dr Walden about it. Later, he offered to "change his plea to guilty"; Dr O'Brien and Mrs Jordan both told him not to admit something that he had not done.

151.5. The claimant described the photos of A in more detail. They showed her "topless from the back, showing her legs". Two of them depicted "full nudity", but none showed any sexual acts. He confirmed that the photographs were in Folder A and had not been deleted.

151.6. The claimant questioned the reliability of Foremost software, saying it was not accepted in the criminal courts.

151.7. The claimant stated that he had searched his hard drive and found picture files with date stamps prior to 2010; in other words, there were files that predated his ownership of the computer. In reply, Dr O'Brien gave his view that the time stamps referred to the date on which the file was created, not when it was downloaded.

151.8. The claimant stated that he had copied files onto the laptop from an older device.

151.9. The claimant mentioned that he had taken his laptop to IT in December 2011 and July 2012 reporting problems with viruses. It was possible, he said, that malware could "build up a stash in temporary Internet files". He named Dr Ralph Wagenblast, who was aware of the problem.

151.10. Dr Walden shared his view that the claimant should not be invited to any more meetings. Dr O'Brien said that he could not make a decision without talking to the claimant.

151.11. The claimant and Dr Walden made allegations that the prior investigation had been "reprehensible" and that he had been "publicly humiliated". He asked Mrs Jordan whether she had already decided that he was guilty. Disagreeing with Allegation 9, we find that the claimant did not at any point in the meeting expressly accuse anybody of dishonesty. Nor did he suggest that there had been race discrimination. At the time, he did not believe that his comments tended to show any breach of a legal obligation. Such a belief would not in any event have been reasonable.

152. There appears to be no record in the minutes of the claimant having stated in terms that he wanted the investigation to be concluded as quickly as possible. It

is, however, undisputed that this sentiment was clearly conveyed by the claimant and Dr Walden at the meeting. That was why the claimant in desperation offered to abandon his defence. (If there were any room for doubt, it was put to rest by Dr Walden in an e-mail dated 18 December 2012 and by the claimant in a telephone call to Dr O'Brien on the same day.)

153. Next day, 12 December 2012, Dr O'Brien met again with Mr Arnold and Mr Kuchar. He followed up some of the points that the claimant had made in the meeting. These included:

153.1. the existence of pre-2010 images – Mr Arnold agreed that they might be file creation dates;

153.2. the possibility of innocent downloading through viruses – Mr Arnold could not be certain how the pornographic images had got onto the hard drive; and

153.3. the Thumbs.db file – Mr Arnold described four of the images there as being "suggestive full frontal poses".

154. Dr O'Brien e-mailed the claimant to invite him to a further meeting. The stated purpose of the meeting was for the claimant to examine hard copies of the images found in the Thumbs.db file and confirm whether these were the photographs of A to which the claimant had referred during the previous day's meeting. This further meeting took place on 13 December 2012 between the claimant (accompanied by Dr Baines) and Mrs Jordan. The claimant was shown eight hard copy images. He was then asked to sign a pre-printed form. In table format, the form asked, in respect of each image, "Image recognised/downloaded or stored by you please indicate Yes or No." Next to each image, the claimant separately wrote, "Y". He then signed the form. Mrs Jordan asked the claimant whether he had been aware of the images before his laptop was seized. His answer was not recorded. Although we are satisfied that the claimant privately knew that he had used his laptop to view pornography, we accept that during this particular conversation he may well have intended his answers to be more guarded than the form suggests. By the time of this meeting, the claimant had carried out his own hard drive search and discovered Thumbs.db. It is quite possible that the claimant believed that all he was acknowledging was that the images had been present on his computer at the time of seizure. Once it was explained to him that he was admitting prior knowledge of the images, the claimant signed a fresh form, stating "N" for the four images identified by Mr Arnold as pornographic (depicting "sexual acts"), and "Y" for the remainder.

155. On the same day, Mrs Jordan made appropriate enquiries to follow up the claimant's virus theory. Again, the outcome of those enquiries could well have worked in the claimant's favour.

156. In order to determine Allegation 9 (if we amend it to change the date), we have to consider the reason why the claimant was asked to attend the meeting of 11 December 2012. We are satisfied that it was nothing to do with any disclosures that the claimant had made to Mrs Field. Dr O'Brien and Mrs Jordan were unaware of them. It must be remembered that Mr Spinks had decided that the Misconduct Procedure should be followed, Mrs Field had chosen Professor Bailey as Disciplinary Manager, and Professor Bailey had appointed Dr O'Brien as Investigating Manager. None of those decisions is the subject of any allegation in the Schedule. Paragraph 10 of Ordinance XXIV gave Dr O'Brien a

free hand to decide how to conduct his investigation. Whether or not to hold a meeting with the claimant was not Mrs Jordan's decision to make and we find she did not make it. As for Dr O'Brien, we are satisfied on the basis of what he said at the meeting that he believed that he could not reach a conclusion without talking to the claimant. In a case such as this, we would be surprised if Dr O'Brien had taken any different approach. It was not suggested in cross-examination that he had any improper motivation in deciding to meet with the claimant as part of his investigation. Dr Walden did not ask for the meeting to be adjourned.

157. Unless the claimant were to amend Allegation 9 (see the December 2016 amendment dispute), we would not be dealing with any allegation based on Dr O'Brien's conduct during the meeting. To be clear, however, we do not think that Dr O'Brien disregarded the claimant's welfare or showed a lack of interest in the claimant's arguments. Everyone present at the meeting wanted the same thing: for the investigation to be concluded as quickly as possible, for the claimant's sake.

158. We turn the next to the reason why Mrs Jordan invited the claimant to 13 December 2012 meeting. Contrary to Allegation 10, we are satisfied that the invitation was not an act of retaliation and indeed was not motivated in any way by any disclosures the claimant had made to Mrs Field. As we have found, Mrs Jordan did not know about them. The invitation came from Dr O'Brien. His email exchange with Mrs Jordan shows that they both regarded the meeting as important to the investigation. We happen to agree. It was a natural step in the investigation to try and establish what images the claimant accepted as having been present on his computer and whether he was aware of them prior to the date of seizure. Although Allegation 10 names Dr Baines, there is no evidence of his having been involved in arranging the meeting – he was the claimant's chosen companion. To be fair to the claimant, we did not understand him to be alleging any wrongdoing on Dr Baines' part.

159. On 17 December 2012, at Mrs Jordan's request, Mrs O'Neill provided some information about the Student S investigation. This included the verbatim record of Professor Hamilton' "stash of porn" remark, including the qualifying phrase, "It could have been a joke, though". A separate e-mail indicated that Professor Hamilton was prepared to make a statement to the disciplinary investigation, on condition that he remained anonymous.

160. The interview with Professor Hamilton took place on 19 December 2012. The record shows that he was asked appropriate and probing questions. Professor Hamilton stood by his evidence about the claimant's "stash of porn" comment, adding that he had been "embarrassed". Significantly, to our minds, Professor Hamilton stated that, by the time of his September 2012 interview, Professor Halsall had already told him about the pictures the claimant had shown him on the train. The interview notes record that, when asked about the date of the alleged conversation, Professor Hamilton replied, "I guess it was sometime in the summer of 2012, soon, perhaps a few days or a week, after his laptop had been encrypted I think. Although it's hard to remember." Professor Hamilton maintained his request for anonymity.

161. On 21 or 22 December 2012 (Friday 21 is more likely), Mrs Field met with the claimant to discuss his informal grievance. They discussed Mrs O'Neill's role in the seizure of his laptop and what Mrs Field had known about it in advance. The

claimant did not, we find, mention race discrimination to Mrs Field or suggest that he had been badly treated because he was Italian. We reject the assertion in Allegation 11 that he did. At the conclusion of the meeting, Mrs Field had promised a response in the New Year. The following day, she went on annual leave, returning on 9 January 2013.

162. Also on 21 December 2012, the claimant provided Dr O'Brien with his version of the minutes of the 15 October 2012 meeting. In a paragraph headed, "Annex", the claimant made clear that he had never shown the pictures of A to Professor Halsall; that the photographs he had shown to Professor Halsall on the train were of Y and were "non pornographic".

163. The same day, Dr O'Brien spoke with Professor Halsall. According to Professor Halsall, the photographs that he had seen on the train were of a naked woman and were "definitely more graphic than Page Three".

164. The claimant's amendments to the 15 October 2012 minutes were forwarded by Mrs Jordan to Mrs O'Neill for comment. In turn, on 7 January 2012, Mrs O'Neill sent the minutes on to Professor Webb. There followed an email conversation leading to tracked changes of which they both approved. This version was forwarded to the claimant by Mrs O'Neill on 8 January 2012. The claimant replied that evening. His e-mail essentially agreed to differ over the minutes. He also asked for the "exact wording 'verbatim' of the allegation that opened this investigation". In reply, Mrs O'Neill informed the claimant that the witness (who we know to be Professor Hamilton) had requested to remain anonymous. When pressed by the claimant to clarify, she stated, "I believe in releasing the part of the notes which you are requesting you would be able to determine who the witness is."

165. This brings us to Allegation 12. We are satisfied that Mrs O'Neill's refusal to disclose the "verbatim" allegation had nothing, consciously or subconsciously, to do with the claimant's race. She was not, as the claimant contends, trying to protect Professor Hamilton because she shared his alleged stereotypes. She withheld the full version because she believed it might reveal that Professor Hamilton had made it. With no little forensic skill, the claimant drove Mrs O'Neill to accept a flaw in her reasoning. If the claimant had really made the "stash of porn" comment to Professor Hamilton, the claimant would already know that Professor Hamilton was the informant and there would be no point in her protecting him. If, on the other hand, Professor Hamilton's evidence had been false, then she should not have acted upon it. But this elegant dissection of her thinking does not get around the plain fact that Mrs O'Neill was duty bound to treat Professor Hamilton's evidence confidentially. He had not brought up the "stash of porn" comment in a disciplinary investigation, but in the confidential investigation of Student S's complaint. Confidentiality was not Mrs O'Neill's to waive. She had already tried to persuade Professor Hamilton to put his name on record, without success. We agree that the "verbatim" account of his evidence would probably have led the claimant to identify him. It was not for Mrs O'Neill to take that risk, even if she thought that the claimant might already know who the informant was.

166. Likewise we make a positive finding that Mrs O'Neill's decision was not influenced by the claimant's criticisms of her to Mrs Field. By making her request on 15 October 2012, she acknowledged herself bound to respect Professor Hamilton's anonymity before the claimant and Mrs Field had even met.

The 2013 promotion application

167. On 4 January 2013 the claimant applied for promotion to the role of Senior Lecturer. By this time, he had held the substantive role of Lecturer for just over 10 months. His application was supported by Professor Missous.

168. Applications for promotion within the EEE School were considered by the SPC at a meeting on 17 January 2013. Professor Brown chaired the meeting. Also present were the Group Heads, including Professor Hamilton. We accept Professor Brown's evidence that, when the time came to consider the claimant's application, he asked Professor Hamilton not to take part and that he did not do so. (This is significant because, in the light of the claimant's withdrawal of Allegation 17 in respect of Professor Brown, Professor Hamilton is the only alleged perpetrator relation to this allegation). The claimant was given a Grade C (marginally missed the required standard). In recognition of his outstanding first year tutorial work, however, the SPC recommended him for an RREP award. A number of other candidates for Senior Lecturer were also graded at C. Following the meeting, the SPC produced a report for onward consideration by the FPC. The report contained a balanced summary of the strengths and weaknesses of the claimant's application. A formal recommendation for an RREP was subsequently submitted on 10 March 2013.

The claimant's DSAR and DAW complaint

169. On 10 January 2013, the claimant submitted a formal Data Subject Access Request ("DSAR") to Ms Clare, Records Officer. We were unable to find a copy of the request in the bundle. We know that the DSAR included a request for various documents associated with the investigation into Student S's complaint, including the witness statements that had led to the seizure of the laptop and the O'Neill/Webb final paragraph.

170. On 11 January 2013 the claimant e-mailed Professor Brown attaching a formal grievance under the DAW Procedure. We will call this "the DAW complaint". His covering e-mail requested that his grievance be dealt with outside Faculty HR. He divided to the grievance into nine numbered allegations:

    1. on 15 October 2012 Mrs O'Neill breached paragraph 7 of the DWS Policy in failing to keep matters confidential – this allegation hinged upon the Cottam/Paul dispute;
    2. Professor Webb and Mrs O'Neill failed to minimise the stress involved, contrary to paragraph 5.1 of the Stress at Work Policy;
    3. they had breached their duty of care to the claimant;
    4. Mrs O'Neill started a new investigation based on hearsay (this particular complaint was amplified by reference to a definition "conventionally used by judges in employment tribunals");
    5. Mrs O'Neill failed to provide "the allegations" in writing, "in violation of the ACAS Code";
    6. delay in dealing with the Student S investigation, contrary to the ACAS Code;
    7. Mrs O'Neill and Professor Webb led Student S during the interviews and alerting Student S to the claimant's alibi in breach of confidence;

8. they led and encouraged other witnesses to provide information about the claimant that was outside the remit of the investigation; and
9. disclosing information to Student S about the claimant's whereabouts in August/September 2011.

171. The document did not specifically mention the inclusion of the O'Neill/Webb report final paragraph as a ground of complaint.

172. Under the heading, "Conclusions", the DAW complaint stated:

> "it is not for [me] to suggest the motivation behind the continuous harassment or, victimisation and persecution that he perceives that he has been the subject of…
>
> The continued series of actions from [Mrs O'Neill] … Raise the significant suspicion of the had a personal level of negative and prejudicial bias was present… Whether such perceived bias … is to do with the personal dislike or other types of discrimination, is hard to say.
>
> It is [my] impression instead that disciplinary procedures in [my] case have been applied excessively, ultimately resulting in active discrimination."

173. The claimant did not assert in this letter that alleged discrimination was because of his race. Nevertheless, we find for the purpose of Allegation 14 that the claimant believed his letter tended to show that he had been the victim of some form of unlawful discrimination. In our view, such a belief was reasonable. His letter was peppered with legalistic words and phrases, together with references to the ACAS Code and employment tribunals. In that context, the words "harassment", "victimisation" and "discrimination" would be reasonably understood to convey their legal meaning, and not just their everyday meaning.

174. When Professor Brown received the claimant's DAW complaint, he discussed it with the Dean of EPS, Professor Bailey. It is unclear how detailed the conversation was. Professor Bailey told Professor Brown to "get it into the system" by sending the DAW complaint to Mrs Heaton. This is what he did. Mrs Heaton agreed to carry out the investigation. Professor Brown also alerted Mrs Field, who, two days previously, had returned to work from annual leave. All of this happened on 11 January 2013.

The informal grievance outcome

175. By the time Mrs Field learned of the DAW complaint, she had already looked into the claimant's informal grievance. She had, for example, spoken to Mrs O'Neill. Notwithstanding that events appeared to have overtaken the informal greivance, she decided to inform the claimant of her findings. Accordingly she prepared a letter and hand delivered it under the claimant's office door. In her letter, Mrs Field acknowledged that the 25 October 2012 meeting had not been planned to the claimant's satisfaction and that it was "not satisfactory" for the claimant's "privacy to be compromised even in a small way". She was aware that the claimant and Mrs O'Neill had markedly different recollections in relation to the Cottam/Paul dispute. Although she knew of witnesses who might "corroborate" one side or the other, she did not look into the dispute more widely. As she understood it, the purpose of the claimant's informal grievance was to enable lessons to be learned. Getting to the bottom of the Cottam/Paul dispute seemed

unnecessary to her, as lessons could be learned without it. She also recognised that it would have been useful for the claimant to have been made aware at an earlier stage of the staff counselling service and occupational health. In most other respects, Mrs Field did not find the informal grievance to be well-founded

176. On 13 January 2013 the claimant was admitted to hospital with an alarmingly high heart rate. He was noted to be suffering from super-ventricular tachycardia, brought on by stress. He took sick leave for a week.

177. On 16 January 2013, the claimant replied to Mrs Field's letter, asking her to refrain from communicating with him.

The "case to answer" decision

178. By this time, Dr O'Brien had almost reached a conclusion. Before making his decision, he sought more detail from Professor Halsall about the images shown on the train. Professor Halsall replied, "Yes they were full frontal and I would consider them pornographic". Some 45 minutes later, Dr O'Brien informed the claimant that he had a case to answer and that the matter would be referred back to the Dean.

179. Before reaching his decision, Dr O'Brien did not ask any follow-up questions of the claimant about what had happened on the train. Allegation 11 requires us to ask ourselves why Dr O'Brien did not take this step. We are satisfied that it was not because of anything that the claimant had told Mrs Field, or because of any allegation of unlawful discrimination in the DAW complaint or otherwise. Dr O'Brien did not know about them. He thought he understood the claimant's version of the train conversation clearly. On the claimant's version of the dates, it was possible that the images shown to Professor Halsall had been on a non-University computer. He accepted that the claimant's account differed from that of Professor Halsall as to whether the images shown were pornographic or not. As he saw it, he did not need to establish whether the woman in the photographs was A or Z.

180. Dr O'Brien and Mrs Jordan finalised their investigation report on 24 January 2013. We accept that it was the product of Dr O'Brien's independent judgment and was not swayed by Mrs Jordan. Here are some of the report's findings that attracted particular attention:

180.1. There was a discussion of the photographs of A, to which the claimant had admitted on 15 October 2012. Dr O'Brien recorded, without apparent challenge, the claimant's description of the photographs as being "topless from the back, showing her legs." At this point he added, "It was agreed that photos of that nature were probably not pornographic." A few paragraphs on, he referred to the "full nudity".

180.2. The report gave a balanced summary of *Histoire d'Ô* and recorded the claimant's view that it was not pornographic.

180.3. He summarised Mr Arnold's view that there was clear evidence of pornographic images on the computer, but that he could not be certain how they got there. This summary fed through into the "Conclusions" section, in which Dr O'Brien highlighted the possibility of a virus "downloading at least some of the images".

180.4. It gave a balanced account of the meeting on 13 December 2012 in which the claimant had viewed the Thumbs.db images.

180.5. Two keenly disputed paragraphs from which it is necessary to recite at some length:

> A person other than Professor Halsall [to whom Dr O'Brien referred as "ANONW", but who we know to be Professor Hamilton] brought it to the attention of the original investigators [into Student S] that [the claimant] referred to having pornographic material stored on his computer. Although no such material was shown to ANONW and ANONW did therefore not know at the time whether there actually was pornography on the computer, the fact that when the laptop was investigated, pornographic material was found suggests that it probably was a serious statement from [the claimant]…
>
> Further additional evidence to support our conclusion comes from the incident in which [the claimant] showed pornographic photographs to [Professor Halsall] on the train.

181. As Allegations 11 and 16 necessitate, we have asked ourselves why Dr O'Brien and Mrs Jordan concluded that there was a case to answer. In our view they reached that conclusion because they thought the evidence supported it. The claimant disagrees. Properly analysed, their reasoning was circular and illogical. All they knew for sure was that a witness had made a disputed allegation that the claimant had confessed to having pornography on his laptop, and the hard disk contained some deleted files and thumbnail files with pornographic content. They did not know how the files had got there. It did not follow from the presence of this material that the claimant had made the confession or that he had meant it seriously. As a matter of strict logic, the claimant's analysis is correct. But that does not mean it was unreasonable for Dr O'Brien to think that the two pieces of evidence supported each other. Whilst it is logically possible for a colleague to have invented an admission that the claimant had pornography on his computer and, independently, the claimant to have inadvertently acquired pornographic files, it would nonetheless have been a sufficiently intriguing coincidence to require the claimant to explain it at a disciplinary hearing.

182. For the reasons we have already given, we are satisfied that neither Dr O'Brien nor Mrs Jordan knew about the claimant's alleged disclosures to Mrs Field. We accept Dr O'Brien's evidence that he did not know about the claimant's DAW complaint by the time he made his decision. Nor did he know that the claimant had made any allegation of race discrimination. His decision, we find, was completely unaffected by any consideration of the claimant's race. The claimant has not proved facts from which we could infer that Mrs Jordan knowingly or unwittingly allowed considerations of race to creep into her thinking. We were unable to make a finding as to whether or not Mrs Jordan knew of the DAW complaint or any allegation of race discrimination within it. There is no reason, however, for us to believe that she allowed the existence of such an allegation to influence her contribution to the decision in hand. Contemporaneous e-mails show that she approached her task professionally and objectively.

Response to the DSAR

183. Meanwhile, Ms Clare began to deal with the claimant's DSAR. After dealing with formalities, such as the payment of the fee, she forwarded the DSAR to Mrs

O'Neill and asked to whether the requested information was available. On 14 January 2013, Mrs O'Neill replied as follows:

> "I do hold the information that [the claimant] requests. Whilst the [Student S] grievance… is closed, it has resulted in an ongoing disciplinary investigation against [the claimant] in particular there are witness statements given in confidence by at least eight witnesses which, should they be disclosed, would undermine the current investigation."

184. Ms Clare followed up Mrs O'Neill's reply with a summary of the relevant data protection principles and the respondent's previous approach to withholding witness statements. She agreed that witness statements "would not be disclosed at any point" and that other information would be exempt from disclosure issue to release would interfere with the current investigation. Applying the principles set out in Ms Clare's e-mail, Mrs. O'Neill informed Ms Clare that none of the documents in the Student S grievance or the disciplinary case should be disclosed to the claimant except for correspondence of which the claimant would already be aware. Without waiting for Mrs. O'Neill's reply, Ms Clare e-mailed the claimant to inform him that no data would be released which would identify other individuals and as being the source of the information provided in relation to the complaints made against the claimant.

185. Allegations 13 and 15 attack the motivation behind Mrs O'Neill's first e-mail of 14 January 2013. Contrary to the claimant's case, we are satisfied that the claimant's race had nothing to do with the stance taken by Mrs O'Neill in her e-mail. Nor was it affected by the claimant's disclosures to Mrs Field. We were unable to make a finding as to whether, by 14 January 2013, Mrs O'Neill knew about the DAW complaint. It was not put to her that she did. In any event, we are satisfied that Mrs O'Neill was not influenced by any allegation of race discrimination in DAW complaint when she sent her 14 January 2013 e-mail. Our reasoning is essentially the same as for Allegation 12, but there is one bespoke argument that we must address. The claimant's interpretation of the phrase, "undermine the current investigation" is somewhat different from our own. It is the claimant's case that this phrase betrayed a mindset on Mrs O'Neill's part that disclosure of Professor Hamilton's statement would have exposed the weaknesses in the disciplinary allegations against the claimant. We do not think that this is what she meant. Mrs O'Neill was just trying to protect the witnesses to whom she had given assurances of confidentiality. Disclosing, in particular, Professor Hamilton's statement would undermine the current investigation because it would force Dr O'Brien to reveal the identity of a witness who had asked to remain anonymous.

186. On a literal reading of Allegation 13 we must also consider the thought processes of Ms Clare. It was she who took the actual decision to refuse the bulk of the DSAR, albeit acting on information provided by Mrs. O'Neill. We do not have the benefit of Ms Clare's oral evidence. We do not need it. The claimant's final submissions do not suggest improper motivation on Ms Clare's part. In his oral evidence he gave his opinion that Ms Clare was "very helpful, honest and thorough." To avoid any doubt, there is nothing from which we could conclude that Ms Clare allowed improper considerations of race to creep into her thinking. Ms Clare was entirely independent of the EEE School and EPS Faculty HR. The e-mail chain demonstrates to us that Ms Clare was simply trying to apply the law and previous University practice as she saw it. There is no evidence that she

knew about any disclosures to Mrs Field or about the content of the DAW complaint.

DAW complaint investigation and arrangements for disciplinary hearing

187. On 21 January 2013 the claimant's general practitioner wrote to the respondent with his opinion that the claimant was suffering from stress. Professor Brown passed the letter to Mrs Field on 24 January 2013 with a request for a referral to Occupational Health. As soon as Mrs Field read the letter, she made the referral with a specific request that it be dealt with urgently. An appointment was made for 30 January 2013 for the claimant to see the Occupational Health Physician, Dr Oliver. The claimant did not attend. When Mrs Field found out, she immediately e-mailed the claimant reminding him of the importance of attending. The claimant replied that he had merely rescheduled due to a prior commitment.

188. Arrangements were made by e-mail on 24 January 2013 to set up a meeting between Professor Bailey and Professor O'Brien to discuss the claimant's case in advance of a disciplinary meeting. The Misconduct Procedure was silent as to whether such a meeting should take place or not. We are satisfied that neither Professor Bailey nor Professor O'Brien meant to put the claimant at a disadvantage. Professor Bailey wanted to satisfy himself that there was a case to answer and that the Misconduct Procedure continued to be the appropriate track for the case. Had he decided that the allegations merited dismissal, he could have referred the case back to Mr Spinks to consider reallocation to the Serious Misconduct Procedure.

189. On 29 January 2013, the claimant, accompanied by Dr Walden, met with Mrs Heaton to discuss the DAW complaint. Mrs Heaton was supported by Mr John McDonald, HR Partner. According to the agreed notes of the meeting:

189.1. The claimant gave his version of what happened at the start of the 15 October 2012 meeting, including a description of where all the participants were in the room. Dr Paul was sitting at the end of the table with some equipment. Dr Walden added, "I don't remember it exactly how [the claimant] does. But I was aware of someone being sat at the end of table with equipment."

189.2. The claimant expressed his dissatisfaction with the comments in the O'Neill/Webb final paragraph. It was important, he said, to question Mrs O'Neill about them.

189.3. The claimant explained the reason for his complaint. It was because he had not received an apology from Mrs O'Neill and that her account of the start of the 12 October 2012 meeting was "a total lie". When asked what he wanted to gain from his complaint, he replied, "I want my dignity back, my work and my professionalism…By you upholding my complaint and showing the University that I am innocent by establishing the truth". Taking this remark its context, we find that the claimant wanted to be exonerated from both the pornography allegations and the comments in the O'Neill/Webb final paragraph.

189.4. The claimant stated that the allegation that had led to the seizure of his laptop was "false". He accused the HR department in general of having decided to "get him for something".

189.5. Mrs Heaton asked the claimant a number of times what reason people would have for treating him in the way he was alleging. Towards the end of the meeting, he replied, "I don't know why this is happening to me. It is because I am Italian." Mrs Heaton did not ask the claimant to elaborate on why he thought this was the case. She thought his comment was out of step with his previous inability to provide a motive. She did not, however, ask the claimant why the notion had just occurred to him. These were missed opportunities.

190. Before leaving the meeting, we deal with Allegations 14 and 18, so far as they concern the claimant's state of mind.

190.1. The claimant believed that comments at the meeting would tend to show that the respondent had unlawfully discriminated against him. In our view, it was reasonable for him to believe that that was what his words would tend to show.

190.2. The claimant had mixed motives both for submitting his grievance and for complaining of discrimination at the meeting. Part of the purpose of bringing the grievance was to secure a finding in the disciplinary case that had not knowingly had pornography on his laptop. That was a subversion of the process, not least because he knew that he had used his laptop to view pornography. On the other hand, he was genuinely offended by the comment in the O'Neill/Webb final paragraph that he had old fashioned attitudes towards women. He also believed that his privacy had been invaded on 25 October 2012. By submitting his grievance he genuinely wanted recognition that he had been badly treated.

"We want Dr Max Migliorato back!"

191. From January to March 2013, 128 students, mostly undergraduates, put their names to an online petition calling for the claimant to be returned to his role. Where individual comments were provided, they typically praised the claimant for his work as a first year tutor. Other students e-mailed Professor Brown directly in similar terms.

192. When Mrs Field became aware of the online petition and e-mails she expressed her concern to Professor Brown that the claimant might be discussing confidential internal investigations directly with the students. Professor Brown sought to reassure her that he did not think that the claimant was behind the petition. As for the impact on students of the claimant's absence from teaching duties, Mrs Field believed that this was for Professor Brown to manage.

The disciplinary meeting

193. By letter dated 30 January 2013, Professor Bailey invited the claimant to a disciplinary meeting to be held on 11 February 2013. The disciplinary allegation related to the "several hundred images" and not to the four in the Thumbs.db file that the claimant had admitted. The claimant was provided with a copy of Dr O'Brien's report.

194. The claimant acknowledged receipt and informed Professor Bailey that he intended to call Mr Ralph Wagenblast, Professor Halsall, Professor Hamilton, Dr Majewski and Professor Missous. The e-mail was copied to Mrs Jordan, who spoke to the claimant about it. She indicated that it was not appropriate for the witnesses to be called. Part of her reasoning was that Professor Hamilton was

on the list of management witnesses. The claimant had been provided with the statements of other management witnesses, but had not received any statement in the name of Professor Hamilton. This confirmed to the claimant what he had suspected for some time: that Professor Hamilton was the anonymous witness whose information had led to the seizure of his laptop. Professor Bailey formalised the position by e-mail on 4 February 2013. He asked the claimant for a statement from the witnesses in support of his case and lists of the claimant's proposed questions to Professors Halsall and Hamilton. Taking nothing for granted, Mrs Jordan e-mailed Professor Hamilton on 6 February 2013 requiring him to be available for the meeting.

195. On 7 February 2013, Professors Halsall and Hamilton e-mailed each other to discuss the claimant. Professor Halsall had been informed that the claimant had written questions for him. He and Professor Hamilton arranged to meet in a coffee shop away from the Sackville Street Building. Professor Halsall denies that the purpose of the meeting was to compare the contents of their witness statements. We do not go as far as to find that he was lying to us about this, but we think it likely that they were, at the least, discussing the sorts of questions that they would have to face at the disciplinary meeting.

196. E-mails passed to and fro between the claimant, Dr Walden, Professor Bailey and Mrs Jordan. The claimant eventually agreed to deliver the documents on which he relied to Professor Bailey's office by 6.30pm on 8 February 2013. This he did and it was forwarded to Professor Bailey's home.

197. The claimant's pack of evidence contained:

197.1. The judgment of the Court of Appeal in *R v. Porter* [2006] EWCA Crim 560.

197.2. A statement from Mr Wagenblast. Essentially, Mr Wagenblast's evidence was:

197.2.1. that viruses and other malware could cause information from websites to be saved into the internet browser cache folder without any user interaction (in other words, pornographic files could have been downloaded onto the laptop without the claimant's knowledge);

197.2.2. that once a file had been deleted from the Recycle Bin, it was no longer accessible using Windows; and

197.2.3. it could not be stated with certainty that the presence of thumbnail pictures in Thumbs.db meant that the images had been displayed by the system.

197.3. Various publications essentially describing the dangers of inadvertently downloading material onto computers.

197.4. A statement from Miss B Davies tending to show that the date of the train incident with Professor Halsall happened before the claimant had acquired his University laptop.

197.5. A statement from Mr Pal and Mr Monteverde setting out various files they had found on the claimant's laptop, including profile pictures of Adobe employees. The time stamps on the picture files dated back to 1998.

197.6. Statements from Professor Missous and Dr Majewski suggesting that Professors Halsall and Hamilton harboured animosity towards the claimant.

198. During this time, Professor Bailey was out of the country. He had travelled to Abu Dhabi and onward to Mexico on University business. Jetlagged, he arrived home on the morning of Saturday 9 February 2013 to find that a large quantity of paperwork had been delivered to him for the disciplinary hearing in two days' time. His heart sank. He read the papers over the weekend. On Sunday 10 February 2013 he informed the claimant that no witnesses would be called to the meeting. Before doing so, he asked Mrs Jordan for advice. In fact Mrs Jordan did not reply until after the claimant had already been notified of Professor Bailey's decision. Mrs Jordan's e-mail stated that "I do have … [Professor Hamilton] on standby so it wouldn't be too problematic to let [the claimant] call them." Professor Bailey replied that he would stand by his decision: "I will not let this turn into a 'circus'".

199. We include these details because they lend important context to an earlier e-mail from Ms Sue Neesham, Professor Bailey's personal assistant, on 7 February 2013. She e-mailed Professor Bailey to inform him that "HR are doing their best to protect the anonymous witness from being called". This e-mail was, we find, slightly overstating the position. Mrs Jordan clearly recognised that the decision was Professor Bailey's to make and was even prepared to make him available once Professor Bailey had indicated that his attendance was not necessary. The exchange also shows that Professor Bailey was determined to keep a tight rein on the meeting.

200. The hearing proceeded on 11 February 2013. Professor Bailey was supported by Mr Ashcroft, HR Partner. Dr Walden accompanied the claimant. Dr O'Brien presented the management case supported by Mrs Jordan. Here is a summary of their discussion:

200.1. There was no attempt by the claimant or Dr Walden to ask Dr Bailey to recuse himself on the ground of bias.

200.2. Professor Bailey made clear at various points in the meeting that he was not interested in the allegation made by the anonymous witness. The allegation had merely led the investigators to his computer. Pornographic material was clearly present on the hard drive. The question was how it had got there.

200.3. Professor Bailey repeated his earlier decision that he would not allow witnesses to be called. Allegation 19 accuses Professor Bailey of having "refused permission to challenge the witness statements to any extent". We take this allegation to refer, in particular, to the evidence of Professors Halsall and Hamilton. The reason why Professor Bailey would not be drawn into discussing that evidence is that he did not believe it was relevant. It was not at all because of race or because the claimant had made any disclosures.

200.4. It is possible that Professor Bailey mentioned the possibility of referring the case back to Mr Spinks. We are satisfied, however, that Professor Bailey did not (as contended in Allegation 19) state that it was his intention to do so, or threaten to "increase the charges" himself. Had he made comments of that kind, we would have expected an objection from Dr Walden. We would also have expected to see it in the claimant's witness statement.

200.5. We have no doubt that the claimant found the meeting to be an uncomfortable experience. He may have found Professor Bailey an intimidating character. But, we find, Professor Bailey did not do anything to

intimidate the claimant. Had that occurred, we would have expected Dr Walden to intervene and for the claimant to have made some reference to it in his appeal opening statement.

200.6. The claimant confirmed that he was of "above average" competence in computers, but that "even a competent person would not know if things had been downloaded into the background onto cache". Professor Bailey asked a number of questions about the claimant's use of his computer.

200.7. Mrs Jordan recounted the meeting of 13 December 2012, the claimant's apparent admission to having known about all 8 thumbnails in Thumbs.db and his later retraction, saying he only knew of four of them.

200.8. The claimant stated that he had been "tortured" by the false allegation and had been to hospital. Professor Bailey acknowledged he was aware of the claimant's health, which Professor Brown was looking after separately.

200.9. Professor Bailey stated that he found Mr Wagenblast's report "interesting" and "very balanced".

200.10. Following more questions to the claimant about his use of the laptop, Dr Walden stated that, due to the claimant's ill health they were "unwilling to enter into anything more". Professor Bailey responded that he hoped measures were being put in place to support the claimant. Dr Walden did not ask for an adjournment or for the meeting to be rescheduled. After some further discussion, Professor Bailey announced that he would discuss the matter with Mr Ashcroft before reaching a decision.

201. After somewhere between 5 and 15 minutes of deliberation, Professor Bailey reconvened the meeting and announced his decision. His reasoning was nothing if not concise:

> "
>
> 1. That there is no doubt that there was inappropriate material of a pornographic nature on [the claimant's] laptop,
> 2. That there was reasonable belief based on the evidence that [the claimant] had known about the existence of inappropriate material on his University laptop,
> 3. That [the claimant's] conduct therefore as a member of staff is judged to be inappropriate and unacceptable."

202. Professor Bailey issued the claimant with a final written warning, effective for two years, subject to the right of appeal. He also recommended that the claimant's "laptop and desktop PC be monitored on a monthly basis as a safeguard for [the claimant] and to ensure that no inappropriate material of a pornographic nature would be found on his equipment."

203. Dr Walden reacted angrily. He castigated the decision as "perverse and unreasonable" and put down a marker that "a vigorous appeal would be absolutely certain".

204. It was hard for the claimant to tell from Professor Bailey's cursory explanation how he had actually come to his decision. We have done our best to reconstruct his thought process, based on his oral evidence and comments he made at the disciplinary meeting and subsequent appeal meeting:

204.1. Professor Bailey disregarded the claimant's alleged actions on the train and supposed confession to the anonymous witness (Professor Hamilton).

204.2. It was beyond doubt that the claimant had knowingly introduced the four topless photographs and *Histoire d'Ô* onto his laptop. These were inappropriate material for the claimant to put on a University computer.

204.3. Professor Bailey also believed that the claimant also knew, prior to the investigation, about the four clearly pornographic thumbnails in Thumbs.db. Professor Bailey was aware that the claimant had denied prior knowledge. His reasons for disbelieving the claimant were, first, the claimant's competence with computers and, second, his apparent admission and retraction on 13 December 2012.

204.4. It is much less clear whether or not Professor Bailey believed that the claimant had known about the "several hundred images". If he did reach such a belief, it would be inconsistent with his apparent acceptance of Mr Wagenblast's report.

205. In one sense, justice was done. We as a tribunal know that the claimant had used his laptop to view pornography. Nevertheless, in our view, Professor Bailey's reasoning – based on what he knew at the time – was unfairly harsh on the claimant. The claimant's admissions supported a finding of knowingly possessing four topless photographs of a friend, plus a film with sexual content that had been shown on terrestrial television. That would not, in our view, deserve a final written warning. Knowingly keeping the four pornographic thumbnails in Thumbs.db would clearly merit a sanction at that level, as would knowingly having hundreds of pornographic files (whether deleted or not. But there was no evidence about how the thumbnails and other material had got there or whether they had been viewed. The claimant's initial admissions on 13 December 2012 appeared to have been based on a misunderstanding, otherwise the claimant would not have immediately retracted them once Mrs Jordan had clarified what they meant. We agree with the claimant that the point about the claimant's competence with computers was facile.

206. The harshness of the decision has caused us to look more carefully at one of the questions posed by Allegation 20, namely whether the claimant's Italian origin might, wittingly or unwittingly, have been a factor in Professor Bailey's mind. We are satisfied that it was not. Our reasons are, briefly:

206.1. We do not find that the statistical evidence raises facts from which we could infer race discrimination. A slight under-representation of BME staff within the EPS Faculty senior management team is not suggestive of stereotyping based on nationality or national origin, Mediterranean or otherwise. The White Other demographic category, to which the claimant belongs, was over-represented at Faculty senior management level.

206.2. Professor Bailey was aware of the dangers of sub-conscious bias, having undergone training on the topic and, prior to the claim being issued, having pushed for such training to be rolled out across the University.

206.3. According to the claimant, the asserted connection between his race and Professor Bailey's decision was Professor Bailey's desire to protect Professor Hamilton. We are satisfied that this was not Professor Bailey's motivation. Their working relationship was not close. Professor Bailey regarded Professor Hamilton's "stash of porn" evidence as being of historical

interest only. It was what led the investigators to the claimant's computer, but it was irrelevant to the disciplinary allegation.

207. We are also satisfied, contrary to Allegation 20, that Professor Bailey was not motivated in any way by any of the alleged protected disclosures. Professor Bailey did not know about the claimant's disclosures to Mrs Field. He did know, in broad terms, about the claimant's DAW complaint and that members of Faculty HR were implicated. He may or may not have known that one of the subjects was Professor Webb. It is unlikely that Professor Bailey took any interest in the detail. As the claimant put to him in cross-examination, Professor Bailey was very busy. He was, we find, frankly not interested in issues raised by the claimant unless they impacted directly on something that arose immediately for his decision. On or about 11 January 2013, the decision was who should deal with the claimant's grievance. At the time of the disciplinary meeting, the question before him, as he saw it, was what material was the claimant's laptop and whether it had got there without the claimant's knowledge. Professor Bailey was able to make these decisions without considering any of the claimant's grievance issues. We cannot infer improper motivation from what Professor Bailey said at the appeal meeting about the claimant's grievance. He did not deny knowledge of any grievances; he merely sidestepped the question by stating that it was irrelevant. He later stated that he was not aware of any of the details. We accept this, and would add that Professor Bailey was not interested in going out of his way to find out.

208. Allegation 20 attacks not just the finding of misconduct and consequent warning, but also the monitoring requirement that Professor Bailey attached to it. He thought that monitoring could be done remotely to check for viruses. As it turned out, whilst the claimant did not have to surrender any equipment permanently, he did take his laptop to IT Services on a monthly basis for inspection, which he found demeaning. Again, we find that the decision to impose this requirement was innocent of any conscious or subconscious considerations of race or of the claimant's disclosures. Monitoring was provided for by the December 2012 Computer Misuse Policy which was by that time in force. The measure was not designed to prevent the claimant from carrying out his research. Professor Bailey would have no reason to stop the claimant from doing the work he was paid to do. He did not intend to require the claimant to surrender any equipment.

209. On 13 February 2013 the claimant received a letter confirming the disciplinary outcome. It gave the claimant no more clue as to Professor Bailey's reasoning than his brief remarks at the meeting. Quite properly, the claimant e-mailed Mr Ashcroft the same day to ask for "a more thorough explanation". What he got from Mr Ashcroft was of little comfort: "I can confirm that the reasonable belief was based on the entire evidence submitted to and reviewed by the disciplinary manager." As a practical consequence, the claimant found it difficult to prepare focused grounds of appeal. Professor Bailey was not consulted before Mr Ashcroft's laconic e-mail was sent. He therefore did not "refuse" the claimant's request as the claimant contends in Allegation 20. We have considered the reason why, regardless of the request, Professor Bailey did not use his own initiative to provide more detailed reasons for his decision. In our view, the answer is probably that Professor Bailey was too busy. He did not want to make time to do more than what was necessary to bring the disciplinary meeting to a conclusion. It was nothing to do with the claimant's race or his disclosures.

210. The claimant's rearranged Occupational Health appointment took place on 14 February 2013. Dr Oliver prepared a report the same day, addressed to Mrs Field and copied to Professor Brown. The report noted that the claimant had not suffered a recurrence of the symptoms that had caused his admission to hospital. It was Dr Oliver's view that the claimant was "coping with his duties". He recommended that the claimant's ongoing complaint be resolved as soon as possible. In a handwritten addendum, Dr Oliver suggested a return to full duties over a period of 3-4 weeks.

211. On or about 20 February 2013 the claimant was on a staircase with Mr Pal when they happened to meet Professor Bailey. There is a dispute about precisely what occurred. Our finding is that Professor Bailey formed the impression, rightly or wrongly, that the claimant "blanked" him. He said to the claimant something along the lines of, "Come on, Max, we need to behave professionally." He did not shout. To our minds it is unlikely that Professor Bailey would need to shout in order to command attention. Professor Bailey's remark was not, as Allegation 22 would have us find, motivated in any way by any disclosures that the claimant had made; it was a response to what had just occurred on the staircase.

Disclosure to Professor Esmail

212. On or about 20 February 2013, the claimant met with Professor Esmail. During this meeting, the claimant complained to Professor Esmail that he had been subjected to race discrimination. This is the disclosure to which the claimant refers in Allegation 21. The claimant reasonably believed that what he told Professor Esmail would tend to show unlawful discrimination. His motives were, in our view, mixed in the same way as his motives for making disclosures to Mrs Heaton.

213. Professor Esmail did not pass on to anybody else what the claimant had told him. None of the actions or omissions of anybody else at the respondent could have been influenced by what the claimant said to Professor Esmail.

The claimant moves research group

214. In February 2013, the claimant moved out of the M&N research group and into a research group headed by Professor Ozanyan. From that time onwards, the claimant and Professor Hamilton had virtually no interaction.

The disciplinary appeal letter

215. By letter dated 25 February 2013, the claimant appealed against Professor Bailey's decision. Here is a summary of the grounds of appeal:

215.1. The finding of misconduct was misconceived because "the evidence presented is formed entirely by permanently deleted files" and thus there was no "possession" within the meaning of the criminal law (*R v. Dyson*).

215.2. Breach of natural justice in using the anonymous allegation.

215.3. Prejudicial inclusion of the evidence of Professor Halsall when, on the strength of the evidence supplied by the claimant, it appeared that Professor Halsall's evidence related to a time before the claimant had acquired his University laptop.

215.4. Breach of the claimant's right to a private life.

215.5. Professor Bailey was biased.

215.6. The penalty was disproportionate.

216. The appeal letter expanded upon these grounds of appeal over five pages. This included further details of his allegation of bias. The facts upon which the claimant relied in support of the bias allegation had all been known to the claimant before the disciplinary meeting had started.

217. It was not suggested in the appeal letter that Professor Bailey had acted in an intimidatory manner during the disciplinary meeting, or that the claimant had been too unwell to participate effectively.

The DAW complaint investigation

218. The same day, Mrs Heaton and Mr McDonald began interviewing witnesses for the purpose of the DAW complaint. First to be interviewed was Dr Paul. He was asked about the 15 October 2012 meeting. Broadly speaking, his account supported that of the claimant. He recalled taking part in a conversation before the claimant and Dr Walden had left the room.

219. On 27 February 2013, Mrs Heaton interviewed Mrs O'Neill. The Heaton-O'Neill interview has been the focus of critical attention in these proceedings. Relevant extracts appear here. We have added *italics* to certain phrases to denote redactions to the version of the Heaton-O'Neill interview that was subsequently disclosed the claimant in October 2013.

219.1. Mrs O'Neill gave a synopsis of the investigation into the Student S complaint.

219.2. She described the sorts of questions that she and Professor Webb had asked of the various witnesses. These included questions about whether witnesses had heard the claimant make any inappropriate comments to Student S and other students and staff.

219.3. She quoted passages from Professor Hamilton's interview. This included Professor Hamilton's general opinion that the claimant's behaviour towards female students was "dreadful", "dirty" and "smutty". She quoted his evidence about the contraception remark ("He has told the student that she should be on the pill") and his reaction to it ("*he makes me feel like I need a shower*") word for word.

219.4. According to the notes, Mrs O'Neill continued, "*Professor Hamilton* said that [the claimant] popped into the office after he had had a virus on his laptop and stated that his stash of porn is now better protected thanks to the University as his laptop had been encrypted. *I reacted to him like I thought it was disgusting but I'm not the IT police."* (Pausing there, Mrs O'Neill did not include Professor Hamilton's qualifying sentence, "It could have been a joke, though.") "[The claimant] has a reputation in the department with the administrative staff they call him Dirty Max. I don't like it. *Professor Halsall* has told me that [the claimant] showed him porn on his laptop.

219.5. Mrs Heaton asked detailed questions about the 25 October 2012 meeting. She explained the background and her reasons for bringing the IT Security personnel to the Faculty Human Resources offices.

219.6. When asked about the Cottam/Paul dispute, Mrs O'Neill stated that she had met the claimant and Dr Walden in reception. Dr Walden walked into her office and asked what was going on. He asked a lot of questions about the IT process and became very emotional. When asked, "Where was this taking

place?" she replied, in apparent contradiction to what she had just said, "This was all in the meeting room." She then described how she had invited Dr Paul and Mr Cottam into the meeting room to answer Dr Walden's queries. After a conversation which included Dr Walden's "ambush" remark, the claimant and Dr Walden left the room. In answer to a direct question from Mrs Heaton, Mrs O'Neill confirmed that Dr Paul and Mr Cottam were not present in the room when she informed him of the allegation of pornography on the computer.

219.7. Mrs Heaton put to Mrs O'Neill the claimant's complaint that she and Professor Webb had asked leading questions of Student S. The phrasing of Mrs Heaton's suggests that she sympathised with the claimant's point of view. Mrs O'Neill replied that it had been Professor Webb who had asked the question and that no harm had come of it because Student S had replied that normally if she said no h he would stop.

219.8. Mr McDonald referred to the O'Neill/Webb final paragraph. He asked Mrs O'Neill whether the claimant had ever had a chance to reply to it. Mrs O'Neill had a recollection of a conversation with the claimant about contraception. She did not mention having discussed his allegedly "old-fashioned views".

220. Although Mrs Heaton asked Mrs O'Neill at various points to explain why she acted as she did, she did not at any time ask Mrs O'Neill whether she had been motivated by the claimant's Italian origin. We do not find it surprising that such a direct question was not asked: it is rare for employees to admit race discrimination openly and rarer still for HR managers to do so. What concerns us more is that Mrs Heaton did not ask indirect questions that might help her reach her own conclusion. The main reason we find for her omission to do so was that she had not asked the claimant to clarify the basis of his race discrimination complaint, meaning that she had very little to ask Mrs O'Neill about.

221. On 1 March 2013, Mrs Heaton interviewed Professor Webb. The conversation covered the Cottam/Paul dispute in detail. On that topic, Professor Webb's account was rather vague, but broadly supportive of the version given by Mrs O'Neill. Dr Paul and Mr Cottam had, she said, been called into the meeting after the start. She recalled that she and Mrs O'Neill "were not happy" that Student S kept changing her "story and emphasis". When asked about the alleged leading question to Student S about being raped, Professor Webb stated (in apparent contradiction of Mrs O'Neill) that she did not think they would have asked such a question. Mrs Heaton put it to Professor Webb that they had taken a long time to investigate. Professor Webb acknowledged the delay and explained that it was due to the summer break and the number of witnesses to whom the claimant had asked them to speak.

222. For the same reasons as with Mrs O'Neill, Mrs Heaton did not ask Professor Webb questions about possible race discrimination.

223. Also interviewed that day was Mr Cottam. His recollection appeared clear that he and Dr Paul had been in the meeting room when the claimant and Dr Walden entered. Mrs Heaton asked him whether was any equipment in the room. This question was relevant because of the recollection of the claimant and Dr Walden that equipment had been there. Mr Cottam replied, "No". Mrs Heaton asked Mr Cottam if he had met the claimant since the meeting. In reply, Mr Cottam recalled having met the claimant at the entrance to the Sackville Street

Building and having a conversation with him. He denied having told the claimant that the procedure have been better handled. Here, then, was Mr Cottam clearly supporting the claimant on the central issue in the Cottam/Paul dispute, but contradicting his version about one of the details.

224. Mrs Field was next to be interviewed. She gave Mrs Heaton an account of the discussions she had had with Mrs O'Neill prior to the 15 October 2012 meeting. Mrs O'Neill had, she said, planned to have Mr Cottam and Dr Paul sitting in her office whilst the meeting took place in a separate room. She added, "Mrs O'Neill came to me because she was nervous about the situation and she felt intimidated by [the claimant] and [Dr Walden]." Pausing there, the claimant's case is that Mrs Heaton should have deduced from that remark that Mrs O'Neill brought Dr Paul and Mr Cottam along as "backup", which she wanted in the room from the very start of the meeting. That is not how Mrs Heaton interpreted Mrs Field's comment. As Mrs Heaton put it, "We are dealing with professional colleagues; we don't need heavies."

225. A further grievance meeting took place between the claimant and Mrs Heaton on 13 March 2013. Minutes of this meeting were sent to the claimant for comment. He later returned them with tracked changes. The amendments made by the claimant look to us to be additional commentary, rather than a recollection of things actually said at the meeting. We find the unamended version a more reliable account. Amongst the various things said at the meeting were the following:

225.1. There was a discussion of the detail of the Cottam/Paul dispute. The claimant gave definite evidence as to who was present in the room at the start of the meeting. Dr Walden stated that he could not remember.

225.2. Mrs Heaton put to the claimant various aspects of the evidence given by other witnesses to the investigation. She did not so much "challenge" him (as Allegation 25 suggests) as give him an opportunity to comment.

225.3. On the subject of the O'Neill/Webb final paragraph, Dr Walden stated that the concerns about the claimant's behaviour towards females were "stereotyping" and the views of Mrs O'Neill.

225.4. Mrs Heaton summarised what she had heard from Mrs O'Neill and Professor Webb on the various topics raised in the DAW complaint.

225.5. The claimant raised the allegation made by the anonymous witness (Professor Hamilton). He stated that "the allegations could be seen as a stereotypical Italian man" and that they were "a total lie". Mrs Heaton showed some concern at the withholding of the anonymous witness's evidence from the disciplinary pack. She did not, however, ask any further questions about the claimant's basis for thinking that the anonymous witness had treated the claimant as a stereotypical Italian man.

226. Following the meeting, Mrs Heaton did not ask to see Professor Hamilton's statement for herself. This was another missed opportunity to investigate.

227. On 18 March 2013, the claimant e-mailed Mrs Heaton with further details about his conversation with Mr Cottam in a corridor on 15 October 2012. According to the claimant, Mr Cottam had repeatedly apologised for what had occurred during the 15 October 2012 meeting. This was significant, the claimant maintained, because if Mrs O'Neill's version was correct, there would have been

no need for Mr Cottam to apologise. As we know, however, Mrs Heaton had already broached this subject with Mr Cottam, who appeared to be denying having made any apology for the procedure. This, then, was another clash of evidence between the claimant and Mr Cottam on one of the details of the Cottam/Paul dispute.

228. On 27 March 2013 the claimant sent to Mrs Heaton a document containing further information about his DAW complaint. Amongst its many points were the following:

228.1. Professor Webb and Mrs O'Neill should have "made an attempt at verifying the credibility of the source of the pornography allegation" (Professor Hamilton) before seizing his computer.

228.2. He summed up the evidence, as he understood it, in relation to the Cottam/Paul dispute.

228.3. He made a complaint about the behaviour of "one of the individuals involved in my case". The claimant did not name him, but we know that it was Professor Halsall. According to the claimant's document, "2 witnesses heard him making racially motivated remarks about my 'latin temperament' while equating me to Berlusconi… This suggests, along with the stereotyping evident in the outcome report … that at least one of the people involved in this case might harbour racist ideas. I have, for the time being, decided not to formalise my complaint, if the person stops." (Though the claimant did not name him at this stage, one of the witnesses was subsequently revealed to be Dr Majewski. We return to this incident, which we dub "the Majewski conversation" in due course).

228.4. He alleged that the anonymous witness (Professor Hamilton) had "been protected and seemingly guaranteed complete unaccountability". He likened the subsequent investigation of his laptop to the witchcraft trials in the Middle Ages. In summary, he stated, "HR needs to become reactive and not proactive. HR should start investigations only on actual written grievances or statements from named individuals who are not just reporting hearsay."

229. On 15 April 2013, the claimant forwarded to Mrs Heaton the 26 November 2012 joint synopsis, highlighting the paragraph that, in his view, amounted to a "confession" in relation to the Cottam/Paul dispute.

230. Mrs Heaton did not look into the Majewski conversation. We accept her explanation that her reason for not doing so was that the claimant had expressly declined to formalise his complaint.

The disciplinary appeal meeting

231. By letter dated 17 April 2013 the claimant invited to an appeal meeting to take place on 29 April 2013. He was informed that the person appointed to hear his disciplinary appeal was Professor Rod Coombs, Deputy President and Deputy Vice-Chancellor. Professor Coombs was independent of the EPS Faculty.

232. The claimant submitted further written material for the purpose of his appeal. In one document he explained the process by which thumbnails could be stored on a browser's cache. He also explained how clicking on a thumbnail would redirect the browser to another web page on which the "parent image" was hosted. The parent image would also then be downloaded. If files within the browser cache were deleted using "Clear Recent History", both the parent

images and the thumbnails would be deleted. It was the claimant's contention that the fact that Mr Arnold had found thumbnails without the parent images showed that the parent images had never been viewed.

233. A further document provided by the claimant was the report dated 16 April 2013 of Ms Katherine Cisek, a digital forensics consultant working at the University of Cambridge Computer Laboratory. Amongst her credentials was membership of the 2Digital Forensics Society (UK)".

234. Ms Cisek had never seen the hard drive image. The claimant had provided her with the material that had been given to Professor Bailey. This material was redacted to delete references to Professor Hamilton's and Professor Halsall's evidence, the claimant's photographs of A, and the claimant's admissions on 13 December 2012 to 4 (initially 8) of the thumbnails.

235. Ms Cisek's conclusions were, essentially:

235.1. that the laptop had not been used to view pornography, because there was no evidence of any deleted parent images having been recovered;

235.2. she "could not rule out the possibility of a virus or viruses visiting pornographic websites and/or downloading pornographic pictures";

235.3. "there is enough evidence that either the laptop or just the hard disk belonged to somebody else" before the claimant; and

235.4. on the balance of probabilities she could not say that there was enough evidence to say the laptop user had "accessed porn websites and downloaded any pictures/videos".

236. At Professor Bailey's instruction, the claimant's further material was sent to Mr Arnold for further investigation. On 25 April 2013, Mr Arnold e-mailed Mr Ashcroft with some counter-arguments against the opinion of Ms Cisek. The e-mail also announced some further discoveries. Amongst these was the presence of a folder called "Max". This folder contained a Thumbs.db file. Present in the file were thumbnails which, in Mr Arnold's opinion, were clearly pornographic. Mr Ashcroft forwarded the e-mail to Professor Bailey the next day. In an inappropriate attempt to lighten the tone, Mr Ashcroft's e-mail joked about the claimant possibly having used a webcam. Professor Bailey ignored the joke, but did take seriously the evidence of the Max folder.

237. In advance of the appeal meeting the claimant prepared an opening statement. It was attractively written and expressed his main points forcefully. There was no mention in it of Professor Bailey having intimidated the claimant during the disciplinary meeting. The claimant referred to the effect of the "3 false allegations" on his health, but did not suggest that he had been too unwell to participate in the disciplinary meeting. In conclusion, the claimant invited Professor Bailey to "backtrack", adding, "I decided to give the University one last chance to correct its mistake rather than dragging the matter to court."

238. The appeal meeting proceeded on 29 April 2013. Professor Coombs chaired the meeting, with support from Ms March, Human Resources Advisor. The management case was presented by Professor Bailey, assisted by Mr Ashcroft. Once again, the claimant was accompanied by Dr Walden. Notes were taken by Caroline Schofield, an Employment Services Assistant who was independent of EPS Faculty HR.

239. At the meeting:

239.1. The claimant read from his opening statement. He sought to distinguish between "images" and "thumbnails". He repeated his assertion that he could not be held responsible for possession of deleted files.

239.2. The claimant asked Professor Bailey about his knowledge of the anonymous witness. By this time, his identity – Professor Hamilton – was an elephant in the room. Notwithstanding the artificial, if not ridiculous, nature of the exercise, Professor Coombs reminded everyone that the witness was anonymous and that everybody should be careful not to reveal their identity. Professor Bailey's reply to the claimant's question was truthful as far as it went. He said that he had only spoken on a one-to-one basis with the witness approximately four times. He could have been more candid about his dealings with Professor Hamilton as Deputy Director of the PSI. There is nothing suspicious about him holding on to this information. He was trying to toe the line drawn for him by Professor Coombs. Revealing the witness's role at the PSI would have crossed that line. To the extent that Professor Bailey sought to "underplay" his relationship with Professor Hamilton, or his answer was "not correct" (as contended in Allegation 27), we find that his reason was nothing at all to do with race or any disclosures the claimant had made.

239.3. Professor Coombs asked the claimant to clarify the two grounds of appeal based on Professor Bailey's alleged bias and breaches of procedure relating to Professor Halsall. Both Dr Walden and the claimant replied. Their answers were difficult for Professor Coombs to reconcile. The claimant initially said that he thought Professor Bailey's decision was "perverse" and that he had been "misled by management". This accorded with Dr Walden's reply: he was not seeking to impugn the integrity or honesty of Professor Bailey. As the interview progressed, however, the claimant accused Professor Bailey of being "known for trying to side with his own management team".

239.4. Whilst presenting the management case, Professor Bailey referred to the Cisek report and explained why it would not cause him to alter his decision. In doing so he referred to the "Max" folder and its contents. Professor Coombs asked Professor Bailey to clarify that he was not presenting new evidence to the panel regarding the new thumbnails that had been found. Professor Bailey did not answer the question directly, and gave further detail about the thumbnails in the "Max" folder. The claimant objected to Professor Bailey trying to "bring new things to the appeal hearing". After some debate, Professor Coombs confirmed that he was "not looking at any new … evidence [from Mr Arnold], but that [Professor Bailey] was just saying that this exists." This statement was ambiguous. It left the claimant with the impression that Professor Coombs would not take the "Max" folder into account.

239.5. At a number of points in the meeting, Professor Bailey made it clear that he had found that the claimant was aware of "pornographic images" on the laptop. In their context, his remarks were clearly a reference, not to topless pictures of a friend, or to *Histoire d'Ô,* but to the clearly pornographic material found by Mr Arnold.

239.6. The claimant asked Professor Bailey whether he was aware of a grievance having been submitted regarding a HR Manager (meaning Mrs

O'Neill). He may also have mentioned an Associate Dean (meaning Professor Webb). Professor Bailey and Professor Coombs replied that this was irrelevant to the case and was not to be heard as part of the appeal hearing. Later in the meeting, the claimant announced an intention to submit a grievance against Dr O'Brien and Mrs Jordan. Dr Walden stated that this grievance was irrelevant to the appeal. Professor Bailey said, truthfully, that he was not aware of any details of the grievance.

239.7. At the conclusion of the meeting, Professor Coombs informed the claimant that he would receive the decision in writing.

240. Professor Coombs then discussed the case with Ms March. Ms Schofield summarised the discussion in an e-mail sent to Ms March the following day. It is not particularly easy to follow Professor Coombs' line of reasoning as recorded in these notes and we accept Professor Coombs' evidence that they are not fully accurate. What is clear, however, is that, by the end of the discussion, Professor Coombs had decided to dismiss the appeal. We are satisfied that this was Professor Coombs' decision and not that of Ms March.

241. That same evening, Ms March and Mr Ashcroft exchanged e-mails on the subject of Ms Cisek. Mr Ashcroft had checked the LinkedIn profile of the Digital Forensics Society. His research revealed that the Society had only 5 members and its website was under construction. On the strength of that evidence, Mr Ashcroft opined, "We've all just been had". Ms March replied that "given her report can be read both ways anyway, we will just have to go with that…" The exchange suggested that Ms March and Mr Ashcroft were working together to discredit the claimant's evidence. Professor Coombs did not know about these e-mails. As far as he was concerned, Mr Ashcroft and Ms March were "keeping each other informed of facts and events".

242. On 30 April 2013, equipped with Ms Schofield's "discussion points" e-mail, Ms March set about drafting an outcome letter to be sent to Mr Spinks so that he could formally dismiss the appeal. She forwarded the draft to Professor Coombs the next day. After making amendments to six of the paragraphs, Professor Coombs approved the letter and Ms March sent it to Mr Spinks. While Ms March was waiting for Professor Coombs' amendments, Ms Schofield e-mailed her with the notes of the appeal meeting. Her covering e-mail added, "Please let me know if you would like any amendments to be made." Ms March forwarded the notes to Professor Coombs. She explained that the notes did not need to be sent to the claimant, as this was the final stage in the internal process. Accordingly, she said, "I don't propose to tweak anything or finalise them." Just before sending this e-mail, Ms March sent an e-mailed reply Ms Schofield, thanking her for the notes. Her e-mail went on to state, mischievously, "I don't propose to tweak anything for the time being, I'll wait until I need to produce them as part of the grievance against me before I do that!" This comment demonstrates two things to us. First, Ms March must have been aware of the claimant's tendency to complain about Human Resources Partners and Mrs O'Neill in particular. Second, that Ms March would have been prepared to make changes to the notes if the claimant submitted a grievance. But we cannot conclude from her comment that she would have tailored the notes improperly. As she explained to Professor Coombs, she did not think there was any need to finalise the notes because, at least for the time being, there were no further internal procedures to which the notes would be relevant.

243. By letter dated 2 May 2013, Mr Spinks informed the claimant that his appeal was unsuccessful and enclosed a copy of Professor Coombs' report.

244. Here are our findings about how Professor Coombs reasoned, together with our evaluation of his reasoning in *italics*:

244.1. He was unpersuaded by the claimant's distinction between thumbnails and "images". (*On this point we agree with Professor Coombs. Regardless of their size, the thumbnails contained recognisable pornographic pictures. The significance of their being thumbnails was that their presence on the hard drive did not necessarily mean that the claimant had viewed the parent images. Professor Coombs understood that point*.)

244.2. He believed that the claimant was raising technical arguments based on the meaning of "storage", based on the criminal law. In his view, the criminal law was unhelpful in interpreting the respondent's own internal rules. (*In fact, Professor Coombs' terminology may have become confused: Porter was a case about the meaning of "possession". He was right, however, to conclude that the criminal law was of limited assistance.)*

244.3. He was satisfied that the information supplied by Professor Hamilton had not simply been taken at face value, but had been "investigated thoroughly and corroborated by other means". (*This was not as stark a position as that taken by Professor Bailey, who regarded Professor Hamilton's allegation as being merely of historical significance. Professor Coombs, like Professor O'Brien, appears to have regarded Professor Hamilton's evidence as supporting the conclusion that the disciplinary allegation was well founded. This meant that the claimant's arguments about the difficulties in testing such evidence had more force than Professor Coombs gave credit.)*

244.4. In Professor Coombs' view, the procedural irregularities alleged by the claimant did not undermine the fairness of the process. (*He did not specifically address the evidence of Professor Halsall and whether, as the claimant argued, it related to a period prior to the claimant's acquisition of the laptop.)*

244.5. There was, in Professor Coombs' view, no evidence that Professor Bailey was biased. (*Indeed, there was none. Had the claimant or Dr Walden believed that Professor Bailey had grounds for recusal, they would have asked him to step aside at or before the disciplinary meeting*).

244.6. Professor Coombs thought that Ms Cisek's report was "not overwhelming conclusive expert evidence that there was not inappropriate material of a pornographic [nature] on [the claimant's] laptop. (*This, in isolation, was a mischaracterisation of the claimant's argument. Ms Cisek's opinion was that there was no evidence that he had ever known of the existence of the pornographic material and it could have been inadvertently acquired.)*

244.7. He quoted Ms Cisek's conclusion that there was insufficient evidence "to say the user of the laptop had accessed porn websites and downloaded any pictures/videos" and that "these findings only indicate perhaps at some point it happened." Having done so, he observed (*rightly in our view*) that this evidence was not conclusive either way.

244.8. That, of course, left open the question of whether the claimant knew about the pornographic material prior to the seizure of his laptop. The original decision had been that the claimant had known. Professor Coombs thought that the original decision was reasonable. In coming to this view, Professor Coombs relied on the new information Professor Bailey had provided about the "Max" folder. (*In our view, this was unfair. The claimant had had no real opportunity to challenge the "Max" folder evidence. He did not ask the claimant about it and led him, probably inadvertently, to believe that it would not be taken into account.)*

244.9. "In light of the gravity of the misconduct", Professor Coombs concluded that "the level of the sanction was proportionate" and that "all factors, mitigating or otherwise, had been fully considered."

245. We now turn to Allegation 28. We are required to consider whether Professor Coombs, in reaching his conclusion, was motivated, consciously or subconsciously, by the claimant's Italian race. We are satisfied that he was not. There is no evidence from which we conclude that there were any national stereotypes operating on his mind. We are also persuaded that Professor Coombs was not influenced by the claimant's DAW complaint or any other disclosures the claimant had made. Professor Coombs made clear during the meeting that he regarded the grievance as irrelevant. He did not know about any disclosures made to Mrs Field or Professor Esmail.

246. Before leaving Allegation 28, we consider whether Professor Coombs' decision was manipulated by Ms March, Mr Ashcroft and possibly Ms Jordan, to the extent where their motivation might become relevant. We do not find that manipulation of this kind went on here. The e-mails we have set out betray mounting frustration within HR at the claimant's grievances, sometimes expressed through gallows humour. But there is no evidence of their actions behind the scenes having rendered Professor Coombs' decision inevitable.

The FPC considers promotion and RREP

247. (In roughly April or May 2013, the FPC met to discuss promotion applications and RREP awards within the EPS Faculty. The meeting was chaired by Professor Bailey. Professor McCrohan from the Faculty of Life Sciences participated as an external member. The remainder of the committee was made up of 7 academic members of staff from EPS, including Professors Brown and Webb. They were supported by Mrs Field and Ms Azariah of Faculty HR.

248. Professor Bailey did not score any of the candidates. Heads of Schools did not score any candidates from within their own School.

249. Neither Mrs Field nor Professor Bailey raised any potential conflict of interest that Professor Bailey might have in chairing the meeting concerning the claimant. Professor Webb declared no conflict. They did not keep quiet about any supposed conflict because of the claimant's race or because he had made any disclosures. They just did not think that there was any such conflict. To the extent that Allegation 31 suggests otherwise, we disagree with it. Like Mrs Field, we struggle to see where the conflict of interest lay.

250. The FPC discussed the various promotion applications, including 9 candidates for the role of Senior Lecturer. They graded the candidates on the various competencies. Professor Webb's grades for the claimant were among the middle of the group in terms of generosity. The overall decision was to

approve only one of the 9 Senior Lecturer promotion applications. The successful candidate was not the claimant. The FPC also discussed 4 applications for RREP awards. There was no formal scoring exercise and we do not know how the individual committee members cast their votes. The result was that the claimant was the only person whose RREP award was declined.

251. There is no evidence that Professor Bailey, "poisoned the minds" of the committee members, as the claimant would like to present Allegation 31. He did not contribute to the assessment of the claimant's RREP award. To the extent that Professor Bailey participated at all, we are satisfied that he was not motivated, consciously or subconsciously, by the claimant's Italian origin or by any disclosures that the claimant made. For the reasons given above we did not allow the claimant to allege that Professor Webb was improperly motivated. For good measure, we would add that we could find no evidence that the claimant's race or his disclosures played any part in her decision. There is no reason to suppose that she went about the RREP assessment any less objectively than the promotion application, where her scores for the claimant were higher than those given by some other committee members.

252. The claimant was informed by letters dated 13 and 14 May 2013 respectively that his promotion application and RREP recommendation had been unsuccessful. He was given the right of appeal, but did not exercise that right.

The DAW complaint outcome

253. By an 8-page letter dated 16 May 2013, the claimant was informed of the outcome of his DAW complaint. The conclusions of Mrs Heaton and Mr McDonald ("the panel") in relation to each of the claimant's 9 numbered allegations was as follows:

1. The panel upheld the first complaint. They found that "at some point in the meeting the [pornography] allegation was discussed with the staff from IT present." The panel did not try to resolve the Cottam/Paul dispute. There was, in the panel's opinion, "some inconsistency amongst the witnesses" on that point. They accepted Mrs O'Neill's evidence that the breach of the claimant's confidentiality was unintentional and that she had not planned for the IT Security staff to be present in the room. It would have been better, they concluded, for the taking of the laptop to have been "organised without IT staff present".
2. There was no finding of breach of the Stress at Work Policy. Whilst acknowledging the anxiety that the claimant must have felt on hearing the pornography allegation on top of the Student S complaint, the panel concluded that Mrs O'Neill had no choice but to report the pornography allegation so it could be investigated.
3. They could not find any breach of the duty of care.
4. In the panel's view, the pornography investigation had not been initiated without just cause. A witness (Professor Hamilton) had made an allegation in the course of the Student S investigation and Mrs O'Neill was bound to investigate it. They took into account that on 15 October 2012 the claimant had admitted to there being images of "a female friend" (A) on his laptop. The panel could not find evidence that the claimant had been singled out for "special attention".

5. The panel addressed the complaint of "failure to present the allegations in writing". They broke it down into stages:

    (a) First, the Student S complaint. Her grievance letter had been sent to the claimant.

    (b) Second, the allegation leading to seizure of the laptop (Professor Hamilton's "stash of porn" remark). The panel found that the claimant had been verbally informed by Mrs O'Neill at the 15 October 2012 meeting of the allegation regarding inappropriate images on his laptop. It was clear from the paragraph complaint number 4 that the panel thought no further information needed to be given to the claimant at that stage.

    (c) Third, the commencement of the investigation. This was notified to the claimant by letter dated 16 November 2012. The passage quoted merely identified the respondent's procedures which were alleged to have been breached.

    (d) Fourth, the disciplinary allegation in Dr O'Brien's letter of 29 November 2012. She quoted it in full. What Mrs Heaton did not appear to have grasped is the point that we have already recorded in relation to this letter. Although the letter described the sexual nature of images, it did not state in terms whether the claimant was alleged to have downloaded them or knowingly stored them.

    (e) The panel did not think it appropriate for the claimant to be provided with copies of witness statements in the Student S investigation. They acknowledged that protecting a witness's identity by refusing to issue a statement was an "exceptional" step. This appeared to relate to the disciplinary investigation. Although it was not expressly stated in the outcome letter, Mrs Heaton had understood the claimant to be complaining about the failure to provide the detail of the pornography allegation (for example, whether it was downloading or viewing) rather than the word-for-word account given by Professor Hamilton.

6. The panel addressed the complaint of delay in the Student S investigation: "The time taken to complete the investigation was unfortunate but considered to be reasonable when taking into account the number of interviews undertaken and the fact that the investigation overlapped with the main holiday period…"

7. The complaint about asking leading questions of Student S was not upheld. As they interpreted the interviews of Mrs O'Neill and Professor Webb, "Neither could distinctly remember giving her a leading question ie 'that she thought she was going to be raped'". In any event, the panel thought it was appropriate for the investigators to rephrase their questions and probe further" because Student S's version of events was so inconsistent. The panel saw nothing wrong with putting to Student S the dates on which the claimant was out of the United Kingdom. (Neither, we might add, do we.)

8. There was no evidence to suggest to the panel that witnesses in the Student S investigation had been led to reveal "dirt" irrelevant to the harassment allegations. The panel impliedly accepted the account given by Mrs O'Neill and Professor Webb about what questions they had asked the witnesses.

9. The letter reiterated the panel's view that it was appropriate for the investigators to reveal to Student S that the claimant had been out of the country.

254. Having addressed the 9 points in the claimant's DAW complaint letter, the outcome letter went on to discuss some of the points that the claimant had raised during the meeting on 29 January 2013. These included the claimant's unhappiness with the O'Neill/Webb final paragraph. Quoting the paragraph in full, the outcome letter concluded:

> "We believe that part of this statement is a value judgment, ie "your general attitude and language when discussing women and sex was old fashioned" and could have been phrased differently. It was appropriate for you to be reminded of the use of language, phrases or behaviours around others in the workplace and in this context, women in the workplace/or in a teaching environment. This helps to ensure that staff do not inadvertently place themselves in a vulnerable, challenging and inappropriate position with students. However on reflection it may have been appropriate to exclude this from the report without further explanation of what this actually meant.

255. This paragraph was generally supportive of the claimant. In our opinion there was nothing wrong with Mrs Heaton condoning a reminder of appropriate standards of behaviour in the workplace. Unfortunately, Mrs Heaton's letter did imply that Professor Webb and Mrs O'Neill had been justified in finding that the claimant had actually made the remarks set out in the O'Neill/Webb final paragraph. We do not think that is what she meant to imply. Though not recorded in the letter, Mrs Heaton thought it had been unfair of the investigators to set out this statement of opinion about the claimant without having given him a chance to comment on it first.

256. With one exception, our view is that Mrs Heaton dealt conscientiously with the many points that the claimant had raised. She did not confine herself to the initial DAW complaint letter and expanded her investigation to include points raised at the meeting. Questions asked by her and Mr McDonald in relation to the Cottam/Paul dispute and the leading of witnesses demonstrate that she had identified and pursued appropriate lines of enquiry. It was reasonable of her to decline to resolve the Cottam/Paul dispute. The evidence was contradictory. Despite the claimant's efforts to map it onto a single timeline, it did not point easily to one conclusion or another. It was still less apparent that Mrs O'Neill had lied. Her recollection might have been honest, but mistaken.

257. The exception is this: at no point in the letter did Mrs Heaton refer to the claimant's assertion that he had been the victim of stereotyping or that he had been treated as he was because he was Italian. This was because Mrs Heaton did not think there were "obvious grounds" for believing that race discrimination had taken place. In our view this was a significant shortcoming in Mrs Heaton's approach to the DAW complaint. True it is that the grounds were not obvious. They are still not evident to us now. But an experienced human resources professional ought to know that race discrimination is rarely overt and the grounds for finding it are often not obvious. Once it was clear that the claimant, albeit orally, was making a complaint of race discrimination, she should have followed it up. If the basis was unclear, she should have asked the claimant to clarify it. She should have asked for the full text of Professor Hamilton's and

Professor Halsall's original interviews to evaluate whether they contained any material from which racial stereotyping could be inferred. It would also have been relatively straightforward of her to re-interview Professor Webb and Mrs O'Neill to ask questions about how their treatment of comments about the claimant compared with their treatment of comments about other persons involved in the investigation such as J. We return in due course to examine Mrs Heaton's motivation for omitting to take these steps.

258. The DAW complaint outcome was the fourth outcome letter, of one kind or another, that he had received from the respondent in just over a fortnight. All of them had wholly or mainly declined to give him what he wanted. In all of them he saw the hand of Human Resources or "Faculty Management" at work. Feeling demoralised and vulnerable, he exchanged a series of e-mails with Professor Esmail between 2 and 22 May 2013. In his e-mails he stated that this was "becoming increasingly clear as a case of victimization"; that he was "in the process of being constructively dismissed"; and that Ms Cisek had been "in court 3 weeks ago with a headteacher trying to get rid of one of the teachers after a colleague did exactly what my line manager did to me".

The Cottam/Paul dispute revisited

259. Having described the way in which the Cottam/Paul dispute was investigated, we turn our minds, as Allegation 4 demands, to the Cottam/Paul dispute itself. The claimant, no doubt, would like the tribunal to reach a finding on what actually happened. At the risk of disappointing the claimant, we did not find it possible, or indeed necessary, to resolve the dispute as to who was present at the start of the meeting. This is not a case where one version of the facts stands out as being clearly preferable to another. We have to bear in mind that the claimant, according to his own witness statement, was in shock at the time. It is likely that, for the claimant, the worst moments of the meeting were noticing the presence of IT Security personnel and being told, out of the blue, that his laptop was going to be seized based on an anonymous allegation of inappropriate material. Whether the IT Security staff were in the room or not at the time that this was communicated to him was a detail that is likely to have been relatively unimportant to him. It appears to be common ground that what angered Mr Walden the most was the fact that they had been ambushed at a meeting that had been convened for a different purpose. The joint statement of Professor Webb and Mrs O'Neill dated 26 November 2012 was not, in our view, the conclusive admission that the claimant has made it out to be. It was a brief summary of the arrangements made for the meeting and did not specifically state that Dr Paul and Mr Cottam had been present in the room when the meeting started. We did not find the written accounts of Mr Paul or Mr Cottam, or the remarks of Dr Walden, particularly helpful in deciding what actually happened inside the Faculty HR Office that day. Their versions are not unanimous and were not tested by cross-examination. Although Mr Cottam's version was clear on the central point of dispute, details of his evidence were contradicted by other witnesses. Added to all of these problems is the delay between 16 May 2013 and the presentation of the claim. It was hard enough for Mrs Heaton and Mr McDonald to work out what had happened 6 months after the event. We are now over 3½ years further on and the picture is foggier still.

260. What we are nevertheless persuaded about is that Mrs O'Neill did not do anything deliberately to intimidate the claimant on 15 October 2012. The purpose of bringing Mr Cottam and Mr Paul to the meeting on 15 October 2012 was so

that Mrs O'Neill could hand the laptop straight to them. Deliberate intimidation would have been out of step with the care with which she and Professor Webb handled the remainder of the investigation. If intimidating the claimant had been Mrs O'Neill's objective, she would not have been so upset immediately afterwards when she spoke to Mrs Field. Staying with Allegation 4, we would add that the claimant was not "falsely accused". Professor Hamilton's allegation was fairly summarised to the claimant. In any event, the claimant had in fact knowingly used his laptop to view pornography.

The claimant's 2013 sabbatical request and teaching duties

261. In April 2013, the claimant made a request for a period of sabbatical leave so he could take up the visiting professorship in Beijing. In accordance with the Academic Leave Procedure, the claimant directed his request to Professor Brown. Two other members of the EEE School applied at that time. Because of the relatively small number of applications, Professor Brown decided not to scrutinise them, but to refer them straight to the Dean without a recommendation. Professor Bailey rejected the claimant's application. His feedback, subsequently given to Professor Brown, was:

> "This is not a strong case: The plan is not well structured and the outcomes are poor and not well defined. In terms of outcomes were looking for both short term and long-term impact. The costs also not well defined and what does it mean by 'existing budgets'.
>
> Also we need to get Max back into teaching and carrying out his duties within the School."

262. The other two sabbatical requests from the EEE School were approved. Some applications from the MACE School and the School of Physics were declined. This was not uncommon. For example, in 2011 he turned down all applications from the MACE School.

263. Contrary to Allegation 32, we find that Professor Bailey refused the claimant's application purely on its merits. He was not motivated by revenge, or any desire to "micromanage" the claimant by keeping him in Manchester, or by the claimant's race or the fact that he had made any disclosures. It is noteworthy that, in 2014, with the claimant's grievance appeal still outstanding, Professor Bailey granted the claimant's sabbatical request.

264. Shortly after discovering that his sabbatical request had been unsuccessful, the claimant had a conversation with Professor Brown. The claimant alleges (Allegation 23) that, during this conversation, Professor Brown told him that Professor Bailey wanted the claimant to take on a full teaching load as soon as possible. We prefer Professor Brown's evidence that he did not say this. It was not what Professor Bailey had said to Professor Brown. In their discussion, Professor Bailey mentioned to Professor Brown that the claimant should be supported to resume his normal duties and get his career back on track. In fact, the claimant was not given a full teaching load. Later in the year, Professor Brown made arrangements for the claimant's timetable to be restructured so he could go on trips to China. He would be unlikely to have done so if he had been instructed by the Dean to put the claimant on a full teaching load and keep him in Manchester where he could be micromanaged.

"Axis of Evil"

265. In about April 2013, the claimant was told by a colleague, Dr Chakraborthy, about a comment that Professor Hamilton had allegedly made about the claimant and Professor Missous. According to Dr Chakraborthy, Professor Hamilton had referred to them as "the Axis of Evil".

266. Under the heading of Allegation 26 (in its amended form as the claimant would like us to consider it), we must consider whether Professor Hamilton uttered these words. In our view, there is insufficient evidence to support such a finding. Professor Hamilton denies making the remark and Dr Chakraborthy's version is completely untested. Even if Professor Hamilton had made such a comment, there is nothing about the remark itself that would suggest a racial motivation for making it. The phrase, "Axis of Evil" was famously used by the then American President George W Bush to describe countries hostile to the United States such as Iraq and North Korea. It had nothing to do with Italy. Those with longer memories may remember the word, "Axis" being used during the Second World War, which would include Italy, but this is not what the phrase, "Axis of Evil" calls to mind.

The claimant's renewed DSAR and ICO complaint

267. In an e-mail to Ms Clare on 17 May 2013, the claimant renewed his DSAR on the ground that "All proceedings are now concluded." Ms Clare discussed the matter with Human Resources and took legal advice, following which she replied to the claimant on 30 May 2013. He was entitled to a number of different categories of information, but, she maintained, the legal exemption still applied to the information the claimant was actually seeking.

268. Dissatisfied with the response, the claimant made a complaint the same day to the Information Commissioner's Office ("ICO"). It took the form of a brief covering e-mail and two attachments, each exceeding 300 kilobytes. One of the attachments was a prescribed complaint form. In his covering e-mail the claimant stated, "At this stage, and before contacting my employer, I would like to know initially whether my complaint has any merit". The parties helped us find the covering e-mail in the bundle, but, try as we might, we could not find the attachments. This presented something of a puzzle when we came to examine Allegation 35. The respondent contends that the claimant was merely "seeking guidance" and not disclosing information. We found ourselves trying to make findings about what information the claimant disclosed without the benefit of reading the document that allegedly disclosed the information. In that evidential vacuum, we found, on the balance of probabilities, that the claimant had set out the procedural history of his DSAR. He was inclined to do the same in many other formal documents and the size of the electronic attachment file suggests it was a substantial document. We also find that his attachments probably made an assertion that the respondent's position in relation to withholding material was unjustified. We are also satisfied that the claimant probably believed that his complaint tended to show that the respondent had contravened the Data Protection Act 1998. At that time, he genuinely and reasonably believed that the respondent was not entitled to rely on any statutory exemption. His covering e-mail might have also sought guidance, but that does not mean that the attachments were not disclosing information.

269. At or about the same time, Student S was trying to obtain documents connected with the investigation into her complaint. Professor Webb replied to her on 4 June 2013, informing her that witness accounts and personal e-mails

would not be released to her, as they would breach confidentiality. To our minds this e-mail is relevant, because it showed that Professor Webb's approach to Student S's disclosure requests was consistent with that of her co-investigator, Mrs O'Neill towards the claimant. They were even-handed.

The DAW review

270. On 29 May 2013 the claimant wrote to Mr Spinks with an "appeal" against the outcome of his DAW complaint. It will be remembered that, in fact, the DAW Procedure provided for a "review" rather than an "appeal".

271. In 8 pages of dense print, the claimant's letter set out the claimant's arguments as to why the DAW outcome was wrong:

271.1. The respondent had, he alleged, shirked its responsibility to investigate the Cottam/Paul dispute. He identified the witnesses whom he believed had provided a version of events different to his own. (At this point he had not received the records of Mrs Heaton's interviews with the witnesses, so he mistakenly believed that Mr Cottam's and Dr Paul's accounts were the same as those of Mrs O'Neill and Professor Webb.) He raised "the fundamental question of whether they have at some point agreed between themselves to present an obviously untrue version of events."

271.2. Mrs Heaton could not possibly have concluded on the evidence available to her that Mrs O'Neill's conduct of 15 October 2012 meeting was unintentional. (It is the claimant's case that it should have been obvious from his appeal letter that one of his grounds of appeal was that the DAW outcome was perverse.)

271.3. On the subject of anonymous informants, the letter referred to the ACAS Guide and the decision of the Employment Appeal Tribunal in *Linfood Cash and Carry Ltd v. Thomson* [1989] IRLR 235, quoting the citation accurately. Each of the last three paragraphs contained an allegation that he had been "discriminated against". There were repeated assertions of "victimization" and an express allegation that "witnesses … appear to have simply used discriminatory stereotypes based on nationality…"

272. Allegation 30 is one of having made a protected disclosure, for which we much examine the claimant's beliefs and motives. He reasonably believed that his letter tended to show that the respondent had unlawfully discriminated against him. By this time, the claimant had been informed that his appeal against his final written warning was unsuccessful. He knew that he had exhausted internal procedures so far as the disciplinary case was concerned. His purpose in maintaining his complaint of race discrimination was not to deflect attention away from his laptop, but to achieve a remedy for the wrongs that he perceived had been done to him.

273. Between 30 May and 5 June 2013, the claimant and Mrs Heaton exchanged e-mails on the subject of the DAW outcome. The claimant notified Mrs Heaton of his intention to appeal. His e-mail stated that he felt victimized. He raised, again, that "one of the people involved in this case has made racist remarks about me in the presence of two witnesses…" Mrs Heaton's reply included this passage:

> "I am clearly very concerned about the statements in your emails relating to victimisation, torment and racist remarks and I would ask that you let me have the evidence to support your assertions. You do

have the right to raise these as a grievance – have you sought advice from [Dr Walden] on this? Let me know if you want to submit a formal grievance."

274. The claimant replied that he was discussing matters with UCU, but did not wish to pursue a grievance, for fear of making his position "more exposed" and "putting witnesses at risk". In response, Mrs Heaton once again encouraged the claimant to let her know if he wanted to take any matter forward through a formal process.

275. On 5 June 2013 Mr Spinks assigned the DAW review to Dr Barker, Head of Compliance and Risk. Dr Barker had never met the claimant before. He introduced himself to the claimant by e-mail on 20 June 2013. His e-mail indicated that he did not propose to interview the claimant. The claimant replied that he had not been expecting to be interviewed. He added a further ground for reviewing the DAW outcome: Mrs Heaton's letter had not been precise enough in its finding as to whether Student S had been asked a leading question about whether she thought she was going to be raped.

276. News of the claimant's DAW review reached Ms Clare in the Records Management Office. By e-mail on 26 June 2013, Ms Clare informed the claimant that the documents in the investigation file would not be available to him until after the DAW review was complete.

Mrs Heaton's motivation

277. We have now found sufficient facts to enable us to consider Allegations 24, 25, 29 and 33:

277.1. We have already recorded the reason why Mrs Heaton did not investigate the Majewski conversation (Allegation 24). Her omission was nothing to do with the claimant's race.

277.2. Mrs Heaton's reason for putting witness evidence to the claimant during the 13 March 2013 meeting (Allegation 25) was not in any way affected by the claimant's race. She wanted to give the claimant a fair opportunity to comment.

277.3. Under Allegation 29 we must consider Mrs Heaton's motivation for deciding to uphold the DAW complaint only partially. She has satisfied us that she was not influenced, consciously or sub-consciously, by the claimant's race, or by the fact that the claimant had made a disclosure of unlawful race discrimination. Her decision was based on her application of the evidence to the numbered complaints, as she understood them, that the claimant had raised in his DAW complaint letter and certain other complaints that she understood him to be raising at the 29 January 2013 meeting, such as the O'Neill/Webb final paragraph.

277.4. Staying with Allegations 25 and 29, we have looked more closely at Mrs Heaton's reasons for not investigating the complaint of race discrimination. In our view, it was a combination of two reasons. One was that, on a literal reading of the DAW complaint letter, there was no complaint of race discrimination. Second, she did not think that the claimant had put forward sufficient evidence of race discrimination for her to investigate that allegation pro-actively. We have expressed our criticism of her reasoning, but we accept it was genuinely the way she thought. She was not prepared

to make the running for him. The claimant had specifically asked for HR to be reactive. We do not think that it was the fact that it was a complaint of unlawful race discrimination that motivated Mrs Heaton to ignore it. Mrs Heaton did not, as the claimant contends, stubbornly refuse to believe that racism could exist in her institution. The e-mail conversation of 30 May to 5 June 2013 makes that clear.

277.5. So far as Allegation 29 relates to Mrs Heaton's failure to deal with every point raised on 13 March 2013 and 27 March 2013, we are not surprised that Mrs Heaton left some points unaddressed. She had numerous complex allegations to consider in the DAW complaint itself. It is entirely unremarkable that she did not go out of her way to look into all the other allegations made by the claimant during the course of the process. Her omission to do so was not tainted by any conscious or subconscious consideration of the claimant's race or any disclosures he made.

277.6. Allegation 33 (if we allow the amendment) is that Mrs Heaton failed between 16 May and 20 June 2013 to address the various matters that the claimant had raised during the meeting of 13 March 2013 and in his e-mail of 27 March 2013. We are not sure what more Mrs Heaton could reasonably have been expected to do between those two dates. She had already formally investigated the DAW complaint and was now inviting the claimant to pursue his further allegations through the appropriate channels. In any event, we are satisfied that Mrs Heaton's omission to go further than she did was nothing to do with the claimant's race and was not affected by any disclosures the claimant had made.

Dr Barker's investigation

278. On 27 June 2013, Dr Barker interviewed Mrs Heaton as part of his DAW review investigation. The purpose of the interview was for Dr Barker better to understand the process that Mrs Heaton had followed. In advance of the interview, Dr Barker prepared a crib sheet containing a list of questions. These questions were relevant and sufficiently probing to demonstrate to us that Dr Barker went about his task conscientiously.

279. Dr Barker did not think it necessary to interview the claimant. This was because he felt he understood the claimant's "appeal" letter sufficiently well to conduct his review. He did not take legal advice.

280. On 5 July 2013, Dr Barker wrote to the claimant to inform him of the outcome. Amongst other things, Dr Barker concluded:

280.1. Mrs Heaton had been right to conclude that the seizure of the laptop could have been better handled. Dr Barker made a specific recommendation for a written procedure to cater for such situations should they arise in future.

280.2. Mrs Heaton had been justified in thinking it impossible to resolve the precise details of the Cottam/Paul dispute.

280.3. Mrs Heaton had been right to criticise the value judgments in the O'Neill/Webb final paragraph.

280.4. On the whole, the investigations concerning the claimant had been properly handled.

280.5. The claimant was encouraged to raise his complaints of race discrimination through formal channels.

281. Dr Barker did not specifically address the question of whether the DAW outcome was perverse. He did not tackle head-on the question of whether it had been open to Mrs Heaton to find that Mrs O'Neill's actions had been unintentional. Under the umbrella of Allegation 36, the claimant invites us to examine the reason why Dr Barker did not specifically address these matters. In particular:

281.1. Was it because the claimant had made disclosures? Our finding is that it was not. What the claimant had asked Dr Barker to do did not sit comfortably with the procedural remit of a Review Officer. It was not Dr Barker's role to correct findings of fact with which the claimant's disagreed. The "perversity" challenge was, in reality, very close to that line. It was accompanied by many procedural objections with which Dr Barker fully engaged.

281.2. We could not find any note of the claimant having put to Dr Barker at any time that he was motivated by race. To avoid any doubt, we could find no evidence from which we could reach a conclusion that considerations of race played on Dr Barker's mind.

282. The claimant did not find out that Dr Barker had interviewed Mrs Heaton until he received Dr Barker's outcome letter. He suspected double standards. It is the claimant's case (Allegation 34) that the reason for the difference in treatment was that the claimant had made protected disclosures. We disagree. We are satisfied that Dr Barker's decision to interview Mrs Heaton and not the claimant was entirely due to Dr Barker's understanding of his remit as a Reviewing Officer. He understood the claimant's grounds for review. He wanted (or "deemed appropriate" in the language of the DAW Procedure) further information about the process that Mrs Heaton had followed. The claimant's like-for-like comparison between his "appeal" letter and the DAW outcome letter (both being 8 pages long) is superficially attractive but flawed. They served different purposes in the DAW review and required a different approach. Dr Barker was not trying to cover up allegations of race discrimination. His outcome letter expressly encouraged the claimant to pursue such allegations using formal channels.

283. On 18 July 2013, the claimant e-mailed Dr Barker to express his dissatisfaction with, amongst other things, Dr Barker's DAW review. The e-mail contained an allegation that documents had been withheld from him and his DSAR had been turned down. By contrast, decisions were being made adversely to him based on the lack of evidence provided by the claimant to support his assertions. In the claimant's opinion, the respondent was applying double standards. (Receipt of this e-mail was the first occasion on which Dr Barker was made aware of this particular allegation). The e-mail opened a window into the claimant's beliefs about the internal grievance process: "I cannot see how, based on this experience, any further grievance would be treated with any less contempt for the principles of natural justice than those already concluded." The final sentence ended, "I have now lost any trust and confidence in my employer."

284. With an eye on Allegation 37, we tried to find evidence of some contact between the claimant and Dr Barker on 7 July 2013. There did not appear to be any. Taking the same approach as Dr Barker in his witness statement, we anticipated that the claimant had probably made a mistake over the date and that he was intending to refer to his e-mail of 18 July 2013. The claimant believed, reasonably, that the information in his e-mail tended to show that the respondent

had breached the implied term of trust and confidence in his contract of employment. He did not, however, believe that he was sending this e-mail in the public interest. His e-mail did not mention anybody's interests other than his own.

285. When Dr Barker received the 18 July 2013 e-mail, he forwarded it to Mr Spinks, but took no further action. We have no evidence that Mr Spinks passed the e-mail on to anyone who played a further part in the management of the claimant.

Sabbatical appeal

286. We now need to rewind the clock a few days. By e-mail dated 20 June 2013, the claimant appealed against the refusal of his sabbatical leave application. One of his grounds of appeal was based on a mistaken belief that, prior to Professor Bailey seeing the application, it had been vetted by Professor Brown who had found no fault with it. The appeal was directed to Professor Luke Georghiou, Vice-President for Research.

287. On 17 July 2013, Professor Georghiou e-mailed Professor Bailey asking for the full version of his reasons for refusing the sabbatical request. His e-mail also enquired as to whether other cases in the Faculty had been turned down in the recent past. Professor Bailey replied the same day with brief details of his previous refusal of study leave in MACE and Physics. Separately, Professor Bailey elaborated on the final sentence of his feedback ("need to get Max back into teaching"). Without going into any details, he mentioned "a disciplinary" and its effect on the claimant's health.

288. On 22 July 2013, Professor Brown e-mailed Professor Georghiou to explain that that year's sabbatical requests had been forwarded by the EEE School straight to the Dean without comment.

289. Professor Georghiou then made his decision. He confirmed the refusal of sabbatical leave. In his view, Professor Bailey's reasons for refusing sabbatical leave were "matters of academic judgment"; the criticisms of the claimant's application were all "matters which could be rectified in a future application". Mrs Heaton informed the claimant of the outcome by letter dated 28 July 2013.

290. Under Allegation 38, we have to consider Professor Georghiou's motivation for this decision. We have not heard oral evidence from Professor Georghiou. We are nevertheless able to infer from the documents that his decision was not influenced in any way by considerations that the claimant had made disclosures of wrongdoing. Professor Georghiou was independent of the Faculty. It is unclear to us why he would want to take "revenge" on the claimant as the claimant's final submissions allege. There is no evidence to suggest that Professor Georghiou was even aware of any disclosures to Mrs Field, Mrs Heaton or Dr Barker. There are no facts from which we could conclude that Professor Georghiou was motivated, either consciously or subconsciously, by the claimant's race.

"Drawing a line"

291. At some point in late 2013, Mrs Heaton took a step back from the claimant's most recent complaint to look at the wider picture. She was anxious to find a way to enable the claimant to "draw a line" under the events about which he had complained, now going back over a year, so that all parties could move forward.

To this end, she approached Dr Walden in an attempt to arrange a three-way meeting between herself, Dr Walden and the claimant. Dr Walden informed Mrs Heaton that the claimant was not interested in meeting her.

The complaint to Professor Brown

292. On 24 October 2013, Ms Clare informed the claimant and the ICO by e-mail that she would release a large quantity of documents, including the claimant's personnel file and from the files relating to the various investigations concerning the claimant over the previous 12 months. She decided to continue to withhold the witness statements (including those of Professors Hamilton and Halsall) taken during the Student S complaint investigation. She did not, however, altogether withhold the record of Mrs Heaton's interview with Mrs O'Neill. This was disclosed to the claimant in redacted form. It will be remembered that, even after redactions, the interview record showed a good deal of what Professor Hamilton had said to Mrs O'Neill. Efforts had been made to preserve Professor Hamilton's identity but, owing to poor redaction, his initials showed through the ink. As we have already observed, the redacted Heaton-O'Neill interview described the no-longer anonymous witness as having stated that the claimant's behaviour towards female students was "dreadful", "dirty" and "smutty". It also revealed that, according to the witness, the claimant had "a reputation in the department with the administrative staff they call him Dirty Max."

293. When the claimant read the Heaton-O'Neill interview he was upset by what Professor Hamilton had apparently said about him. On 29 October 2013, the claimant met with Professor Brown to complain. He insisted on an investigation with the administrative staff. The purpose of such an investigation, the claimant explained, would not be to discover which administrator had been calling him "Dirty Max", but rather to establish than none of them had used this nickname about him at all, and thus expose Professor Hamilton as a liar. Professor Brown was uncertain how to respond. One thing he was not prepared to do was to start interviewing administrative staff himself. There was no procedure for him to do so and he had no line management responsibility over them. After the meeting, he sought advice from Professor Bailey, who suggested he speak to Mrs Heaton. When Professor Brown telephoned Mrs Heaton on 4 November 2013, she said that she would progress the matter appropriately.

294. On reading the mass of disclosed material, the claimant formed the belief that the respondent held further documents falling within the scope of his DSAR. He took this up with Ms Clare in a further request for specific documents. Ms Clare gave a detailed reply. E-mails passed to and fro over the following weeks.

295. Mrs Heaton delegated to Mrs Field the task of responding to the concerns that the claimant had raised with Professor Brown. We are not sure precisely when Mrs Field was given this responsibility, but it is likely to have been some time between 4 and 26 November 2013. At any rate, there was a period of inactivity in relation to this latest complaint. We accept Mrs Field's evidence that there were essentially two reasons for her hesitancy. First, she was unsure what progress had been made in arranging the three-way meeting. Second, she was reluctant to start any investigation before the claimant initiated a formal procedure. She had already attempted one informal investigation and the claimant had been dissatisfied with the result. The claimant asked Dr Baines if there had been any advance, which led to Professor Brown chasing Mrs Field on 27 November 2013. After checking with Mrs Heaton that the "drawing a line" meeting was not going to

happen, Mrs Field emailed the claimant on 29 November 2013 to arrange a meeting to discuss his latest concerns. In the meantime, on 29 November 2013, Professor Brown alerted Mrs Field and Mrs Heaton to three e-mails from female members of staff supporting the claimant. In fact, around this time, the claimant sent Professor Brown approximately 35 statements from various individuals in support of his complaint. In summary, they described the claimant as kind, helpful and professional. The authors of the statements had not witnessed any inappropriate behaviour on the claimant's part.

296. On 30 November 2013 the claimant provided further detail of the claimant's complaint to Mrs Field by e-mail. He specifically referred to the claimant's contention that "a colleague was telling deliberate lies". Balanced against this serious allegation was Professor Brown's concern for the welfare of the colleague in question (Professor Hamilton), who had approached him "in a stressed state".

297. Mrs Field spoke to the claimant on the telephone on Monday 2 December 2013, following which claimant sent her an e-mail. His position, as stated in the e-mail was that "it would be inappropriate for anyone previously involved in my cases and already tainted with their own opinions to be looking at the new 'concerns'". On receipt of this e-mail, Mrs Field emailed Professor Brown on 13 December 2013 to suggest that he should conduct the initial stages of the investigation in accordance with the principles of the informal stages of the grievance procedure. Professor Brown immediately expressed his dissatisfaction with this approach. He advocated an independent investigator. Over the next few days, the claimant and Mrs Heaton exchanged e-mails in which they agreed that Mrs Heaton should not investigate the claimant's complaint either. Following this exchange, Mrs Heaton informed Mrs Field of the need for a clear process. This prompted Mrs Field to meet with Professor Brown on 10 December 2013. The outcome of that meeting was that Professor Brown would write to the claimant to ask him to put his concerns in writing.

The December 2013 grievance

298. Whether prompted by Professor Brown or not, the claimant submitted a written grievance by e-mail on 10 December 2013. Under the heading, "Complained", the claimant identified Professor Hamilton and Professor Halsall. Against Professor Hamilton, the claimant's complaint was "Making false allegations, Bullying, Harassment, deliberately trying to cause dismissal or resignation, perverting the course of disciplinary procedures." The complaint against Professor Halsall was one of "making discriminatory and disparaging comments about the complainant, complicity in Bullying, Harassment, giving incorrect/partial statements in the course of disciplinary procedures". The statement of complaint was followed by a brief narrative. In the narrative, the claimant alleged breaches of the "Statutes of the University" and the "Dignity at Work Policy". He specifically alleged that Professor Halsall had made "discriminatory and disparaging remarks" about him. Although the final sentence expressed the hope that it would be "in everyone's interest to establish the truth", there was no indication of how anyone but the claimant might actually benefit.

299. One feature of the grievance letter, which took on significance in subsequent stages of the process, was that it expressly accused Professor Halsall's comments of being "discriminatory" but did not make such an allegation against Professor Hamilton.

300. The covering e-mail alleged that Professor Hamilton's comments "can now be viewed as stereotyping and racially motivated". It also that Mrs Heaton had failed to act on his complaint in a timely fashion and "might end up putting the University into disrepute by giving the impression of connivance". He urged Mr Spinks to "protect the University's reputation".

301. Accompanying the formal grievance letter was a separate list of 26 "inaccuracies/false statements/errors". A separate covering e-mail indicated that its purpose was "just to set the record straight in the event of litigation".

302. Submitted by the claimant at or about the same time was a more detailed statement in support of his grievance. In his statement, the claimant identified 5 particular comments which he wished "to be discussed". To each comment the claimant gave a separate label:

302.1. S1 - the claimant's behaviour towards female students was "dreadful", "dirty" and "smutty";

302.2. S2 - the claimant had "a reputation in the department with the administrative staff they call him 'Dirty Max'";

302.3. S3 - [Professor Halsall] told me [the claimant] showed him porn on his laptop;

302.4. S4 – Professor Hamilton's "stash of porn" remark;

302.5. S5 – "[the claimant] has told [Student S] that she should be on the pill"

303. In the supporting statement, the claimant asked for an investigation into whether (under S3), Professor Halsall and Mrs O'Neill had "conspired to give similar accounts". The claimant referred to the Majewski conversation and Halsall's "Latin mentality" comment during the Skype conversation of 22 October 2012. He did not, however, include these in the numbered list of remarks that were the subject of his grievance. In support of his complaint about statement S5, the claimant quoted from earlier correspondence with Mrs Heaton. The quoted passage indicated that he had made a remark to Professor Halsall about contraception in order to cut short an unsolicited conversation about Student S. The words that the claimant stated he had used were, "something along the lines of 'Let's hope she is aware of contraception!'". The claimant's supporting statement made a number of detailed legal points, including a discussion of the different legal definitions provided by ACAS, compared to "Employment Tribunal or Civil Court" According to his statement, the investigation should have "the primary objective of publicly clearing [the claimant's] name from the allegations." The supporting statement made clear his view that the statements had unfairly influenced the Student S investigation and the disciplinary case which had so badly affected him.

304. The claimant's supporting statement was accompanied by a 76-page bundle of supporting evidence. Amongst other things, the bundle included the thread of emails and Skype conversation between the claimant and Professor Halsall on 22 October 2012. It also included the record of Professor Halsall's interview with Dr O'Brien.

305. We have to assess, for the purpose of Allegation 40, whether the claimant believed that the information disclosed in his grievance tended to show a breach of legal obligation. In our view, the claimant did hold that belief. He thought he was alleging that both Professor Halsall and Professor Hamilton had unlawfully

discriminated against him by making false statements based on national stereotypes. He also thought that his grievance was describing a miscarriage of justice, in the sense that the impugned comments had unfairly impacted the Student S and pornography investigations. Moreover, we think that it was reasonable for him to think that his words conveyed that meaning.

306. The claimant thought that he was making this disclosure in the public interest. That is not to say that his motives were entirely altruistic. His main purpose was undoubtedly to clear his name. He thought that, by appealing to the respondent's desire to protect its own reputation, he was more likely to achieve the personal vindication that he wanted. But he did also want the outcome to include a change to the respondent's procedures to ensure that none of his colleagues were put through the same experience as he had been. Bearing in mind the size of the University and the number of academic colleagues who could be potentially affected, we think that the claimant had the public interest in mind as well as his own. He reasonably believed, therefore, that his disclosure was in the public interest.

307. We pause at this point to examine Allegation 39. We are satisfied that both Mrs Field and Mrs Heaton did their best to find an appropriate procedure for investigating the claimant's concerns. They were not, as the claimant alleges, "using procedures as a smokescreen", trying to "buy some time" or avoiding having the matter investigated at all. The delay had nothing to do with the claimant's race or any disclosures he had made. There was about one month's inactivity during which Mrs Field believed that efforts were being made to resolve matters with Dr Walden's help. When Mrs Field discovered that this was not going to happen, she made considerable efforts over the next two weeks to try and find a procedure acceptable both to the claimant and Professor Brown. Much of the delay could have been avoided had the claimant invoked the grievance procedure in the first place.

308. When Mrs Heaton received the claimant's grievance, she and the claimant had a further e-mail conversation. The claimant rejected Mrs Heaton's attempt to arrange for the grievance to be resolved informally. He insisted that EPS Faculty HR be kept out of the process of appointing an independent investigator.

309. On 11 December 2013, the ICO provided the claimant with the written outcome of his complaint. In summary, the ICO took the view that it was unlikely that the respondent had complied with the claimant's DSAR. In particular, the ICO observed that exempt material did not appear to have been released within the statutory timescale. That finding related to the material withheld on the ground that it formed part of ongoing internal procedures. Once those procedures had been exhausted, as appeared to be the case between 18 July and 29 October 2013, the previously-exempt data should have been provided as soon as practicable. The ICO also noted that the respondent had been asked to review the witness statements given in confidence (during the Student S investigation) and seek consent from those witnesses so that as much personal data as possible could be released.

310. The claimant's grievance was formally acknowledged by Mr Spinks on 13 December 2013. He assured the claimant that the investigating manager would be appointed from outside the EPS Faculty and that Mr Mullen, rather than Mrs Heaton, would manage that process.

311. The investigation of the December 2013 grievance was assigned to Professor Dean Jackson from the Faculty of Life Sciences. Professor Jackson agreed to take on this responsibility on 8 January 2014. Immediately afterwards he spoke to Mr Mullen, Deputy HR Director, to arrange a briefing meeting. Contrary to the claimant's contention, we are satisfied that Mr Mullen did not tell Professor Jackson what the outcome should be or imply the likely outcome by saying that it would be "an easy case".

312. Professor Jackson read a large quantity of material supplied to him by Mr Mullen. As he read, it also became clear to him that an important piece of evidence was missing. This was the record of Professor Hamilton's September 2012 interview. Before meeting the claimant, Professor Jackson obtained a copy of the document. He did not pass a copy onto the claimant, who still had to make do with the redacted Heaton-O'Neill interview.

313. On 24 January 2014, at Professor Jackson's request, the claimant sent him copies of the 35 statements that the claimant had sent to Professor Brown.

314. On 29 January 2014 Professor Jackson met with the claimant to discuss his grievance. Professor Jackson was assisted by Mr Martin Banks, HR Partner from the Faculty of Humanities. Contemporaneous notes were taken by Ms Maggie Martin. Owing to Dr Walden's unavailability, the claimant's companion at this meeting was Dr Barnes. Our bundle contains detailed notes that Dr Barnes prepared and initialled on the day after the meeting. The claimant annotated Dr Barnes' notes in handwriting some time afterwards. Dr Barnes' notes, with and without the annotations, were disclosed to the respondent for the first time in March 2016.

315. Before describing in detail the events of the meeting, we must ask ourselves why it took until 29 January 2014 to arrange it. Paragraph 4.9 of the Grievance Procedure stated that such a meeting would normally take no more than 10 working days following receipt of the written grievance. This was not, however, a normal case. Investigators had to be drawn from the academic staff and Human Resources staff completely outside the EPS Faculty. This process had to be coordinated by Mr Mullen. The holiday period would inevitably have prolonged the process. In the case of Professor Jackson, he was only appointed on 8 January 2014. We are satisfied that he did not deliberately delay the meeting. So far as Professor Jackson was concerned, we are satisfied that the timing of the meeting was completely unaffected by any considerations of the claimant's race or the fact that the claimant had alleged discrimination in his disclosures. In the case of Mr Mullen, we cannot find any evidence from which we could conclude that those factors motivated him to delay the meeting. To the extent that Allegation 42 contends otherwise, we reject it.

316. During the meeting, amongst other things:

316.1. The claimant pointed out that, as a result of the poor redaction, it was now apparent that Professor Hamilton was the anonymous witness. Professor Jackson did not disagree.

316.2. Although not contemporaneously noted by Ms Martin, Professor Jackson probably did make reference to there being "elements of the rumour mill". Dr Barnes recalled the phrase within a day of the meeting. Such an opinion would have been a natural reaction to seeing Professor Hamilton's 29

November 2012 interview and the reference to "Dirty Max". We are not able to state what the precise context was.

316.3. Professor Jackson made an observation that in December 2012 or January 2013, the claimant's line manager should have intervened at an earlier stage to address the claimant's health issues. It is unlikely, in our view, that Professor Jackson said that there had been a "catalogue of irrational decisions" or a "sequence of blunders" or anything as strongly-worded as that. That was not Professor Jackson's opinion. The claimant could not recall the precise words at the time of making tracked changes to the minutes, and his handwritten annotations to Dr Barnes' notes are less likely to be reliable than Ms Martin's contemporaneous version. Had Professor Jackson made such a concession, we would have expected Dr Barnes to have written it down.

316.4. In response to a question from Professor Jackson, the claimant explained that "bullying" and "harassment" were "synonymous in internal proceeding but in court there is a difference". Later in the meeting, the claimant asked if the respondent's solicitor "had mentioned vicarious liability".

316.5. The claimant told Professor Jackson that he had sent e-mails to Mrs Heaton saying that Professor Bailey had victimised him.

316.6. In answer to Professor Jackson's question, the claimant stated that an improvement to the system would be "a very good outcome".

316.7. Professor Jackson queried whether the statements about which the claimant complained were "misinterpretation or lying"? There is a dispute as to whether, at this point, Professor Jackson said, "The statements are definitely false." On this point, we prefer Professor Jackson's evidence. The claimant's version does not appear in Dr Barnes' notes.

316.8. There was a discussion of the number of tribunal cases that had been brought against the respondent. The claimant said that he had heard from his trade union that there were "significant problems, irrational decisions, mostly involving foreign members of staff."

316.9. The claimant briefly described the Majewski conversation.

316.10. The claimant offered Professor Missous, Chris Darkin, Ian Hawkins and Jackie Platt as names of witnesses to separate incidents involving Professor Hamilton.

316.11. The claimant voiced his suspicion, in relation to the Student S complaint, that Professors Hamilton and Halsall had "put the student up to this". He called for the investigators to gain access to their e-mails.

316.12. There was no explicit reference to the Skype conversation of 22 October 2012 with Professor Halsall or his use of the phrase, "Latin mentality".

317. On 31 January 2014, the claimant wrote to Professor Jackson and legal definitions of the burden and standard of proof and the "*mens rea*" in criminal offences. In conclusion, the claimant stated that "it would be utterly unacceptable based on the present information if [Professor Hamilton] was deemed not to have lied."

318. On 13 February 2014, the claimant sent his proposed amendments to the minutes of the 29 January meeting, together with a further letter complaining about the respondent's "withholding of evidence". The focus of the letter was on the statement initially provided by Professor Hamilton in the Student S investigation. The letter made reference to two reported employment law cases, namely *Linfood* and *Burchell.* His concluding paragraphs warned the respondent that he might "pursue breaches of contractual obligations for non-compliance with the appropriate procedures" and/or "consider seeking an Order from the Tribunal or Court requesting full disclosure of evidence".

319. On receipt of the claimant's proposed version of the minutes, Professor Jackson and Mr Banks cross-checked the claimant's version with Ms Martin's handwritten notes. Professor Jackson agreed that many of the proposed changes should be incorporated. There were, however, some amendments that bore no relation to the handwritten notes. These changes Professor Jackson and Mr Banks would not allow. Quite correctly, we find, they refused to include Professor Jackson's alleged admissions about a "sequence of blunders", "catalogue of irrational decisions", or "The statements are definitely false." They also refused to include the "rumour mill" comment, which, on our findings, probably had been said. The most likely explanation is that Professor Jackson forgot his precise words and was relying on Ms Martin's notes.

320. On 28 February 2014, the claimant e-mailed Mr Banks to complain about the delay. His e-mail warned Mr Banks that he would have to consider "resolution through the Courts". Unfortunately, the e-mail coincided with the beginning of the busiest period of the year for Professor Jackson. During March and April, as well as conducting this investigation, he had to conduct performance development reviews for 37 members of staff, together with promotion and probation reviews.

321. On 5 March 2014, the investigators spoke to Professor Hamilton. He was given a copy of his original O'Neill/Webb interview record to refresh his memory. Professor Jackson questioned him on various aspects of it. For example, Professor Jackson asked Professor Hamilton what he meant by his comment that the claimant's "attitude towards students is dreadful". Professor Hamilton replied that the claimant had a "flippant, cocky attitude". In answer to similar questions about his words, "sleazy" and "smutty", Professor Hamilton explained that he had been referring in particular to the claimant's remarks about contraception. Professor Jackson put it to Professor Hamilton that it "looks like it is a witch hunt," adding, "are these moderated?" In reply, Professor Hamilton stated that he was expressing his honest feelings. Professor Hamilton told Professor Jackson that the claimant had been "black listed by funders for poor submissions". Whether this was literally correct or not, it was certainly misleading as, by then, the claimant had had his funding approved. He also stood by his account of the "stash of porn" remark: "This was clearly a 'joke', but I did not view it as that way." When Professor Jackson asked Professor Hamilton who had told him about the claimant's supposed nickname, "Dirty Max", Professor Hamilton replied that he would only name his source if it remained off the record. After having been given an assurance of confidentiality, Professor Hamilton told Professor Jackson that his source had been Professor Gibson. With this exception, Professor Hamilton agreed to waive the confidentiality on which he had previously insisted in relation to his original statement.

322. On 7 March 2014, it was Professor Halsall's turn to be interviewed. There was a discussion of the incident at the time of Student S's viva. Professor Halsall

confirmed he heard "raised voices" and an "animated meeting". He was asked searching questions about his statement to the Student S investigation and about the possibility of having colluded with Professor Hamilton. Referring to the train journey, he confirmed that the claimant had shown him "porn…in a social context". It is unclear whether Professor Jackson asked Professor Halsall about the Skype conversation on 22 October 2012 or about his use of the phrase, "Latin mentality". There appears to be a clash between Professor Jackson's witness statement and the record of the interview on this point. We do not find it necessary to reach a conclusion. The "Latin mentality" comment was not central to the investigation: the claimant had not mentioned it during his interview or listed it in S1 to S5.

323. Next to be interviewed was Professor Gibson on 10 March 2014. Professor Gibson could not recall having told Professor Hamilton about the "Dirty Max" comment. In Professor Gibson's opinion, his lack of recollection was not surprising in view of the passage of time and the fact that such a comment would have been "only of passing interest/importance to him". He did, however, recall an occasion when the claimant had, in his view, acted unprofessionally, focusing on the low-cut blouse of an attractive female student who was being interviewed.

324. The same day, Professor Jackson and Mr Banks interviewed Jackie Platt, the former head of administration at the EEE School. Ms Platt was adamant that she had not heard the "Dirty Max" comment and spoke highly of the claimant's interactions with students.

325. Following up the claimant's suggestion, Professor Jackson and Mr Banks interviewed Mrs Knowles on 14 March 2014. She had, she said, only heard the "Dirty Max" comment from the claimant himself and not from the administrative staff. It was her opinion that Professor Hamilton was "not always truthful" and was "more cunning" than Professor Halsall.

326. By 18 March 2014, Professor Jackson had not yet concluded his report. The claimant e-mailed him on that date to call for him to act with greater urgency. His e-mail asked whether interim measures had been place, such as suspension of the alleged perpetrators, or removal from Professor Bailey, Mrs Heaton and a large number of EPS Human Resources staff of virtually all responsibilities in relation to the claimant. The latter measure was, in the claimant's view, necessary to avoid a conflict of interests. He reminded Professor Jackson of his disclosure request, stating that the respondent's failure to comply was obstructing him "in initiating legal proceedings against Profs Hamilton and Halsall, and the Directorate of HR". The e-mail was copied to Mr Mullen and Mr Banks. Professor Jackson e-mailed two separate replies on the same day. He outlined the interviews that had taken place to date. In relation to the interim measures, Professor Jackson's response was that they lay outside his mandate. He had had no interaction with Human Resources at EPS so could not comment on any reassurances that they might give. So far as we know, Mr Mullen and Mr Banks did not take it upon themselves to approach EPS Human Resources or to suspend any individuals.

327. On 31 March 2014, Professor Jackson interviewed Dr Majewski by telephone. He recounted a conversation a colleague (Dr Sligh) in the cafeteria, during which Professor Halsall approached them and started talking about the claimant. According to Dr Majewski, Professor Halsall had told them about the problems with Student S. As recorded in the interview notes, Dr Majewski "noted that [the

claimant's] temper was a problem because he was Italian." Dr Majewski did not mention any reference to Silvio Berlusconi.

328. In our view, Professor Jackson missed an opportunity here. Although Dr Majewski had not substantiated the allegation made by the claimant, there was clearly sufficient evidence to call for an explanation from Professor Halsall. Professor Jackson could have arranged a follow-up interview with Professor Halsall to discuss it. This omission would have been more serious had the Majewski conversation been a central allegation in the claimant's December 2013 grievance. One practical result is that Professor Halsall did not have a chance to respond to Allegation 24 until he was shown the Schedule.

329. Professor Jackson decided not to interview Professor Missous. He did not believe that Professor Missous could contribute directly to the claimant's specific grievance complaints and was more likely to make comments about Professor Hamilton in general.

330. Before reaching a conclusion, Professor Jackson spent one day reading academic literature on the subject of lying. His considered view was that a person tells a lie if they confirm something which they know to be false with intention of making another person believe that it is true.

331. We are now in a position to consider Allegation 43. It contains a number of strands, each requiring particular findings of fact:

331.1. It is the claimant's case that Mr Banks deliberately "applied" omissions to the minutes. We agree, but only in the sense that he (with Professor Jackson) refused to include certain passages that the claimant wanted to have included. We have not heard from Mr Banks, but we have no reason to believe that his thought processes were any different from those of Professor Jackson. They took the decision together. There is nothing from which we could conclude that Mr Banks' decision was wittingly or unwittingly affected by considerations of the claimant's race or of any protected disclosures the claimant made.

331.2. The allegation, as it appears in the Schedule, is that the respondent failed to "take any action in relation to the issues raised". As an assertion in general terms, it is plainly incorrect. Professor Jackson interviewed many witnesses including Dr Majewski, Ms Platt, and Professor Gibson, whose name the claimant had not even suggested.

331.3. In final submissions, the claimant concentrated on a failure to take action in relation to perceived conflicts of interest raised in his e-mail of 18 March 2014. There is nothing from which we could infer that such omission was anything to do with the claimant's race or any disclosures he made. By 18 March 2014, Professor Jackson's investigation was nearing its conclusion. It would be difficult for all aspects of the claimant's employment to be managed without any involvement from EPS Faculty HR. The claimant had not applied for promotion in 2014 and there were no pending decisions on which Professors O'Brien, Bailey, or Webb could exert any influence while the grievance process was ongoing.

332. On 16 April 2014, Professor Jackson informed the claimant of the outcome of the grievance. The outcome report ran to eight pages and was jointly written by Professor Jackson and Mr Banks. Here is our summary. To deal with the claimant's various attacks on it, we have found it necessary to add our own

critical appraisal, which we have set out in *italics* so as to distinguish it from Professor Jackson's reasoning:

332.1. The grievance in respect of S1 ("dreadful", "dirty", "smutty") was not upheld. In the investigators' opinion, Professor Hamilton had an "excellent recall of statements made at the time" and was "able to justify all statements made". He had been "clearly genuinely appalled by aspects of [the claimant's] behaviour" and S1 had been his expression of "his personal feelings" towards the claimant. *In our view, this was a conclusion that Professor Jackson genuinely and reasonably reached. The claimant challenged Professor Jackson on the relevance of Professor Hamilton's "excellent recall" in circumstances where he had been allowed to refresh his memory from the original O'Neill/Webb interview record. We accept Professor Jackson's explanation that he thought Professor Hamilton had a good memory of the events themselves which provided the context for his statements during the Student S investigation*.

332.2. With regard to S2, the investigators rehearsed and evaluated the evidence at some length, including the evidence of Professor Gibson, whom they did not name. The investigators contemplated that Professor Gibson might have told Professor Hamilton about the claimant being called "Dirty Max", and might subsequently have forgotten having said so. In the investigators' view, such a possibility "may not be so surprising". They found no evidence to support the suggestion that the female administrative staff had actually called the claimant, "Dirty Max". Nevertheless, the investigators found insufficient evidence to substantiate the view that Professor Hamilton's comment was "a pack of lies" as the claimant had alleged. They believed that Professor Hamilton "thought that the use of this phrase was reflecting common perception at the time". They could not find evidence to support a finding that Professor Hamilton's motivation was to fabricate a case against the claimant. They noted that the context was an investigation into an allegation of sexual harassment.

Our opinion in relation to this finding is as follows:

(a) The claimant criticises Professor Jackson for not having applied the correct legal definition of recklessness, taken from the criminal law. There is no merit in this criticism: the investigation was not a criminal court.

(b) Having said that, our opinion is that Professor Jackson's conclusion would have been more robust if they had expressed a clear finding as to what, if any, basis Professor Hamilton had had for making his comment. If they found Professor Gibson had been the source, Professor Hamilton would not have been telling "lies" by merely passing it on during the O'Neill/Webb interview. If Professor Gibson had not used that phrase at all to Professor Hamilton, it was hard, on the investigators' findings, to understand how Professor Hamilton could have genuinely believed in the truth of what he was saying. If the investigators were unable to make a finding as to what Professor Gibson told Professor Hamilton, it would have been better if they had said so in clear terms.

(c) We also think that best practice would have required Professor Jackson to engage squarely with the claimant's allegation that

Professor Hamilton's comments had been based on national stereotypes. Whilst not in the grievance letter itself, that allegation was plainly raised in the covering e-mail.

(d) The claimant goes further. It is his case that Professor Jackson was obliged to reach a conclusion on the balance of probabilities whether Professor Hamilton had heard the phrase, "Dirty Max" used about the claimant. Here we disagree with the claimant. It is not an abdication of responsibility for an investigator to decide that the evidence is inconclusive. He or she need not strive to make contentious findings of fact, especially where the allegations are serious and the evidence is contradictory.

332.3. Professor Jackson and Mr Banks were satisfied that Professor Halsall and Mrs O'Neill had not "conspired" as alleged by the claimant. Alluding to the incident on the train, they accepted that Professor Halsall had been aware of "content of a sensitive nature" on the claimant's laptop, consisting of "naked images of a female friend". The use of the word "porn" in statement S3 was "a matter of individual interpretation". They did not think it necessary to decide for themselves whether the images were pornographic or not. *We find not only that this was Professor Jackson's genuine view, but that it was fully justified on the evidence.*

332.4. The investigators did not reach a conclusion as to whether or not the claimant had told Professor Hamilton about a "stash of porn" (S4) or whether Professor Hamilton had lied about such a conversation. They declined to re-visit the decisions made in the disciplinary and appeal process in relation to the material found on the claimant's laptop. *In fact, both Professor Bailey and Professor Coombs had steered clear of making a finding as to what the claimant had told Professor Hamilton. Professor Jackson could, in theory, have pursued that line of enquiry without disturbing the disciplinary or appeal findings. We understand, however, that in practice, it would have been difficult to keep such an investigation on track. There would be an ever-present risk of being diverted into the question of whether the claimant actually did have pornographic material on his computer.*

332.5. In relation to statement S5, the investigators could not resolve the precise words or context of what the claimant had said about Student S and contraception. Taking the claimant's own words, the investigators expressed their opinion that it was "entirely inappropriate and unprofessional for any member of University staff to discuss the contraceptive needs of students under their care". *We find no fault with this conclusion.*

332.6. The investigators could find no evidence of conspiracy between Professor Halsall and Professor Hamilton. In coming to this view, they took into account the nature and frequency of their professional and social interaction. *This was a reasonable conclusion on the evidence. Unlike us, the investigators had not been provided with the e-mails passing between Professors Hamilton and Halsall. Even those e-mails did not show conspiracy to try to cause the claimant's dismissal, as the claimant's grievance had alleged.*

332.7. The claimant had not been bullied or harassed. The investigators regarded "the key to this assessment" as "whether actions or comments made during this case could be viewed as demeaning and unacceptable to

the recipient". *This was not a strict legal definition of harassment, but concentrated appropriately on the perspective of the alleged victim.* In the investigators' view, both Professor Halsall and Professor Hamilton had given statements to the Student S investigation "in good faith" and "without malicious intent".

332.8. The various comments S1 to S5 were found to have had "limited material influence" on the decisions made in the Student S investigation or the disciplinary case.

332.9. The outcome letter quoted the Skype message conversation and Professor Halsall's remark about the claimant's "Latin mentality". The phrase was acknowledged to have "racial connotations" but "must be taken in the broad context of this very frank and personal online discussion." In that context, the investigators did not consider the phrase was to be racially motivated or to constitute harassment. Part of Professor Jackson's reasoning was based on his findings in relation to the Majewski conversation. His finding was that, during the conversation, Professor Halsall had referred to the claimant's "Latin temperament". In Professor Jackson's view, although this phrase was inappropriate, Professor Halsall must have felt that it was warranted, based on Professor Halsall's own observations of the claimant's behaviour, and in particular, the "episodes of shouting" between the claimant and Student S. *Here, Professor Jackson accepts that he made a mistake. In fact, Dr Majewski had not used the phrase, "Latin temperament" in his interview. The confusion probably arose, in our view, from the fact that the claimant had himself used this phrase in his version of the Majewski conversation. He used that phrase in his e-mail of 27 March 2013 in the course of the DAW complaint. Even if Professor Jackson did not see that actual document, it is likely that Professor Jackson saw or heard something to associate "Latin temperament" with the claimant's version of the Majewski conversation.*

332.10. Professor Jackson did not record any finding as to precisely what Professor Halsall had said during the Majewski conversation. The allegation was that Professor Halsall had likened the claimant to Silvio Berlusconi. Though not articulated in the outcome letter, it was clear that that particular allegation was not substantiated – Dr Majewski's interview did not mention such a remark at all. *In our view, there were two respects in which this aspect Professor Jackson's outcome report fell short of best practice. First, it would have been preferable had Professor Jackson expressed a view about what Dr Majewski had actually said. If what Dr Majewski had said was true, it would suggest that Professor Halsall harboured a stereotypical view of the tempers of Italian men. Such a finding would have been relevant to the "Latin mentality" remark. Second, Professor Halsall appeared to regard Dr Majewski's evidence as less reliable than that of Professor Halsall because the former was "hearsay". That view was based on a misunderstanding of hearsay. Professor Jackson was not investigating whether or not the claimant's nationality was the cause of his temper. He was investigating whether Professor Halsall made a racially stereotypical comment. Dr Majewski was reporting having heard Professor Halsall make such a comment. Dr Majewski's account was direct evidence of what Professor Halsall had said.*

333. These findings bring us to Allegation 44. The claimant's case is that the grievance was "turned down", "the content of the response was flawed" and "the outcome included inappropriate conclusions concerning justification of Professor Halsall's use of racial references to the claimant's Latin mentality". As to these allegations:

333.1. We are satisfied that Professor Jackson's decision on the grievance was based on his view of the evidence and was not influenced in any way, consciously or otherwise, by the fact that the claimant had made disclosures about race discrimination.

333.2. There were aspects of Professor Jackson's reasoning that were, in our view, imperfect. But we are nonetheless able to make a positive finding that these flaws were not the product of any conscious or subconscious motive to ignore the claimant's complaints of discrimination.

333.3. Professor Jackson made a mistake about Professor Halsall's supposed use of the phrase, "Latin temperament". Was this, we ask ourselves, Professor Jackson consciously or sub-consciously misreading the evidence to find a way to excuse Professor Halsall's use of discriminatory language? We are persuaded that it was not. It must not be forgotten that Dr Majewski's evidence, and the Skype exchange, were on the periphery of this grievance. The focus was on statements S1 to S5. The claimant's actual allegation relating to the Majewski conversation had been unsubstantiated.

333.4. In case the law requires us to do so, we have looked for evidence of Professor Jackson's decision having been manipulated by others, such as Mr Banks, Mr Mullen, or persons unknown in Human Resources, whose motivation we might then have to consider. We cannot find any evidence of such manipulation.

334. This is a convenient opportunity to return to that part of Allegation 24 that concerns the Majewski conversation itself. What did Professor Halsall actually say? In our view, it is very difficult to make a finding. The only witness to the conversation from whom we have heard from directly is Professor Halsall. He denied saying that the claimant's temper was because he was Italian. Dr Majewski's version given to Professor Jackson is that Professor Halsall did make that statement about the claimant. But there are 4 problems with accepting it. First, Dr Majewski's version could not be tested in the tribunal. Second, it is different from what Dr Majewski was reported by the claimant to have heard. Third, the conversation happened some 4 years ago. Most fundamentally, however, the phrase, "because he is Italian" is not what Allegation 24 actually alleges. The claimant's case is that whilst in the cafeteria Professor Halsall said "that the problem with the claimant was his Latin mentality" and "who does he think he is acting like Berlusconi". There is no reliable evidence that he said either of those things.

335. On 16 April 2014, Mr Mullen e-mailed Professor Bailey, Professor Brown, Mrs Heaton and Mrs Field to inform them of the grievance outcome. Professor Bailey replied, "Thanks – I think we should now had to a review of all the grievance complaints from [the claimant] and have a position for any further cases." Mrs Heaton agreed. In fact, no formal review took place. We accept Mrs Heaton's evidence that there was a discussion between Heaton and Field in a one-to-one meeting but they did not think any further action was necessary.

The grievance appeal

336. By letter dated 22 April 2014, the claimant appealed against the grievance outcome. There were eight grounds of appeal. In relation to statement S1, his ground was that "In internal proceedings, the principle of *res ipsa loquitur* (the thing speaks for itself) applies. Also regarding S1, the claimant drew attention to the definition of harassment in the DAW Procedure. That definition included "excessive and/or unwarranted criticism". Accordingly, the appeal letter argued, the investigators should have asked "whether his recklessness in providing baseless and slanderous comments can be reasonably believed to constitute Harassment under the test of foreseeability." He criticised Professor Jackson for confining his enquiry to whether Professor Hamilton had made comments in good faith. With regard to S3, the claimant observed that "the handling of [Professor Hamilton's] statement was in December 2013 determined to be in breach of the [Data Protection Act] by the ICO." The final ground of appeal was, "The assertion that it was my own fault that I am labelled with racial stereotypes is offensive, irrational and in itself racist."

337. In June 2014, the claimant was asked for his availability to attend an appeal meeting. He supplied dates and, in response to a further request in July 2014, did so again. A meeting was scheduled for 29 July 2014. Unfortunately, that meeting ended up being postponed owing to Dr Walden's unavailability. It was eventually rearranged to take place on 29 September 2014.

Further documents sent to the claimant

338. On 30 April 2014, the claimant re-opened his e-mail correspondence with Ms Clare. Now that Professor Hamilton had agreed to waive confidentiality, the claimant insisted on full compliance with his original DSAR. He asked for "all the remaining correspondence" between Mrs O'Neill, Professor Webb and members of IT staff and "all other documents related to my cases". Ms Clare was under the impression that all outstanding documents would be supplied to the claimant as appendices to the grievance outcome. It took a further email from the claimant to disabuse her of that notion. On 11 May 2014, the claimant further requested e-mails passing between Professors Hamilton and Halsall. After some to-ing and fro-ing, Ms Clare agreed to request these e-mails directly from the two individuals, but declined to search the server for deleted emails.

339. In an e-mail on 16 June 2014, Ms Clare disclosed a large quantity of documents including the full investigation file into the Student S complaint (including Professor Hamilton's 3 September 2012 interview) and the unredacted Heaton-O'Neill interview. These documents were followed by the notes of (by then) Professor O'Brien's interview with Professor Hamilton. Ms Clare informed the claimant on 3 July 2014 that both Professor Hamilton and Professor Halsall had confirmed that there were no more e-mails to disclose. The claimant replied that he would "get in touch with my solicitor immediately". The same afternoon he e-mailed again, stating that he had "received advice from my counsel" and that "failure to comply now will result in us seeking a disclosure order from a Court or Tribunal in due course".

Disclosure to Mr Conway, sabbatical request and appeal correspondence

340. On 2 July 2014, the claimant e-mailed Mr Conway, the Deputy Secretary, requesting a meeting. His e-mail stated that he was approaching Mr Conway "under … Public Interest Disclosure Procedure". He wished to discuss concerns

"which I fear might constitute breaches of the Fraud Act and Data Protection Act". They met twice over the next two weeks, talking together for nearly 3½ hours. During the course of the meetings, the claimant told Mr Conway:

340.1. that he believed that certain e-mail exchanges (in particular, between Professors Halsall and Hamilton) had been withheld from him;

340.2. that he believed that certain documents had been modified, in particular that the interviews of Professors Halsall and Hamilton in the Student S investigation did not match what was set out in the Heaton-O'Neill interview; and

340.3. that he had serious concerns about omissions that Mr Banks had made to the minutes of their meeting to discuss the December 2013 grievance.

341. We are satisfied that the claimant reasonably believed that these assertions, in particular that documents had been modified and that content had been omitted from minutes, tended to show that employees had acted dishonestly, committed the criminal offence of fraud and breached obligations under the Data Protection Act 1998.

342. It is probable that the claimant genuinely believed at this time that he was raising these matters in the public interest as well as in his own interests. This explains his use of the Public Interest Disclosure Procedure was the most appropriate vehicle for raising these concerns. In contrast to the December 2013 grievance, however, our finding is that it was not reasonable for him to hold that belief. This is because the claimant did not mention anything apart from his own personal data and he did not refer to the impact of the alleged wrongdoing on anybody but himself.

343. Following the meetings, the claimant e-mailed to confirm to Mr Conway that he considered the response to his DSARs to be complete but he reserved his right to seek disclosure through channels outside the University. Mr Conway's reply, that same day, included this advice:

> "If you do intend to raise your concerns through a formal route, such as the Public Interest Disclosure Procedure, you are entitled to do so; however, I would advise that you might consider this after the outcome of your current appeal."

344. Later that day, the claimant e-mailed Mr Conway, stating, "I will decide after the appeal what to do, though, as you can imagine an unsatisfactory outcome through a further irrational decision will reduce drastically any chance of resolving this dispute without resorting to a tribunal."

345. Mr Conway sought legal advice from the Office of the General Counsel about what to do in the light of his meetings with the claimant. He did not tell anybody else about what the claimant had told him.

346. In the meantime, the claimant made a renewed request for sabbatical leave. It was considered by the EEE School Sabbatical Leave Committee and was one of four applications passed for recommendation to the Dean. Professor Brown duly informed Professor Bailey on 20 June 2014 of the four recommended applications. Generically, Professor Bailey enquired whether the teaching could be adequately covered, whether there would be additional costs and how the sabbatical would be assessed. Following a discussion, with Professor Brown, Professor Bailey approved the applications including that of the claimant.

347. On 16 July 2014, the claimant e-mailed Natalie Thompson-Vassel, Directorate Support Services Assistant with some queries about the evidence that would be considered at the appeal meeting. What followed was a chain of correspondence between the claimant and Ms Jenny Knights, HR Partner within the Faculty of Humanities. This chain included an e-mail sent by the claimant on 29 July 2014, in which the claimant mentioned the "inevitability for tribunal proceedings to arise".

Professor Hamilton's promotion

348. In August 2014, Professor Bailey was faced with the vacant role of Director of the PSI. He decided to appoint an Acting Director to fill the gap. It will be remembered that Professor Hamilton, for some years, had been Deputy Director. Professor Hamilton's name was not at the top of Professor Bailey's list, but when he asked around the Faculty, he was persuaded that Professor Hamilton would be the best person for the job. Professor Hamilton was accordingly appointed.

349. At the time Professor Bailey made his decision, he knew that the claimant's December 2013 grievance had not been upheld and that there was an appeal pending. He did not know the precise findings. At any rate, he did not understand Professor Jackson to have found that Professor Hamilton had made any false statements about his colleagues. Had he interpreted the 2013 grievance outcome in this way, it would not have affected his decision about whom to appoint to the role. It might have caused him to recommend additional training.

350. Contrary to Allegation 46, we are satisfied that Professor Bailey did not time his decision in order to make a mockery of the claimant, or for any reason whatsoever to do with the claimant's race or any disclosure the claimant had made.

351. At some point in 2014, probably also August 2014, Professor Halsall was promoted to fill the role of Head of the EMD Group, now vacated by Professor Hamilton. That decision was made by Professor Brown.

The appeal meeting

352. The management side prepared a bundle of 274 pages. In support of his appeal, the claimant provided a further bundle of some 450 pages, together with a 16-point summary of "Factual Inaccuracies or Misrepresentations" in Professor Jackson's report.

353. Within the claimant's bundle was a statement dated 12 May 2014 from Dr Raman Garg. The statement engaged with the following extract from Professor Hamilton's 3 September 2012 interview:

> "[Professor Hamilton] is only aware of two problems with [the claimant] in the past. One was an Indian PhD student (male) that [the claimant] fell out with and he went back to India and submitted his thesis. [Professor Hamilton] was required … to sort out an external examiner as if he were the supervisor. [Professor Hamilton] is not aware of the nature of the falling out."

354. Dr Garg stated that the claimant had taken pains to help him in his PhD and did not mention any falling out. He explained that he had submitted his thesis from India without the claimant's knowledge. His statement did not explain who had made the arrangements for an external examiner.

355. As with previous bundles, the claimant's appeal bundle also contained numerous reported employment law cases. As well as *Linfood* and *Burchell,* the claimant included the employment tribunal's judgment and reasons in the case of *Howard v. Metropolitan Police.* In summary, the tribunal had found that a black female police officer had been singled out for hostile and aggressive treatment without any credible explanation. She was the only black woman in the unit. The perpetrator had views about colleagues' treatment of her based on sex and race. From those facts the tribunal could conclude that the reason for her treatment had been because she was black and because she was a woman. The case also set out clearly the time limit provisions applicable to cases of discrimination.

356. After two changes of personnel, the person eventually appointed to chair the appeal was Dame Sue Ion, one of the lay members of the Board of Governors. Other members of the panel were Professor Gregory and Professor Calam.

357. Dame Sue spent an entire weekend reading the papers in preparation for the meeting.

358. The claimant prepared an opening statement for the appeal. He alleged that Mrs O'Neill had "interfered with the editing" of the Arnold report, so that it "lacked important information". It referred again to courts and employment tribunals. His statement concluded with an assertion that his nationality had "played a significant role in the discrimination that I have suffered".

359. The claimant also prepared a 13-page synopsis. It detailed the way in which he perceived had been treated over the previous two years. This included the impact of Professor Hamilton's and Professor Halsall's alleged lies on the subsequent internal proceedings. He referred, amongst other things, to the Human Resources Directorate's "immoral practices that are in breach of the Law of the Land" adding, "These practices endanger all employees". The penultimate paragraph asked the panel to make a decision, on the balance of probabilities, that

359.1. "Hamilton is accountable for his false statements"

359.2. "Hamilton and Halsall have conspired to destroy my career and life"

359.3. "Management bears responsibility for the manner they protected Hamilton and victimised me instead"

359.4. "racial discrimination has been a contributing factor in Hamilton's and Halsall's Harassment and in the way the management took sides with the Harassers against me".

360. At the meeting itself, the claimant was accompanied by Dr Walden. Human Resources support was provided by Ms Knights. Professor Jackson presented the management case.

361. During the course of the appeal meeting:

361.1. The claimant read aloud from his opening statement and synopsis. The panel agreed to take it into account.

361.2. The claimant compared Professor Hamilton's 3 September 2012 interview with the account of it given by Mrs O'Neill in the Heaton-O'Neill interview. There were differences between the two versions, which, according to the claimant, showed that "the documents have been edited since this meeting took place". This, the claimant said, was a "criminal

offence". Mrs O'Neill had "tampered with evidence". There was "a procedure that needs to be followed". These remarks prompted a rather confused discussion about what to do next. The claimant did not want any further delay and did not want to submit a new grievance. Dame Sue believed that evidence-tampering allegations went beyond the scope of the December 2013 grievance. Eventually, there was an agreement that the panel would proceed as best they could, without any precise understanding of how far, if at all, they would have to expand their remit.

361.3. The claimant listed the outcomes he wanted from the meeting. These were, "The truth", "To clear my name", "Justice" and "Don't want to happen to anyone (liars are being protected). He later added that he wanted "a University that doesn't do this to its staff".

362. This brings us to Allegation 47. The claimant believed:

362.1. that what he said at the meeting, including reading from his synopsis, tended to show that the respondent had breached its legal duty not to discriminate against him;

362.2. that his description of the impact of the alleged lies on disciplinary and grievance procedures tended to show that a miscarriage of justice had occurred;

362.3. that his accusation of evidence-tampering tended to show that a criminal offence had occurred.

363. In our view, these beliefs were reasonable.

364. The claimant believed that disclosing this information was in the public interest as well as his own. As with the December 2013 grievance, his main motivation was to clear his name, but there was a significant secondary purpose, which was to stop colleagues from suffering the same fate as himself. We consider that it was reasonable for the claimant to hold this belief.

365. After the meeting, the claimant put forward further written submissions. The panel then made its decision. The outcome was communicated to the claimant in a letter from Dame Sue dated 21 October 2014. We accept that the letter captured the panel's essential reasoning, which we set out here. (As with Professor Jackson's report, we add our own commentary in *italics*).

365.1. Overall, the grievance appeal was not upheld.

365.2. The panel declined to interview further witnesses. They thought it was beyond their remit to re-open the disciplinary proceedings or other complaints which had already been investigated and concluded. *This was, essentially, the panel refusing to be drawn into investigating whether Professor Hamilton's and Professor Halsall's comments had resulted in unfairness in the Student S and disciplinary cases. A more zealous panel might have gone out of its way to explore this question, but it would be harsh to criticise Dame Sue's panel for not having done so. Such an enquiry would always risk re-opening the previous internal procedures which had already been finally concluded.*

365.3. It was noted by the panel that there had been a considerable passage of time since many of the events referred to in the grievance. In the panel's opinion, the time lag had affected memories of those involved – in particular concerning details and dates.

365.4. The panel concentrated primarily on the main points of the December 2013 grievance, which they took to be the various statements made by Professors Hamilton and Halsall and the claimant's allegation that they bullied and harassed him.

365.5. So far as Professor Hamilton was concerned, the Panel agreed in broad terms with the findings of Professor Jackson. They thought that Professor Hamilton's 3 September 2012 comments, seen in the context of the whole interview, and the fact that he made them during the Student S investigation, were just opinions. In their view, there was not "any intention on Professor Hamilton's part to mislead or to falsify evidence given". Without identifying which comments they were referring to, they expressed the view that, "Some of the comments made by Professor Hamilton had nothing to do with the [Student S investigation] and were unsubstantiated criticism."

In our view, so far as we have been able to make findings about Professor Hamilton's comments, the panel here encapsulated them in one pithy sentence. Professor Hamilton asserted, based at most on something that Professor Gibson might have said, that the claimant had been given an insulting nickname. He also made gratuitous criticisms of the claimant's research which were irrelevant to the Student S investigation. Like Professor Jackson, the panel should in our view have addressed the claimant's assertion that Professor Hamilton's comments were based on discriminatory stereotypes. The claimant had reiterated that contention in his 13-page synopsis. Had they considered this allegation, however, the likelihood is that they would have found it difficult to uphold. They had already expressed their view that the delay had affected recollections of those involved.

365.6. The panel recommended that the respondent should take "steps to ensure that interviewers and interviewees understand the potential consequences of any opinions recorded during formal investigations or processes".

365.7. The panel agreed with Professor Jackson that Professor Hamilton had not bullied or harassed the claimant. Relevantly, as the panel saw it, Professor Hamilton "did not search out an opportunity to put forward his views but rather he was interviewed as part of a University investigation". *The claimant's main challenge to this finding was that the panel had not applied the definition of bullying in the DAW Procedure. Had they done so, the claimant argues, the panel would have been driven to the conclusion that Professor Hamilton's "unsubstantiated criticism" of the claimant amounted to bullying. We disagree. The DAW Procedure provided a list of examples of behaviour that may amount to bullying, but did not prescribe that every time an incident such as "derogatory remarks" occurred, it would automatically amount to bullying. It also had to amount to the "misuse of power" and be caught by an adjective such as "offensive". The panel was entitled to take into account the context. Professor Hamilton's comments were confidential and were not repeated. The only use of the word "unsubstantiated" in the DAW Procedure was not in the definition of bullying and was, in any event, qualified by the phrase, "malicious intent". It was clear from the outcome letter that the panel did not think Professor Hamilton's intentions were malicious.*

365.8. In the view of the panel, Professor Halsall's "comments regarding [the claimant's] nationality were not appropriate for the workplace" and "not expected in enlightened 21st century society and certainly not within a top University with many international academics and students". Viewed in the context of the claimant's very frank relationship with Professor Halsall, however, the comments did "not constitute discrimination or harassment". *We agree with the broad sweep of this conclusion, although we found it difficult to find sufficient facts to enable us to conclude whether the "Latin mentality" comment amounted to discrimination or not.*

365.9. Though not raised in the December 2013 grievance, the panel considered the claimant's concern about discrepancies between Professor Hamilton's 3 September 2012 interview and the Heaton-O'Neill interview. They noted that the claimant had had to wait until after 16 April 2014 to see the original interview record. "This meant that in reviewing the information which had been redacted or selectively reported/interpreted and discussed in previous grievances and appeals, [the claimant] became convinced that [he] had been significantly disadvantaged, unfairly treated and that the evidence had been deliberately distorted and falsified as part of a University campaign against [him]." The panel did not find that such a campaign existed, but recommended a review of the practice of summarising evidence from previous statements, when giving evidence to subsequent investigators or panels. *This was an appropriate response to the discussion during the appeal meeting about "tampering" with evidence.*

365.10. The panel also addressed the claimant's concerns about the practice of granting anonymity to witnesses. They observed that, with hindsight, maintaining Professor Hamilton's anonymity had achieved the opposite of what had originally been intended. Confidentiality had been meant to avoid destruction of workplace relationships, but had merely reinforced the claimant's perception of conspiracy. A recommendation was made that the respondent should review the circumstances under which it granted anonymity to witnesses in formal proceedings. *This was, in our view, a justified conclusion and an appropriate recommendation. It showed the panel's willingness to explore issues that had not been raised in the December 2013 grievance letter.*

366. The claimant replied to the outcome letter, indicating that he would take the matter further, but not internally. He criticised the panel of having "failed to address any of the points raised and the specific evidence submitted". His written closing submissions to the tribunal characterise the letter as "1 page of introduction, 1 page to address why Prof Hamilton and Halsall are blameless, and 1 page to recommend policy changes". These two statements demonstrated to us that the claimant had lost his sense of perspective.

367. And so we come to Allegation 49. We are satisfied that the appeal outcome was the decision of the panel, free from manipulation by persons behind the scenes. The panel reached reasonable conclusions on the key points of the claimant's grievance. They left some significant concerns unaddressed. We have to examine the claimant's contention that in omitting to deal with them, Dame Sue was influenced (possibly unawares) by the claimant's race or the fact that he had made disclosures of wrongdoing. We are quite satisfied that she was not. There is no evidence from which we could conclude that Dame Sue held stereotypical views about Italians. The outcome letter shows that she went about

her task conscientiously and was prepared to depart from the strict letter of the December 2013 grievance to look at the claimant's concerns.

368. The claimant began the early conciliation process on 6 November 2014 and obtained a certificate from ACAS on 20 December 2014. His claim to the tribunal was presented on 25 February 2015.

369. We were not provided with any witness statement or oral evidence to explain why the claimant waited as long as he did to bring his claim. Representations on this issue were made by solicitors on his behalf in Further and Better Particulars early in the tribunal proceedings. Essentially, the explanation advanced in that document was that the claimant was a serving employee and "would trust the respondent to address his concerns with credibility and in accordance with due process". In oral submissions, the claimant stated that he could not bring his claim until he had the full, unredacted, versions of Professor Hamilton's 3 September 2012 interview and the unredacted Heaton-O'Neill interview record.

370. We have looked to the documents for evidence that might confirm or contradict these assertions. Our findings are:

370.1. There is abundant documentary evidence from which we would infer that the claimant wished to pursue internal procedures.

370.2. The claimant was not misled into delaying. In July 2014 he was advised to complete his appeal before pursuing the Public Interest Disclosure Procedure, but he was never advised by the respondent to delay bringing an employment tribunal claim.

370.3. We cannot infer from the documents that the claimant trusted the respondent to deal with those procedures in a manner that would avoid the need for a tribunal claim. The claimant's "trust and confidence" e-mail to Dr Barker on 18 July 2013, and his "inevitability that tribunal proceedings will arise" comment on 29 July 2014 are two examples that contradict this assertion. These comments were not put to the claimant in cross-examination, but we do not regard this omission as causing any unfairness: likely as not, the respondent's counsel steered clear from asking questions about delay because the claimant did not give any evidence about his reason for it.

370.4. On receipt of the outcome letter, the claimant declared an intention to pursue the matter outside the respondent's organisation. If what was holding the claimant back from issuing his claim was his wish to exhaust internal procedures, we would have expected him to have wanted to begin the process straight away. It is odd, therefore, that once he had obtained his ACAS certificate, he took nearly two months to present his claim.

370.5. The claimant had the text of the Skype conversation from October 2012. He knew about the Majewski conversation in March 2013. Since December 2013 the claimant had the written evidence, in the Heaton-O'Neill interview, upon which he complained about statements S1 to S5. The poor redaction also showed him what he had long suspected – that the author of some of the comments was Professor Hamilton. The claimant knew – and repeatedly reminded the respondent - that a tribunal could order disclosure of documents, which would enable him to discover the remaining redacted passages. In any event, he received the full unredacted versions on or about

16 June 2014. If the unavailability of documents was the reason for the claimant's delay, it was not a good reason.

The claimant's 2015 promotion application

371. In late 2014, or early January 2015, the claimant submitted his second application for promotion to the role of Senior Lecturer. His and other applications were discussed by the EEE SPC. Professor Halsall was on the panel, but did not participate in the discussion of the claimant's case. The claimant's application went forward to the FPC with the following report:

> "B: meets the presumptive level for promotion.
>
> The committee noted that [the claimant] had been making very significant improvements to his research profile following a difficult period. His publications rate and quality is now of a standard meeting the requirements of Senior Lecturer. His international visibility is significant including a recent visiting [chair] position in China. Funding is on the low side but improving. The Committee also understood there were mitigating circumstances over a period of about 18 months which would have affected his research performance.
>
> …
>
> Teaching and Service: [the claimant] now has no direct lecturing duties (on sabbatical) and in the recent past has taught only to MSc. However, he has contributed in a substantive way to the undergraduate programme. He is part of the first year tutoring team…and has received excellent feedback from his students…
>
> Overall the [SPC] supported this promotion, though noted [it] was marginal in some areas…"

372. The FPC met on 30 April 2015. The panel was chaired by Professor Stephen Flint, who had had no dealings with the claimant. Eight other senior academics were on the panel, including Professor Brown and Professor Webb. Being the claimant's Head of School, Professor Brown did not participate in the discussion or scoring of the claimant. Professor Webb played a full part. Also in attendance was Mrs Field, who did not take part in the scoring.

373. Various aspects of the claimant's performance were discussed. These included Teaching and Learning, but there was also, in Professor Brown's words, "a significant discussion of the level of papers and drafts not being enough." The overall decision was to decline the claimant's application. Their rationale was recorded as being:

> "The Teaching & Learning aspects of this case was deemed to be the main area for development. Teaching scores would require improvement in order to lead to promotion. There were positives in this case but on balance across the criteria, this case was deemed not to merit promotion."

374. The scores given by individual panel members were set out in a table. Professor Webb's scores were more generous than those awarded by three other members of the panel. For Teaching & Learning, the weakness identified in the minutes, Professor Webb's score was consistent with the vast majority of the panel.

375. On 29 June 2015, the claimant was informed that his application was unsuccessful. He appealed by e-mail dated 3 July 2015. There were three grounds of appeal:

375.1. lack of diversity on the FPC panel;

375.2. Professor Webb's "undeclared conflict of interest"; and

375.3. lack of evidence of teaching scores.

376. The UPC Appeal Panel met on 21 July 2015 to consider the claimant's appeal. It would ordinarily have been chaired by Professor Bailey, but he stood down, declaring a conflict of interest. Taking his place in the chair was Professor Keith Brown, Vice President and Dean of the Faculty of Humanities. The other three panel members were all senior academics with no prior dealings with the claimant. The panel was satisfied that the presence of Professor Webb had not adversely affected the panel scoring.

377. In 2016 the claimant renewed his promotion application. This time he was successful. He is now a Senior Lecturer.

378. This brings us to Allegation 50. The claimant's case is that Professor Webb should have declared a conflict of interest. It is alleged that her failure to do so was motivated by the claimant's race and/or by the fact that he had made protected disclosures. We are satisfied that this was not the case. Professor Webb's scores fell comfortably in the range of scores given by the FPC panel. It is rather puzzling to us to think that she might, even subconsciously, be swayed by the claimant's nationality or disclosures into remaining on the panel, so that she then could give scores consistent with everyone else.

RELEVANT LAW

Direct race discrimination

379. Section 13 of EqA provides:

> (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.

380. Race is a protected characteristic. By section 9 of EqA, race includes a person's nationality and national origins.

381. A claimant may compare himself to how a real comparator was treated and/or to how a hypothetical comparator would have been treated. In both cases, the circumstances of the claimant and those of the comparator must be the same or not materially different: section 24(1) EqA.

382. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as he was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

383. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v.*

Eastleigh Borough Council, where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind: *Nagarajan v London Regional Transport* [1999] IRLR 572*.* This latter consideration is important, because people rarely admit discrimination and may themselves be unaware that they are discriminating.

384. Tribunals dealing with complaints of direct discrimination must be careful to identify the person or persons ("the decision-makers") who decided upon the less favourable treatment. If another person influenced the decision by supplying information to the decision-makers with improper motivation, the decision itself will not be held to be discriminatory if the decision-makers were innocent. If the claimant wishes to allege that that other person supplied the information for a discriminatory reason, the claimant must make a separate allegation against the person who provided the information: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439.

385. Section 123 of EqA provides, so far as is relevant:

> (1)… proceedings on a complaint [of discrimination] may not be brought after the end of—
>
> > (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> >
> > (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section—
>
> > (a) conduct extending over a period is to be treated as done at the end of the period;
> >
> > (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> > (a) when P does an act inconsistent with doing it, or
> >
> > (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

386. In Commissioner of Police of the Metropolis v Hendricks [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to "an act of extending over a period". I shall read out the

> 48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'…

> 52. ... The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

387. In considering whether separate incidents form part of "an act extending over a period", one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see *British Medical Association v Chaudhary* , EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA & UKEAT/0804/02DA) at paragraph 208, cited with approval by the Court of Appeal in *Aziz v. FDA* [2010] EWCA Civ 304.

388. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority [1992] IRLR 416*, *[1992] ICR 650, CA*

389. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298.

390. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

390.1. the length of and reasons for the delay;

390.2. the effect of the delay on the cogency of the evidence;

390.3. the steps which the claimant took to obtain legal advice;

390.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

390.5. the extent to which the respondent has complied with requests for further information.

391. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

392. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

> (1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

393. The tribunal must not look at each allegation of discrimination in isolation, but should take a "holistic view of all the relevant facts": *X v. Y* UKEAT/0322/12.

394. We have borne in mind the case of *Madarassy v Nomura International plc* [2007] EWCA Civ 33. In the field of direct race discrimination, it is not sufficient for the claimant merely to prove a difference in race and a difference in treatment. Something more is required. There has to be something from which the tribunal could conclude that it was the difference in race that was the reason why the claimant was treated as he was.

395. In *Chief Constable of Kent Police v. Bowler* UKEAT/0214/16/RN, decided on 22 March 2017, Simler P reminded tribunals that unreasonable treatment, by itself, does not give rise to an inference of discrimination. Incompetent handling of a grievance was not sufficient on its own to suggest that it could have been motivated by the fact that the employee had done a protected act.

396. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong,* but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshrun Hebrew Congregation* [2016] UKEAT 0190/15.

397. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Protected disclosures

398. The law governing protected disclosures differs depending on whether the disclosure was made before or after 25 June 2013.

399. In both cases, according to section 43A of ERA, a "protected disclosure" is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with, amongst other sections, sections 43C and 43F.

400. In relation to disclosures before 25 June 2013, Section 43B(1) of ERA provides, so far as is relevant:

> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following-
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, [or]
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur…

401. Section 43C provides that "a qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith – (a) to his employer…"

402. A qualifying disclosure is made in accordance with section 43F if the worker makes the disclosure in good faith to a prescribed person and "reasonably believes (i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and (ii) that the information disclosed, and any allegation contained in it, are substantially true."

403. Disclosures made after 25 June 2013 are to be judged according to the following provisions:

> "
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, [or]
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur…"

404. A worker makes a disclosure in accordance with sections 43C and 43F in the same way as before, except that, for post-25 June 2013 disclosures, the words, "in good faith" have been deleted.

405. It is common ground that the Information Commissioner is a prescribed person in relation to disclosures about compliance with the requirements of legislation relating to data protection: see the Public Interest Disclosure (Prescribed Persons) Order 2014 and its predecessors.

406. The word "disclosure" should be given its ordinary and natural meaning: *Bolton School v. Evans* [2007] ICR 641 at paragraph 14. The ordinary meaning of "information" is conveying facts. Thus a disclosure of information requires something more than a mere allegation: *Cavendish Munro Risks Management Ltd v Geduld* [2010] ICR 325, EAT. The paradigm example of this distinction was given by Slade J at paragraph 24:

> 'Communicating "information" would be: "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that: "You are not complying with health and safety requirements." In our view this would be an allegation not information.'

407. In *Kilraine v London Borough of Wandsworth* UKEAT 260/15, the EAT has warned that tribunals should take care when applying the principle in *Geduld*, to the effect that a mere allegation does not amount to a qualifying disclosure if it does not convey information. The statute does not itself make a distinction between 'allegation' and 'information' and tribunals should not focus on whether any putative disclosure is one or the other, given that 'information' and 'allegation' are often intertwined.

408. Where the worker relies on section 43B(1)(b), the information must identify, albeit not in strict legal language, the breach of legal obligation on which the worker relies: *Fincham v. HM Prison Service* [2003] All ER (D) 211 per Elias J at paragraph 33.

409. *Tolley's Employment Law* offers the following opinion in relation to section 43B(1)(c):

> "It is uncertain quite what is meant by the term "miscarriage of justice", which has no legal definition. In most cases, those disclosures warranting protection under this limb will be covered already by ERA 1996, s 43B(1)(*a*) (criminal offence).
>
> … The concept of 'miscarriage of justice' need not be confined to legal proceedings; it could potentially be applied to situations such as internal disciplinary and appeal hearings where an employee does not believe he has received a fair hearing because of the impropriety of their employer".

410. The question of reasonable belief involves two stages. The first is subjective: did the worker actually believe that the information tended to show one of the relevant categories of wrongdoing? The second stage is objective: was that belief reasonable? That second question is to be judged according to what a reasonable person in the worker's position would believe: *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4.

411. A disclosure of information may not be made in good faith, even if the worker reasonably believes the information to be true, if the disclosure is made for some ulterior motive, such as personal antagonism: *Street v. Derbyshire Unemployed Workers' Centre* [2004] EWCA Civ 964. The question is whether the worker made the disclosure for the purpose of remedying the alleged wrong: *Street* at paragraph 71.

412. In *Chesterton Global Ltd v. Nurmohamed* UKEAT/0335/14, Supperstone J accepted that it was open to a tribunal to find that a worker reasonably believed that a disclosure about individual contractual entitlement was made in the public interest if it affected some 100 employees also working for the same employer. On the general point of principle, he said this:

> The objective of the protected disclosure provisions is to protect employees from unfair treatment for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace (see *ALM Medical Services Ltd v Bladon* at paragraph 16 above). It is clear from the parliamentary materials to which reference can be made pursuant to *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 that the sole purpose of the amendment to section 43B(1) of the 1996 Act by section 17 of the 2013 Act was to reverse the effect of *Parkins v Sodexho Ltd*. The words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. As the Minister observed: "the clause in no way takes away rights from those who seek to blow the whistle on matters of genuine public interest".

<u>Protection from detriment</u>

413. By section 47B(1) of ERA, "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done by his employer on the ground that the worker has made a protected disclosure."

414. In respect of disclosures made after 25 June 2013, section 47B(1A) of ERA also provides:

> "(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment….
>
> on the ground that W has made a protected disclosure.
>
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
>
> (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

415. Section 47B clearly envisages that the "other worker" will be personally liable. It is a defence against such liability for the worker to show that they relied upon a statement by the employer satisfying certain conditions (section 47B(1E).

416. Section 48(1A) of ERA allows a worker to present a complaint to an employment tribunal that she has been subjected to a detriment in contravention of section 47B. On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done. Where a complaint is well-founded the tribunal has power to award compensation against the employer. There is no express power to award compensation against any co-worker who has breached section 47B(1A).

417. Subjecting a person to a detriment means putting them under a disadvantage: *Ministry of Defence v. Jeremiah* [1980 ICR 13, CA, per Brandon LJ. A person is subjected to a detriment if she could reasonably understand that that she has been detrimentally treated. A detriment can occur even if it has no physical or economic consequence. An unjustified sense of grievance, however, is not a detriment: *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

418. Whether or not the employer's act (or deliberate failure to act) was done "on the ground that" the worker had made a protected disclosure involves looking at the motivation of the employer. Was the employer influenced to any material extent by the fact that the worker had made a protected disclosure? "Material", in this context, means "more than trivial". The authority for formulating the test in this way is *NHS Manchester v. Fecitt* [2011] EWCA Civ 1190, [2012] IRLR 64.

419. In our view, before examining the motivation of the employer under section 47B(1), or the colleague under section 47B(1A), the tribunal should identify the decision-maker in respect of each act or deliberate failure. Knowledge of a disclosure, or improper motivation, on the part of another person is, in our view, irrelevant except in so far as it plays on the mind of the decision-maker. Where a claimant believes that another colleague has influenced the decision-maker with improper motivation, his remedy is to allege a breach of section 47B(1A) against the colleague for their part in influencing the decision. The employer will be vicariously liable for that breach under section 47B1B). Likewise, in a claim under section 47B(1A) against a colleague, the focus should be on *that*

colleague's motivation; if the colleague was influenced by others, the worker should raise a separate complaint against those others.

420. There is no authority directly on this point. Some commentators suggest that a different approach is necessitated in the light of *Royal Mail Group Ltd v. Jhuti* UKEAT 0020/16. That case concerned automatically unfair dismissal. Mitting J held that, the tribunal should not, for unfair dismissal purposes, always be constrained to limit its focus on the reasoning of the decision-taker. Where the decision has been manipulated by a third party, as had occurred on the facts of that case, the motivation of the manipulator ought to be considered when looking at the reason for dismissal.

420.1. The reasoning in *Jhuti* only applies to dismissals of employees. It does not directly concern detriment short of dismissal. Mitting J's main reason for allowing tribunals to consider the reasoning of the manipulator was the exclusion, in detriment cases, of compensation for losses flowing from dismissal. But where there has been no dismissal, no such problem exists. Where tainted information has led to a detrimental decision (which is not the dismissal of an employee) the claimant can recover compensation for losses caused by both the provision of the tainted information and the consequent decision.

420.2. The *Jhuti* approach, if applied to detriment complaints, would potentially expose an innocent decision-taker to personal liability (which in *CLFIS v. Reynolds* was Underhill LJ's main reason for rejecting the composite approach). It is doubtful whether a worker who is liable under section 47B(1A) can be ordered to pay compensation, but the innocent decision-taker would still suffer the stigma of an adverse tribunal judgment personally against his name.

421. Tribunals should look with care at arguments that dismissal, or detriment, was because of acts related to the disclosure rather than because of the disclosure itself. But if the employer's reason for subjecting the worker to a detriment was the belief that the worker had committed an act of misconduct at the same time as making the protected disclosure, the detriment is not on the ground of making protected disclosure: *Bolton School v. Evans* [2007] IRLR 140, CA.

<u>Claims and amendments</u>

422. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

423. In *Chandhok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> 17. ….Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim

> is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...
>
> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

424. In *Ali v. Office for National Statistics* [2005] IRLR 201 the Court of Appeal emphasised that, in deciding whether a particular complaint has been raised in a claim form, the tribunal should examine the document as a whole. Merely ticking a box alleging discrimination by reference to a protected characteristic may not be sufficient to raise a complaint of such discrimination if the underlying facts cannot be ascertained from the narrative.

425. In *Amin v Wincanton Group Ltd* UKEAT/0508/10/DA, HHJ Serota distinguished between a claim that is "pleaded but poorly particularised" and a *Chapman v. Simon* case, where the complaint is not pleaded at all. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the tribunal's jurisdiction. The remedy in an appropriate case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, "clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points".

426. Guidance as to whether or not to allow applications to amend is given in the case of *Selkent Bus Company v. Moore* [1996] IRLR 661. The following points emerge:

426.1. A careful balancing exercise is required.

426.2. The tribunal should consider whether the amendment is merely a relabelling of facts already relied on in the claim form or whether it seeks to introduce a wholly new claim. (Technical distinctions are not important here: what is relevant is the degree of additional factual enquiry needed by the claim in its amended form: *Abercrombie & Ors v Aga Rangemaster Ltd* [2013] EWCA Civ 1148).

426.3. Where the amendment raises substantial additional factual enquiry, the tribunal should give greater prominence to the issue of time limits and whether or not the relevant time limit should be extended.

426.4. The tribunal should have regard to the manner and timing of the amendment.

426.5. The paramount consideration remains that of comparative disadvantage. The tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it.

427. In *Amey Services Ltd v. Aldridge* UKEATS 0007/16, Lady Wise held that tribunals must not allow an amendment to a claim whilst leaving questions of time limits to be determined at a later stage. The case concerned what is known in the jargon as a *Prakash*-type amendment - adding an allegation based on events occurring since presentation of the claim form. Lady Wise did not, however, distinguish between such amendments, on the one hand, and applications, on the other hand, to amend claims based on the events that took place before the claim form was presented. The rationale for taking time limits into account was that an amendment has the effect of backdating the new claim to the date that the original claim form was presented, meaning that the respondent cannot revisit the time limit issue later (*Rawson v Doncaster NHS Primary Care Trust* UKEAT/0022/08). Unfortunately, Lady Wise did not distinguish between the period from original presentation to amendment, on the one hand, and, on the other hand, the time that elapsed between the alleged discriminatory act and the presentation of the claim.

428. It appears at least possible, therefore, that *Aldridge* will be interpreted as meaning that the time limit question must be determined at the amendment stage in every case. This could even apply where, as here, there is a long series of allegations stretching over a number of years, with a dispute as to whether the acts complained of were part of an act extending over a period. That is a notoriously fact-sensitive question.

<u>Findings of fact in internal proceedings</u>

429. In *Salford Royal NHS Trust v. Roldan* [2010] EWCA Civ 522, Elias P observed:

> The second point raised by this appeal concerns the approach of employers to allegations of misconduct where, as in this case, the evidence consists of diametrically conflicting accounts of an alleged incident with no, or very little, other evidence to provide corroboration one way or the other. Employers should remember that they must form a genuine belief on reasonable grounds that the misconduct has occurred. But they are not obliged to believe one employee and to disbelieve another. Sometimes the apparent conflict may not be as fundamental as it seems; it may be that each party is genuinely seeking to tell the truth but is perceiving events from his or her own vantage point. Even where that does not appear to be so, there will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved. That is not the same as saying that they disbelieve the complainant. For example, they may tend to

believe that a complainant is giving an accurate account of an incident but at the same time it may be wholly out of character for an employee who has given years of good service to have acted in the way alleged. In my view, it would be perfectly proper in such a case for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of on one side or the other.

Cases on unfair dismissal

430. The claimant relies on a number of cases concerning complaints of unfair dismissal:

430.1. He relies heavily on the guidance given to employment tribunals hearing unfair dismissal cases in *Linfood Cash & Carry Ltd v. Thompson* [1989] IRLR 235.

Every case must depend upon its own facts, and circumstances may very widely – indeed with further experience other aspects may demonstrate themselves – but we hope that the following comments may prove to be of assistance:

1. The information given by the informant should be reduced into writing in one or more statements. Initially these statements should be taken without regard to the fact that in those cases where anonymity is to be preserved, it may subsequently prove to be necessary to omit or erase certain parts of the statements before submission to others – in order to prevent identification.

2. In taking statements the following seem important:

(a) date, time and place of each or any observation or incident

(b) the opportunity and ability to observe clearly and with accuracy;

(c) the circumstantial evidence such as knowledge of a system or arrangement, or the reason for the presence of the informer and why certain small details are memorable;

(d) whether the informant has suffered at the hands of the accused or has any other reason to fabricate, whether from personal grudge or any other reason or principle.

3. Further investigation can then take place either to confirm or undermine the information given. Corroboration is clearly desirable.

4. Tactful inquiries may well be thought suitable and advisable into the character and background of the informant or any other information which may tend to add or detract from the value of the information.

5. If the informant is prepared to attend a disciplinary hearing, no problem will arise, but if, as in the present case, the employer is satisfied that the fear is genuine then a decision will need to be made whether or not to continue with the disciplinary process.

6. If it is to continue, then it seems to us desirable that at each stage of those procedures the member of management responsible for that hearing

should himself interview the informant and satisfy himself what weight is to be given to the information.

7. The written statement of the informant – if necessary with omissions to avoid identification – should be made available to the employee and his representatives.

8. If the employee or his representative raises any particular and relevant issue which should be put to the informant, then it may be desirable to adjourn for the chairman to make further inquiries of that informant.

9. Although it is always desirable for notes to be taken during disciplinary procedures, it seems to us to be particularly important that full and careful notes should be taken in these cases.

10. Although not peculiar to cases where informants have been the cause for the initiation of an investigation, it seems to us important that if evidence from an investigating officer is to be taken at a hearing it should, where possible, be prepared in a written form.

430.2. Two recent decisions in the context of unfair dismissal are critical of human resources managers overstepping the mark. The first is *Ramphal v. Department of Transport* UKEAT 0352/14. HHJ Serota commented:

55. In my opinion, an Investigating Officer is entitled to call for advice from Human Resources; but Human Resources must be very careful to limit advice essentially to questions of law and procedure and process and to avoid straying into areas of culpability, let alone advising on what was the appropriate sanction as to appropriate findings of fact in relation to culpability insofar as the advice went beyond addressing issues of consistency. It was not for Human Resources to advise whether the finding should be one of simple misconduct or gross misconduct…

56. I consider that an employee facing disciplinary charges and a dismissal procedure is entitled to assume that the decision will be taken by the appropriate officer, without having been lobbied by other parties as to the findings he should make as to culpability, and that he should be given notice of any changes in the case he has to meet so that he can deal with them, and also given notice of representations made by others to the Dismissing Officer that go beyond legal advice, and advice on matter of process and procedure.

430.3. It should be noted that:

430.3.1. HHJ Serota derived these propositions from a case (*Chabra v. West London Mental Health Trust* [2014] ICR 194, SC) concerning breach of contract, not unfair dismissal. Nevertheless, the guidance continues to find favour. It was cited with approval by HHJ Richardson in *Dronsfield v University of Reading* UKEAT/0200/15/JOJ at paragraph 47.

430.3.2. Again, the EAT in *Ramphal* was concerned the fairness or otherwise of a dismissal. It did not address the question of whose motivation a tribunal should examine when dealing with either discrimination or detriment cases.

430.4. The claimant has referred to a number of cases (for example, *Wincanton Group plc v. Stone* [2013] IRLR 178 concerning the relevance of disciplinary warnings in complaints of unfair dismissal. They do not, in our

view, assist a tribunal to resolve a discrimination complaint by a serving employee

430.5. *Jinadu v. Docklands Buses Ltd* UKEAT 0434/14 concerns the fairness of a dismissal. It does not dictate to employers when disciplinary procedures should or should not be stopped.

The criminal law

431. For the purposes of offences under the Criminal Justice Act 1988, a person is not in "possession" of images on a computer if those images have been permanently deleted: *R v. Porter* [2006] EWCA Crim 560. This case does not, in our view, assist an employer in internal disciplinary proceedings or a tribunal in scrutinising them.

CONCLUSIONS

The July 2015 amendment dispute

432. We decided that no amendment was required to the claim form in order to advance the claim based on Allegations 1 to 49 of the Schedule. The claimant had merely particularised his vague and general allegations of discrimination and detriment in his claim form. We would add that if we have overlooked any allegations in the Schedule that go beyond further particulars of the claim form, the respondent has only itself to blame. The respondent's scattergun approach to raising the July 2015 amendment dispute provided us with no assistance at all in resolving it.

The December 2016 amendment dispute

433. We would have preferred, had we been sure that the law would allow us to do so, to resolve the December 2016 amendment issue before finding the facts and attempting to resolve time limit issues. Here is how we would have decided the issue in general terms:

433.1. Where, on an ordinary reading of the Schedule and further and better particulars, it was reasonably clear that the Schedule contained the allegation that the claimant wished to pursue in his final submissions, we decided that no further amendment would be necessary. The claimant should be allowed to pursue the allegation.

433.2. Where the final submissions introduced an assertion of fact that was relevant to an existing allegation, but which did not substantially change the basis on which the allegation was pursued, and did not seek to add any further free-standing complaints, we did not think that any further amendment was required.

433.3. Where a further amendment was required, and the respondent had objected, we generally refused it. We came to this view, considering only the time that had elapsed between submitting the Schedule and the date of the hearing. It seemed to us far too late to alter the basis of the claim after the evidence had been completed. There were already a large number of allegations, each raising numerous issues for determination. There was a real danger that, if a further amendment were allowed, the respondent would be deprived of a fair opportunity to defend itself against the amended claim. We therefore confined ourselves to considering the allegations as they appeared in the Schedule and took into account the claimant's closing arguments only to the extent that they were relevant to those allegations.

(But for our findings of fact, we would have made an exception in the case of Allegation 31, for reasons which we explain in the table below.) We bore in mind, as a relevant factor in all of these decisions, that the claimant was represented by a firm of solicitors at the time of preparing the Schedule. The tribunal and the respondent would ordinarily be entitled to expect that such a detailed document, prepared by professionals, would set out the entirety of the claim that the respondent would have to meet.

433.4. Some allegations did not require amendment, but had not been put to the relevant witness in cross-examination. We tried to take as flexible an approach as possible, but where we thought that a witness had not had a fair opportunity of answering an allegation, we were not prepared to make a finding adverse to that witness on that point. In coming to this view, we took into account a number of occasions during the hearing on which we had reminded the claimant of the need to put his case to the witnesses and the guidance we had given to the claimant on how to go about it.

434. The following table shows how we applied those principles to the specific grounds of objection. The first column, headed, "R", refers to the relevant paragraph in the respondent's supplemental submissions. The heading to the second column, "C", denotes the paragraph in the claimant's final submission to which the respondent takes objection. The remaining column headings speak for themselves.

R	**C**	**Allegation in the Schedule**	**Assertion to which the respondent objected**	**Decision**
4.1	3	1	Professor Gibson was influenced by race	No further amendment required. Allegation discernible from Schedule.
4.2	7		Mrs O'Neill took charge of the investigation	No further amendment required. Did not change basis of existing allegation.
4.3	9	2	Discriminatory language openly tolerated by the respondent's managers	No amendment required to assert lack of admonition of the "libido" e-mail as a fact from which the tribunal could conclude that Professor Hamilton's other acts were motivated by race. As a free-standing allegation, an amendment is required and is refused. Allegation 2 is about the sending of the e-mail, not Professor Hamilton's reaction to it. The Further and Better Particulars are consistent with that interpretation.
4.4	12, 13, 21	6	Mrs O'Neill adopted a persecutory approach and levels of bias,, adopting a less favourable path	These paragraphs relate to the questions asked by Mrs O'Neill and Professor Webb of Student S and their approach to the claimant's alibi. The Schedule does not currently complain of less favourable treatment in this regard. An amendment would be required and is refused.
4.4	23.4	4	Mrs O'Neill succumbed to her own prejudice against the claimant and adopted	It is reasonably clear from Allegation 4 that the claimant was alleging that Mrs O'Neill's decision to act on the information supplied by Professor Hamilton was motivated by the claimant's race. An accusation of adopting Professor Hamilton's

			stereotypical views	allegedly stereotypical views simply adds more detail to the mental processes that the tribunal would have to consider. No amendment is required.
4.4	25	6	Professor Webb and Mrs O'Neill included unfounded stereotypes in the outcome report	Allegation 6, which is based on the outcome report, accuses only Professor Hamilton of race discrimination. To bring in two more alleged perpetrators would require an amendment which we are not prepared to grant. In any event, our findings of fact would make the claimant's amended case unsustainable.
4.5	13.7		Professor Halsall exposed Professor Hamilton to adverse comments and poisoned the workplace	The tribunal does not understand this to be a free-standing complaint. No further amendment required.
4.6	26	4	Meeting on 15 October organised to intimidate and humiliate the claimant	Allegation 4 already contended that Mrs O'Neill had subjected the claimant to "intimidatory conduct".
4.7	27, 124.7.7		There was a level of collusion throughout the tribunal proceedings	No amendment required. It is not a free-standing complaint.
4.8	30	4	Professor Beattie was an appropriate comparator	This is a rather arid point. Strictly speaking, the claimant needs an amendment to complain that the respondent treated him less favourably than it actually treated Professor Beattie. He does not need an amendment to complain that he was treated less favourably than a hypothetical comparator would have been treated. The treatment of Professor Beattie could be relevant to the treatment of a hypothetical comparator. No amendment is required for this purpose.
4.9	41	8	Initiating the disciplinary process immediately after the meeting was….a consequence of the awareness in Mrs Field's team of the need to stop the claimant from making further disclosures about Mrs O'Neill and the anonymous witness	This allegation was reasonably discernible in Allegations 8 and 10, so far as it related to the motivation of Mrs Field and Mrs Jordan. No further amendment is required in this regard. An amendment would be required to allege improper motivation on anybody else's part.
4.10	46	8	Mrs Jordan was biased against the claimant from the outset	Bias against the claimant is part of the mental processes relevant to Mrs Jordan's motivation in Allegation 8. No amendment required.

4.10	46.4		Mrs Jordan had a significant role in Professor O'Brien's negative attitude towards the claimant.	The Schedule did not contain an allegation that Mrs Jordan had improperly influenced Professor O'Brien. Amendment is required and is refused. If the claimant merely seeks to suggest that Professor O'Brien found out about the claimant's protected disclosures from Mrs Jordan, no further amendment is needed.
4.11	50	9	Disregard for the claimant's welfare was a detriment	An amendment would be required to introduce this as a complaint. The amendment is refused.
4.12	54	11	Professor O'Brien ignored the claimant's e-mail of 20 December 2012	This is reasonably clear from Allegation 11. No further amendment is required.
4.12	54	11	Professor O'Brien violated Article 8 of the European Convention and showed lack of care for the claimant's privacy	The tribunal has no jurisdiction to deal with these as separate legal causes of action. Nor are these allegations discernible as detriments in Allegation 11. Amendment would be required and is refused.
4.13	60	12	"Unconscious perception that Italians are violent and volatile"	This is providing more detail about the alleged mental processes of Mrs O'Neill. It does not change Allegation 12. No amendment is required.
4.14	61	12	Mrs O'Neill knew that the claimant had made disclosures against her	This allegation necessarily follows from Allegation 12. No further amendment is needed.
4.15	64	13	The respondent knew refusal of the claimant's subject access request could lead to "disclosure" to the Information Commissioner for non-compliance	The tribunal did not understand the claimant to be arguing that he was subjected to a detriment in anticipation of him making a future protected disclosure. Such a claim would inevitably fail. This allegation is conceivably relevant to the refusal of his subject access request being motivated by his past protected disclosure (Allegation 13). To that extent, no amendment is required.
4.16	69	15	Bad faith on the part of Mrs O'Neill and "officers involved at the time in the investigation of IT misconduct"	No amendment is needed to allege bad faith on Mrs O'Neill's part. Allegation 15 already impugns her motivation. The only other person accused in relation to Allegation 15 is Mary Clare. She was not an "officer involved … in the investigation of IT misconduct". An amendment to Allegation 15 would be needed before the claimant can allege that anyone breached his rights beside Mrs O'Neill or Ms Clare. The amendment is refused.
4.17	72	16	Professor O'Brien deliberately acted in retaliation to the claimant making	This contention is plainly covered by Allegation 16.

			protected disclosures and on racial grounds	
4.18	82, 84	19	Professor Bailey inappropriately conducted a pre-meeting during which the outcome of the disciplinary meeting was fixed and the respondent has "tried to conceal this".	The tribunal does not understand the claimant to be relying on the pre-meeting itself or the alleged predetermination as free-standing complaints. They are matters from which the claimant invites the tribunal to conclude that Professor Bailey's decision was motivated by race and/or protected disclosures (Allegation 19).
4.19	87	19	Mrs Jordan and Professor Bailey were working as a unit against the claimant	This is only relevant to Professor Bailey's motivation. Mrs Jordan is not named as a perpetrator in Allegation 19. An amendment would be required and is refused.
4.20	89	19	Professor Bailey's anger towards the claimant for loss of his family time	This is not understood to be a separate act of discrimination. It is part of the surrounding facts.
4.20	91.1	19	Lack of regard for the claimant's health	This is part of Allegation 19.
4.20	96	19	Wanting to silence the claimant from making further disclosures	This is part of Allegation 19 and does not change it.
4.20	98.4	20	Wanting to obstruct an appeal from being lodged	This is reasonably clear from Allegation 20. Professor Bailey is alleged to have refused to provide written reasoning to assist with the claimant's appeal.
4.20	109.1, 110	23	Professor Bailey's concerns were not genuine and he was seeking to hinder the claimant's recovery	These contentions relate to the detail of the mental processes that the tribunal is already required to examine in Allegation 23. No amendment is required.
4.21	98.3, 100.2, 101	20	Professor Bailey had an oblique motive to protect Professor Hamilton, Professor Webb and Mrs O'Neill; he sought to underplay his knowledge of Professor Hamilton	If an employer acts to a worker's detriment in order to protect persons accused in the worker's protected disclosure, a tribunal might well say that the detrimental act was done on the ground of the protected disclosure. Allegation 20 needs no further amendment.
4.22	122.1		Mrs Jordan played a crucial function in connecting the claimant's disclosures with	No further amendment is required. There are no free-standing complaints here. The tribunal understands the claimant to be explaining how various decision-makers came to be aware of his

			Professor O'Brien, Professor Bailey and the appeal panel	protected disclosures.
4.23	125	27, 28	Professor Coombs and Professor Bailey "prevented the claimant from advancing his appeal because he had made protected disclosures"	The respondent has mischaracterised the claimant's paragraph 125. There is no allegation that Professor Coombs prevented the claimant from advancing his appeal. Paragraph 125 accuses Professor Coombs of having preferred Professor Bailey's word over that of the claimant because he made protected disclosures. That falls squarely within Allegation 28, which concerns the appeal outcome. So far as paragraph 125 relates to Professor Bailey, it is consistent with Allegation 27. No further amendment is required.
4.24	123.3	27	Professor Hamilton's project was strongly endorsed by Professors Bailey and Gibson	No amendment is required. This point illustrates the claimant's Allegation 27 that Professor Bailey underplayed his involvement with Professor Hamilton.
4.25	130.1.5		No right-minded person would consider *L'Histoire d'Ô* pornographic.	No amendment is required. It is a consideration in examining the motivation of a number of decision-makers as to whether the claimant knowingly allowed pornography to be on his computer.
4.26	135	28	Professor Coombs affirmed the disciplinary sanction to undermine the claimant's credibility in any grievance or disclosure he might make in the future.	This is part of the detail of Professor Coombs' mental processes with which Allegation 28 is already concerned. However, it is different from the allegation put to Professor Coombs in cross-examination, which was that he was concerned about the *existing* grievance. We do not therefore think it would be fair to take it into account.
4.27	141, 142	29	Mrs Heaton intended to cover up what had happened, arising from a need to silence the claimant from making further disclosures	No amendment is required to Allegation 29. Mrs Heaton had – just – a fair opportunity to defend herself against the accusation of a cover-up. It was put to her that she had thrown the claimant's complaints of racism back at him. It was not put to Mrs Heaton that she was motivated by fear of future disclosures. We do not think it would be fair to allow that particular allegation to proceed.
4.28	149, 150	31	The poisoning of management against the claimant (in particular Professors Webb and Bailey – paragraphs 147-148)	Allegation 31 is presently against Mrs Field only. To the extent that the claimant seeks a finding of discriminatory motivation on the part of anybody else, an amendment is required. But for our findings of fact, we would have considered this an exceptional case where it would be fair to allow a further amendment. The narrative to Allegation 31 suggested that the claimant's real complaint was against the person or persons who made the decision to refuse his award. Otherwise the claimant would merely be shooting the messenger. This is plainly how the respondent understood the claimant to be putting his case. Professor Bailey addresses Allegation

				31 directly in his witness statement. He had a fair opportunity to deal with it in cross-examination: it was put to him that he could be seen to be "victimising" the claimant. We would therefore have allowed further amendment to add Professor Bailey as an alleged perpetrator for the purposes of the section 47B claim. In the end, however, we refused the amendment, because, by the time we came to determine that question, we had found as a fact that Professor Bailey did not have the proscribed motivation. We did not, in any event, allow the claimant to allege that Professor Bailey was motivated by race. This was not put to him. It was not entirely clear whether or not the claimant also wanted to amend Allegation 31 so as to allege that Professor Webb was improperly motivated. To avoid any doubt, we would take the same approach for her as for Professor Bailey.
4.29	164	34	Dr Barker ignored that the claimant's appeal was one of perversity and not of procedural error	This appears to us to be another way of saying that Dr Barker ignored what the claimant believed to be solid evidence that witnesses had lied. That is squarely part of Allegation 34 and was put to Dr Barker.
4.29	165,172	36	Dr Barker's approach arose from the "preoccupation that the claimant's disclosures were raising in the management of the claimant".	This allegation is hard to understand. If it is another way of saying that Dr Barker dismissed the claimant's review application in order to cover up the wrongdoing by managers of whom the claimant was complaining, then it is consistent with Allegation 36 and with the case put to Dr Barker in cross-examination. Otherwise, the claimant cannot pursue it.
4.30	177	38	Decision not to award sabbatical was an act of revenge	No amendment is required. This contention does not change Allegations 32 and 38.
4.31	183	41		No decision necessary as allegation withdrawn
4.32	191	43	Professor Jackson was not truthful in his discussions with Dame Sue Ion	So far as this is a free-standing complaint of discrimination or detriment, an amendment would be required and is refused.
4.32	192	43	Minutes redacted in bad faith	No amendment is required. This is part of Allegation 43. Making deliberate omissions to minutes because of race is unlikely to be in good faith.
4.33	211	49	Dame Sue Ion did not engage with the substance of the grievance	This is, in our view, a pithy way of restating Allegation 49. No amendment is needed.

The own initiative amendments

435. We now turn to the amendments to which the respondent had not drawn our attention, but nevertheless were required:

435.1. It seemed to us that, in Allegation 9, the claimant was intending to complain about the investigation meeting on 11 December 2012 and not, as the Schedule indicated, the follow-up meeting of 13 December 2012. Similarly, Allegation 10 appeared to have been drafted in the mistaken belief that the meeting with Mrs Jordan on 13 December 2012 had taken place on 18 December 2012. These discrepancies appeared not to have troubled the respondent and were not the subject of any specific ground of objection. We saw no disadvantage to the respondent in allowing the claimant to amend his claim in this regard. Indeed, so far as Allegation 9 was concerned, the respondent had prepared its witness statements on the assumption that the claimant had made a mistake about the dates. We would have allowed the amendment, but for the fact that, by time we came to consider it, we had rejected the claimant's amended case on the facts.

435.2. There was no express assertion in Allegation 9 or Allegation 11 that the claimant had made a protected disclosure. The narrative suggested that this may have been an accidental omission. We might well have allowed an amendment, but for the fact that, by the time we came to consider it, we found (paragraphs 151.11 and 161) that the alleged disclosure of information had not been made.

435.3. During final submissions, the claimant sought to argue that he had made various disclosures that qualified for protection under section 43B(1)(d) of ERA (danger to health and safety). Looking at the Schedule as a whole, we took the view that the claimant could not advance such an argument without further amending his claim. We noted in particular that the claimant's solicitors had specifically identified each alleged protected disclosure by reference to section 43B(1)(b) and 43(1)(c). The further and better particulars of Allegation 7 simply stated, "this was a protected disclosure confirming allegations of racism." We did not think it would be fair to allow a further amendment at this stage. The respondent's witness statements were specifically tailored to address the case they thought they had to meet. They dealt in detail with whether the claimant had raised issues of race discrimination. They did not state whether the claimant had raised health and safety concerns at the relevant times.

435.4. We would have been content to allow an amendment to Allegation 24 by adding Professor Halsall as an alleged perpetrator and by altering the date from March 2011 to March 2013. Professor Halsall was mentioned by name in the narrative and addressed the allegation directly in his witness statement. Mrs Heaton's witness statement was prepared on the basis that the date was an error. An amendment would not pose any additional difficulty to the respondent in defending the claim. But for the question of time limits in relation to Professor Halsall's actions, and our findings of fact in relation to Mrs Heaton, the amendment would have been allowed. As it was, the amended form of the claim was unsustainable.

435.5. Allegation 26 (the "Axis of Evil" allegation), on its face, appeared to name the only perpetrator as Professor Missous. In fact, it was clear from the narrative that the claimant was complaining about the conduct of

Professor Hamilton. That is the way the respondent appeared to have interpreted the allegation, as Professor Hamilton addressed it in his witness statement. The respondent's written submissions contend that Professor Hamilton was not cross-examined upon this allegation. We disagree. The employment judge had a clear note of it. Subject to the proviso that, having found the facts, the amended claim must fail, we would have allowed the amendment.

435.6. During the course of cross-examining Mrs Heaton, the claimant informed us that the basis of Allegation 33 was not, as the Schedule reads, one of failure to deal with the claimant's complaint in relation to the sabbatical issue. Rather, he said, it was about Mrs Heaton's failure to deal with concerns he raised at a meeting with Mrs Heaton on 13 March 2013 and in an e-mail he wrote to her on 27 March 2013. Whereas Allegation 29 was a complaint that Mrs Heaton failed to address these matters in her DAW outcome decision, Allegation 33 attacked her failure to deal with the same matters at any time between the DAW outcome and 20 June 2013. This basis not only differed from the Schedule, but from the Further and Better Particulars which themselves attempted to alter Allegation 33 in the Schedule. This was plainly unsatisfactory. On the other hand, we considered that there would be very little in the way of additional factual enquiry. Mrs Heaton had a fair opportunity to deal with it in her evidence and no objection was raised by the respondent. We would have decided to allow the claimant to put Allegation 33 in the way he wished. By the time we came finally to determine that question, however, we had already found facts that made this allegation unsustainable.

435.7. There appeared to have been a mistake in the alleged date of the disclosure to Dr Barker in Allegation 37. Here we allowed an amendment. There was no disadvantage to the respondent: Dr Barker's witness statement had been prepared on the basis of a disclosure on 18 July 2013 and not 7 July 2013 as alleged in the Schedule.

435.8. As Allegation 46 appeared in the Schedule, the alleged perpetrators were Professors Halsall and Hamilton. The narrative, however, clearly attacked the decision to promote those two individuals. In the case of Professor Hamilton's promotion, it was undisputed that the decision was made by Professor Bailey. It would have appeared fair, but for our findings of fact, to allow the claimant to amend his claim by naming Professor Bailey as the perpetrator. By contrast, we saw no point in allowing any amendment in respect of the promotion of Professor Halsall. It was the claimant's own case that the decision-maker in this respect was Professor Brown. In relation to all the other allegations affecting Professor Brown, the claimant had withdrawn any suggestion that Professor Brown acted with improper motivation. He did not ask Professor Brown, or anybody else, about the reason why Professor Brown had promoted Professor Halsall.

Direct race discrimination

Allegation 1 (Gibson), 4, 7, 8, 12, 13, 15, 16, 17 (Hamilton), 19, 20, 24 (Heaton), 25-29, 31 (Field), 32, 33, 36, 38, 39, 42, 43, 46, 49 and 50

436. On most of the allegations of direct discrimination we ultimately found it unnecessary to consider the question of jurisdiction and time limits. This is because we had found sufficient facts to enable us to dispose of the allegations

on their merits. Our decision was that none of these allegations was well founded. The following table indicates our reason for rejecting each allegation together with the finding of fact that support that reason.

Allegation	**Conclusion**	**Finding at paragraph**
1 (Gibson)	Professor Gibson's inaction was not because of race.	69
4	The alleged less favourable treatment (subjecting the claimant to intimidatory conduct and falsely accusing him) did not happen. To the extent that Allegation 4 requires further facts to be found, we could not do so because of the delay.	259, 260
7	Referring, accurately, to the claimant's belief could not reasonably be understood to be less favourable treatment, or to be detrimental to him. In any event it was not because of race.	136
8	The less favourable treatment did not occur in the manner alleged and in any event was not because of race.	149, 150
12	Refusal to provide the information was not because of race.	165
13	Ms Clare's decision on the DSAR was not because of race. Nor was Mrs O'Neill's input into that decision.	185, 186
15	The treatment was not because of race.	185
16	The escalation of the disciplinary case to the Dean was not because of race.	181
17 (Hamilton)	Professor Hamilton did not treat the claimant in the manner alleged. We did not have to consider his motivation. Had this been necessary, we would have also had to consider the time limit.	168
19	Refusal to permit challenge to witness statements was not because of race. Professor Bailey did not threaten the claimant as alleged. Professor Bailey did not act in an intimidatory manner. He did not predetermine the outcome. If Professor Bailey demonstrated any lack of understanding of the issues, it was not	200.3, 200.4, 206

	because of race.	
20	Professor Bailey's decision was not because of race. The final written warning was not because of race. The monitoring requirement was not because of race. Professor Bailey did not "refuse" to provide more detailed reasons. The fact he did not use his initiative to do so was not because of race.	206, 208, 209
24 (Heaton)	Mrs Heaton's omission to investigate was not because of race.	230, 277.1
25	Mrs Heaton did not "challenge" the claimant as alleged. She gave the claimant an opportunity to comment on the evidence of witnesses, which could not reasonably be perceived as less favourable treatment or to be to the claimant's detriment. In any event it was not because of race.	225.2, 277.2
26	Professor Hamilton did not make the alleged remark and there is nothing from which we could conclude that it was made because of race.	435.5
27	Professor Bailey withheld some information about Professor Hamilton, but it was not because of race. Denying knowledge of the detail of the claimant's grievance was truthful and was not less favourable treatment.	239.2, 239.6
28	Professor Coombs' outcome decision was not because of race.	245, 246
29	Mrs Heaton's decision was not because of race. Her failure to address the complaint of race discrimination was not because of race.	277
31	Mrs Field's omission to declare any conflict of interest, in so far as this was less favourable treatment at all, was not because of race.	249
32	The refusal of sabbatical leave was not because of race.	263
33	Mrs Heaton's inaction was not because of	277.6

	race.	
36	This allegation did not appear to have been put to Dr Barker and, in any event, there is nothing from which we could conclude that the less favourable treatment was because of race.	281.2
38	There are no facts from which we could conclude that Professor Georghiou's refusal of the appeal was because of race.	290
39	There was a delay of about a month, but it was not because of race.	307
42	The delay was not because of race.	315
43	There is nothing from which we could conclude that "omissions to the minutes" were because of race. Professor Jackson did not refuse to investigate matters further. His omission to take action in response to perceived conflicts of interest was not because of race.	331
46	The appointment of Professor Hamilton to the Acting Director role was not because of the claimant's race.	350
49	The alleged less favourable treatment did not occur. Dame Sue's letter did engage with the substance and the key points of the grievance. To the extent that there was any less favourable treatment in leaving issues unaddressed, the omission was not because of race.	367
50	Professor Webb's omission to recuse herself was not because of race.	378

Allegations 1 (J), 2-5, and 24 (Halsall)

437. In our view, the treatment alleged here was not part of one ongoing discriminatory state of affairs. The conduct of J was an isolated incident. The conduct of Professors Halsall and Hamilton should be viewed together because of the close relationship of those two individuals and the connection between their comments and their shared views about the claimant's attitude to women and sex. In our view, that conduct, so far as it is relevant to this claim, ended in March 2013 with the Majewski conversation. By that time, Professors Hamilton had ceased to be the claimant's head of research group. Neither he nor

Professor Halsall had any ongoing interaction with the claimant. All that was left, even from the claimant's point of view, were the ongoing consequences of isolated acts.

438. Turning to the *Keeble* factors:

438.1. The time limit for these allegations would ordinarily have expired in June 2013. The delay is approximately 20 months.

438.2. We have already found (paragraph 370) that the claimant did not have a good reason for delaying the presentation of his claim.

438.3. Allegations 1 (based on the conduct of J), 2-5 and 24 (based on Professor Halsall's alleged remarks) all involve attempting to find facts based upon the fading memory of witnesses. As we have recorded in paragraphs 55, 61, 67, 69, 93 and 259, the delay has made this exercise very difficult.

438.4. The respondent initially did not comply with requests for further information. That explains the delay up to October 2013 (when the claimant received the Heaton-O'Neill interview) and possibly up to January 2014 (when Professor Jackson did not deny that Professor Hamilton was the author of the comments to which the claimant had taken offence). It does not explain any further delay.

438.5. The claimant did not act promptly once he knew the facts. Even when he had the unredacted 3 September 2012 interview he took another 8 months to present his claim.

438.6. Throughout the period from March 2013 to February 2015, the claimant was represented by Dr Walden, a lecturer in employment law. The claimant himself demonstrated considerable knowledge of employment tribunal and court procedure. By 3 July 2014, he was receiving advice from counsel. Before 29 September 2014, the claimant had read the detail of *Howard,* which specifically set out the law relating to time limits.

439. Taking all these factors into account, we do not think it is just and equitable to extend the time limit. The tribunal therefore has no jurisdiction to consider these complaints.

Protected disclosures

Allegation 7

440. The claimant did not make a protected disclosure to Mrs Field on 16 November 2012. He did not make any allegation of race discrimination and did not otherwise disclose any information that, even in his belief, would tend to show that somebody had discriminated against him (paragraph 135). In any case, the claimant's predominant purpose at this time was to have evidence against him in the disciplinary case ruled inadmissible. He knew that he had used his laptop to view pornography. He was trying to raise a smokescreen. That was not, in our view, acting in good faith.

Allegation 14

441. The claimant made a disclosure of information in his DAW complaint. He set out various things that Mrs O'Neill had done during the course of the Student S investigation and asserted, in general terms, that he had been discriminated against and victimised. These assertions could be described as "allegations", but that does not stop them from also conveying information. As we have found, the

claimant reasonably believed that the information tended to show breach of a legal obligation (paragraph 173).

442. The claimant made his disclosure to his employer in good faith. He had some ulterior motives, but was also trying to remedy a perceived wrong (paragraph 190). This disclosure was therefore protected.

Allegation 18

443. The claimant disclosed information about the meeting about lies allegedly told by Mrs O'Neill and comments made in the O'Neill/Webb final paragraph, together with assertions of race discrimination. As we have found (paragraph 190), he reasonably believed that this information tended to show breach of a legal obligation.

444. The disclosure was in good faith, and thus protected, for the reasons also set out in paragraph 190.

Allegation 21

445. The claimant made a protected disclosure to Professor Esmail. In good faith, he disclosed information that, in his reasonable belief, tended to show that there had been breach of a legal obligation (paragraph 212).

446. This disclosure had no bearing on any subsequent events, because Professor Esmail did not tell anybody about it.

Allegation 30

447. The appeal letter contained a protected disclosure. It disclosed the information we have set out in our findings of fact. The claimant reasonably believed (paragraph 272) that it tended to show a breach of a legal obligation. He made the disclosure in good faith (also paragraph 272).

Allegation 35

448. The claimant disclosed information to a prescribed person. He reasonably believed that the tended to show breach of obligations under the Data Protection Act 1998. He also reasonably believed that the information was substantially true (see paragraph 268). The complaint to the ICO was therefore a protected disclosure.

Allegation 37 (as amended)

449. The claimant reasonably believed that his e-mail to Dr Barker tended to show a breach of a legal obligation. He did not believe that the e-mail was sent in the public interest and it would not have been reasonable for him to do so.

Allegation 40

450. Paragraphs 305 and 306 explain how we decided that the December 2013 grievance contained a protected disclosure. The claimant reasonably believed that his disclosure tended to show that there had been a breach of a legal obligation and that a miscarriage of justice had occurred. It was reasonable for him to think that the disclosure was made in the public interest.

Allegation 45

451. The claimant made a disclosure of information to Mr Conway. It did not qualify for protection. Whilst it satisfied the test of reasonable belief in relation to a legal obligation (paragraph 341), it was not reasonable for the claimant to

regard it as being made in the public interest for the reasons given at paragraph 342.

452. The claimant's disclosure to Mr Conway did not influence any of the alleged detrimental acts that occurred afterwards. Mr Conway did not tell anybody apart from the respondent's legal advisors.

Allegation 47

453. The claimant made a protected disclosure during the course of the appeal meeting. Paragraphs 362, 363 and 364 explain why we came to that conclusion.

Detriments

454. We did not need to consider the issue of jurisdiction and time limits in relation to the allegations of detriment. By the time it came to examine this issue, we had already found sufficient facts to enable us to dispose of the allegations on their merits. The following table shows how we concluded in relation to each one.

Allegation	**Conclusion**	**Finding at paragraph**
8	The detrimental act did not occur in the manner alleged. It was not on the ground of the alleged disclosure (Allegation 7) which in any event was not a protected disclosure.	149, 150, 440
9	The only act that we have the power to consider is the invitation to the meeting. First, we do not think it would be reasonable of the claimant to perceive it as being detrimental. An investigation meeting was an important part of a fair process. Neither Mrs Jordan nor Dr O'Brien made the decision to start an investigation. Second, the invitation was not on the ground of the alleged disclosure (Allegation 7) which in any event was not protected.	156, 157, 440
10	It could not reasonably be thought of as detrimental to be invited to a further meeting, for the reasons given above. The invitation was not on the ground of the claimant's disclosure (Allegation 7) which was in any event not protected.	156, 440
11	The detrimental acts and deliberate failures to act were not on the ground of the alleged disclosure (Allegation 7) which was in any event not protected.	179, 181, 440
12	Refusal to release the "verbatim" allegation was not on the ground of any disclosure the claimant made, which in	165, 440

	any case was not protected.	
13	Ms Clare's decision on the DSAR was not because of the alleged disclosure (Allegation 7) which was not protected.	185, 186, 440
15	The treatment was not on the ground that the claimant had made any of the alleged disclosures. The Allegation 7 disclosure was not protected. The Allegation 14 disclosure did not influence Mrs O'Neill's actions.	185
16	The escalation of the disciplinary case to the Dean was not on the ground of either the Allegation 7 disclosure (which was unprotected) or the Allegation 14 disclosure.	181
17 (Hamilton)	Professor Hamilton did not do the alleged act. We did not have to consider his motivation. Had this been necessary, we would have also had to consider the time limit. We would not have regarded it as being part of a series of acts similar to what occurred later.	168
19	Refusal to permit challenge to witness statements was not on the ground of his disclosures. Professor Bailey knew of the DAW complaint but did not know the detail. He did not threaten the claimant as alleged. Professor Bailey did not act in an intimidatory manner. He did not predetermine the outcome. If Professor Bailey demonstrated any lack of understanding of the issues, it was not on the ground of the claimant's disclosures.	200.3, 200.4, 206, 239.6
20	Professor Bailey's decision, final written warning and monitoring requirements were not on the ground of the claimant's disclosures. Professor Bailey did not "refuse" to provide more detailed reasons. The fact he did not use his initiative to do so was not on the ground of any disclosures the claimant had made.	207, 208, 209, 239.6
22	Professor Bailey's comment on the stairs was not on the ground of any disclosures.	211
23	The alleged detrimental act did not occur.	264

27	Professor Bailey withheld some information about Professor Hamilton, but it was not on the ground of any disclosure the claimant had made. Denying knowledge of the detail of the claimant's grievance was truthful and was not less favourable treatment.	239.2, 239.6
28	Professor Coombs' outcome decision was not on the ground of any protected disclosure the claimant had made.	245, 246
29	Mrs Heaton's decision, and her omission to address some of the claimant's concerns was not because of any protected disclosure the claimant had made.	277
31	Mrs Field's omission to declare any conflict of interest could not have reasonably been perceived to be to the claimant's detriment. It was not on the ground of any disclosure that the claimant had made. The disclosure to Mrs Field (Allegation 7) was not protected.	249, 440
32	The refusal of sabbatical leave was not on the ground of any protected disclosure.	263
33	Mrs Heaton's inaction was not on the ground of any protected disclosure.	277.6
34	The decision to interview Mrs Heaton and not to interview the claimant was not on the ground of any protected disclosure.	282
36	To the extent that Dr Barker failed to act on any of the points raised by the claimant, he did not deliberately fail on the ground that the claimant had made protected disclosures in his "appeal" letter (Allegation 30) or DAW complaint.	281.1
38	There are no facts from which we could conclude that Professor Georghiou's refusal of the appeal was because of any protected disclosures.	290
42	The delay was not on the ground of any protected disclosure.	315

43	There is nothing from which we could conclude that "omissions to the minutes" were on the ground of protected disclosures. Professor Jackson did not refuse to investigate matters further. His omission to take action in response to perceived conflicts of interest was not on the ground of any protected disclosure.	331
44	The imperfections in the outcome letter, such as they were, were not on the ground of any protected disclosure.	333
49	The alleged detrimental act did not occur. Dame Sue's letter did engage with the substance and the key points of the grievance. To the extent that there was any deliberate failure to act in leaving issues unaddressed, the omission was not because of any disclosure the claimant had made.	367

Postscript

455. Our conclusions are such that the entire claim fails.

456. We are conscious that the claimant continues to be employed by the respondent. He has gained promotion during the lifetime of this claim. His final written warning expired over two years ago. It is not our function to tell parties how to conduct their future working relationships. We would hope, however, that, once the parties have read this judgment and taken on board the criticisms of both sides, they might try to rebuild a mutual relationship of trust.

Employment Judge Horne

Date: 29 March 2017

SENT TO THE PARTIES ON
07 April 2017

FOR THE TRIBUNAL OFFICE