**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4102702/2012 & S/4107069/2012**

**Held in Edinburgh on 14th September 2015, 15th September 2015, 16th September 2015, 25th November 2015, 1st December 2015, 15th December 2015, 19th December 2015, 15th January 2016, 20th January 2016, 28th January 2016, 8th & 9th February 2016, 15th February 2016, 29th March 2016, 26th, 27th, 28th and 29th April 2016**

**Employment Judge: Ms Jane M Porter**
**Members: Mr G Nisbet**
**Ms S Stewart**

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| Professor R Sheikholeslami | Claimant<br>Represented by:<br>Mr Simon Gorton QC |
| The University of Edinburgh | Respondent<br>Represented by:<br>Ms A Carmichael QC |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

It is the judgment of the Employment Tribunal that:

1 The claim of sex discrimination is dismissed.

2 The claim of failure to make reasonable adjustments is dismissed.

3 The claim of discrimination arising from disability is dismissed.

4 The claim of victimisation succeeds in part.

5 The claim of unfair dismissal succeeds.

6 The claim of failure to pay holiday pay succeeds.

7 The application to reconsider the decision to refuse an amendment to include a claim for notice pay is refused.

8 The case will be listed for a hearing on remedy in due course.

**Introduction**

1. The claimant, who is 60 years old, was employed by the respondents as a Professor and held the Chair of Chemical Process Engineering with them between the 1st of May 2007 and the 12th of April 2012. In these conjoined cases she claims that she was unfairly dismissed. She also claims that in the course of her employment she suffered discrimination on the grounds of her disability and sex and victimisation. At the start of the hearing, the tribunal gave permission for the claim to be amended to bring a claim for unpaid holiday pay. The application to amend to include a claim for breach of contract in respect of notice pay was refused and an application has been made that that decision should be reconsidered.

2. The claimant's claims are resisted by the respondents. There has been considerable procedure in this case, notably 16 Preliminary Hearings in the period from 2012 to September 2015. In September 2015 the full Hearing on the Merits commenced.

3. The procedure up to the commencement of the full Hearing on the Merits was determined by a differently constituted Tribunal to that which heard the full Hearing on the Merits. The new Tribunal came fresh to the case in mid September 2015. The hearing could not proceed on the 14th September 2015 as the new Tribunal required a reading day, witness statements having been the subject of a previous order.

4. Unfortunately, and despite the considerable pre-hearing procedure, parties were unable to agree a Joint Bundle of Documentation. In these proceedings therefore the respondents rely upon Bundles of Documentation named respectively the First, Third and Fourth Bundle of Documentation for the Respondents. There is no Second Bundle of Documentation for the Respondents. These bundles are referred to in this judgment by the page number on the bottom right hand corner of each document. For her part, the

claimant referred to a bound Schedule of Documents which was entitled "Claimant's Bundle of Documents" (CBD). In this judgment the documents within that bundle will be referred to by their page numbers and not by the alternative CBD numbers at the top right hand corner of the bundles.

5. The claimant also referred to the attachments to her witness statement and supplementary witness statement as productions. Again in this judgment these are referred to by the page numbers on the bottom right hand side of each document.

6. Unfortunately, the documents separately lodged by the parties led to a situation where the Tribunal frequently had to cross reference correspondence or email chains in separate Bundles of Documentation. This did not assist the judicial determination of this case.

7. Despite the lengthy procedure in this case, disability status remained at large at the commencement of the Hearing in September 2015. In the course of the procedure there was a Joint Report prepared which concluded that the claimant was a disabled person, however, the contents of the report were not accepted by the respondents. Disability status was therefore a further issue for the Tribunal to determine in these proceedings.

8. There was no Joint List of Issues prepared in this case.

9. The witness statements were taken as read in this case with each witness commencing either with supplementary questions only or with cross examination.

10. The parties conducted themselves on the basis that the Hearing be on liability only, loss being a complex subject in itself.

11. The evidence concluded on the 29th April 2016. Written submissions were ordered and were supplied within the following 28 days with responsive

submissions provided shortly thereafter. However, shortly after the production of the submissions Employment Judge Porter became unwell and remains absent from her post.

12. Prior to the 3rd June 2016, Employment Judge Porter had drafted the Findings in Fact and Observation on Evidence in this case. Due to her continuing ill-health the Vice President assisted in the completion of this judgment, along with the Members, Ms Stewart and Mr Nisbet. However, for the avoidance of doubt, this decision is that of the original tribunal, all of whom have approved this judgment (including Employment Judge Porter).

**The Issues**

13. The Tribunal themselves considered the issues before them to be:

i. Was the claimant treated less favourably because of her sex in terms of section 13 of the Equality Act 2010?
ii. Did the respondent victimise the claimant in terms of section 27 of the Equality Act 2010?
iii. Was the claimant a disabled person at the relevant time, all in terms of section 6 of the Equality Act 2010?
iv. If so, did the respondent know, or could it be reasonably be expected to know that the claimant was a disabled person?
v. Did the respondent apply to the claimant a provision, criteria or practice that put her at a substantial disadvantage in comparison with persons who are not disabled?
vi. If so, did it know, or could it reasonably have been expected to know that the claimant would be placed at this disadvantage?
vii. If so, did the respondent fail to take steps which it would be reasonable for it to have to take to avoid the disadvantage?
viii. Was the claimant treated less favourably because of something arising in consequence of her disability in terms of section 15 of the Equality Act of her disability?

ix. If so, was that treatment a proportionate means of achieving a legitimate aim?

x. Did the respondent have a potentially fair reason for dismissal?

xi. Did the respondent adopt a fair procedure?

xii. Was dismissal within the band of reasonable responses?

xiii. Did the respondent fail to pay to the claimant her full entitlement of accrued holiday pay (and therefore make a deduction from wages in contravention of section 13 of the Employment Rights Act 1996)?

xiv. Should the decision to refuse the claimant's application to amend to include a claim of breach of contract (notice pay) be revoked and replaced with a decision to allow the amendment?

xv. If so, was the respondent in breach of contract in this respect?

**The Witnesses**

14. The claimant herself gave evidence. Cross examination commenced on 16th September 2015 and finished on 29th March 2016.

15. In the period 27th to 29th April 2016 the Tribunal heard evidence from Alison McNaught, HR Partner, School of Engineering, Professor Peter Grant, the former Head of the School of Engineering when the claimant was appointed but who is now retired, Jon Gorringe, the former Head of Finance of the respondents, Professor Nigel Brown who was the Head of the College of Science and Engineering between July 2008 and August 2011, Professor Alan Murray who was the former Head of the School of Engineering between August 2008 and June 2012, Bridgeen McCloskey, Director of Professional Services of the School of Engineering, Professor David Ingram, Professor of Computational Fluid Dynamics in the Institute for Energy Systems in the School of Engineering, Dr Don Glass, Honorary Fellow in the School of Engineering, Dr Kim Waldron, the former University secretary, Professor Lesley Yellowlees, Vice Principal of the respondents and Head of the College of Science and Engineering, Professor Jo Shaw, the Deputy Head of

the College of Humanities and Social Sciences, Sheila Gupta, the former Director of HR of the respondents and June Bell, the Head of HR at the College of Science and Engineering.

16. The Tribunal made the undernoted essential Findings in Fact in respect of the evidence of these witnesses.

**Findings in Fact**

17. On 20th September 2006, the claimant was interviewed in respect of the position of Chair in Chemical Engineering with the respondents. The interviewing panel was chaired by Professor Graham Bulfield who was Head of the College of Science and Engineering at that time.

18. The outcome of the process was that Professor Stefano Brandani should be appointed as the Chair of Chemical Engineering. The reasons for this were that Professor Brandani's research in Carbon Capture and Storage was a research of growing importance in energy which was relevant to research at that time being carried out within the respondents and, further, that Professor Brandani had greater experience and knowledge of UK academia and teaching and research than did the claimant who had previously been employed in Australia.

19. After Professor Brandani was appointed, Professor Bullfield spoke to Professor Peter Grant who was at that time the Head of School of Engineering and suggested to him that the claimant should also be appointed. In December 2006 and January 2007 negotiations took place with the claimant regarding a package to be offered to her by the respondents.

20. The Tribunal accepted that in entering into these negotiations and subsequently accepting employment with the respondents it was the intention of both parties that the claimant should maintain her position with the respondents until retirement. To this end there was discussion between the

claimant and Jon Gorringe regarding the shared equity scheme of which she was a recipient and whether that scheme could be maintained till retirement (**CBD4, 4 of 496**).

21. As part of her start up package the claimant was to be given the use of a laboratory which was at that time being used by an external company called Artemis. In order to bring the laboratory up to the required specification it had to be completely gutted and refurbished.

22. The Tribunal accepted the evidence of Professor Peter Grant that the claimant's overall start up package was valued at £948,000 of which £600,000 was spent on the laboratory. The Tribunal accepted the evidence of Professor Peter Grant that Professor Brandani received an offer of £182,000 from the respondents as a start up package.

23. The claimant commenced her employment with the respondents on the 1st of May 2007. It was anticipated that the claimant's laboratory would be ready by May 2008. It was anticipated that in the intervening period the claimant would start planning her laboratory with the Estates and Buildings Team at the respondents.

24. Following the commencement of the claimant's employment, interviews were conducted to appoint a technician who would spend 60% of his or her time working with the claimant. In the event Steven Gourlay was appointed. However Steven Gourlay turned out to be unsuitable for the post and Dr Peter Anderson, a Research Assistant in Chemistry was appointed and started working with the claimant in or around April 2008.

25. By September 2008 the chemical process engineering laboratory was still not completed. In January 2009 Mr Bob Gusthart was appointed as Technical Services Manager and recommended that a Process Design Engineer was needed to construct the laboratory. The respondents acceded to this request and brought in an outside company, namely Desighn Limited. From April to

June 2009 Desighn Limited worked with the claimant on the specification of her laboratory. In about August 2009 Desighn Limited completed the specification for the claimant's laboratory. The laboratory was completed round about October and November 2009.

26. In the period May 2007 to October 2009 the claimant had no research facility as she did not have access to a working laboratory. In this period the Tribunal finds that the claimant raised the issue of her lack of technical support and the delay in construction of the laboratory with the respondents on numerous occasions.

27. On the issue of the delay in the construction of the laboratory the Tribunal accepted the evidence of Professor Murray that the delay was, in part, due to the school's inexperience in a new area of research and their consequential lack of knowledge in the construction of the laboratory for the same, coupled with long lead times for component parts. Further, the Tribunal accepted the evidence of Professor Alan Murray and Professor Peter Grant that the claimant did not display the hands on advice and input to the laboratory's design and construction in the way that was expected of a recipient of a start up package. For her part, the claimant's position was that she had not accepted the position of Chair and Professor of Chemical Process Engineering to move across the globe and to act as a technician and set up a lab. (The claimant's chief witness statement **para 72**).

28. The Tribunal considered the issue of the lack of hands on advice and input by the claimant in the setting up of her laboratory to be an example of the miscommunication that existed between the claimant and the respondents at that time. The claimant accepted that Professor Alan Murray and Professor Peter Grant had certain expectations that the claimant would have significant involvement in the setting up of her laboratory. The Tribunal found that such expectations (which were incumbent upon men and women), were not adequately communicated to the claimant in such a way that it was clear to the claimant that this was part of her role within the respondents. In reaching

this conclusion the Tribunal accepted that there was communication between the respondents and the claimant regarding her involvement in setting up the lab; however such communication did not appear to result in clarification of the point that the claimant's lack of input into the laboratory was a cause of its delay and completion.

29. On the issue of communication generally the Tribunal found as a whole that the expectations of the incumbents of the School of Engineering as to the nature and extent of the role of a Professor within the school were not shared by the claimant. The Tribunal found this difference to be attributed to a difference in culture and expectation and noted the shared collective experience of academia within the UK by the incumbents within the School of Engineering. The Tribunal also observed that many of the incumbents of the School of Engineering had worked together for a considerable number of years. The claimant had no experience of UK academia.

30. Further and in any event the Tribunal observed that the claimant held and does hold a high opinion of her status as a world renowned Professor of Petrochemical Engineering and was not prepared to engage herself in tasks which she considered were demeaning. In this respect the Tribunal accepted the evidence of Professor Alan Murray that the claimant (like some other academics) was someone who did not like to follow rules, which she felt constrained her other activities.

31. The claimant relies upon Professor Stefano Brandani as a comparator and maintains that he was given laboratory space and a technician from the outset of his employment which the claimant was not. To this end the Tribunal accepted the evidence before it that whilst Stefano Brandani was indeed given a laboratory space at the outset of his employment with the respondents such laboratory space was within an established laboratory which he shared with others. Accordingly on commencing his employment with the respondents there was no requirement for him to have a "start up" laboratory of the nature and extent to that provided to the claimant. The

Tribunal observed that there was no evidence before it to support the proposition that the claimant was not provided with technical support from the commencement of her employment with the respondents.

32. In late August 2008 Professor Peter Grant asked Professor Brandani to serve as Head of the Examination Boards for Chemical Engineering Undergraduate Students- "Chair of the Board of Examiners". The Tribunal accepted the evidence of Professor Alan Murray that this was an onerous role which was not perceived to be prestigious.

33. There was no transparency in the recruitment of Professor Brandani to the position of Chair of Board of the Examiners. To this end the Tribunal accepted the reasons given by Professor Nigel Brown that Professor Stefano Brandani had been appointed as Chair of the Board of Examiners as he had already established his research activity and had engaged enthusiastically with teaching and therefore to a certain extent was established within the respondents. Whilst the lack of transparency in these criteria for selection can be criticised, the Tribunal concluded that the criteria were nothing whatsoever to do with the claimant's sex.

34. In January 2010 a new team who were working in Carbon Capture joined the University. That group was headed up by Professor Jon Gibbins. A significant amount of equipment was coming with the new team which needed to be housed within the School of Engineering.

35. The Tribunal accepted the evidence of Professor Alan Murray that the only space available to store equipment was in part of the newly refurbished technical process engineering laboratory designed for the claimant. Professor Alan Murray discussed this with the claimant who objected strongly to his decision to house the equipment there.

36. There ensued correspondence regarding the housing of Professor Gibbins' equipment within the claimant's lab (**CBD140-157**). The parties liaised

regarding the possibility of an external expert intervening in the dispute but were unable to reach agreement.

37. In January 2010 the claimant was diagnosed with work related stress and depression. She did not return to her employment with the respondents. In late April 2010 the claimant found out her salary would be reduced when she was absent on sick pay. Her salary was initially reduced to half pay and then to no pay.

38. The claimant asked HR about income protection insurance and workers health and safety insurance. They gave her advice about who to contact. In the period January 2010 to the termination of her contract of employment the claimant produced fit notes to the respondents covering her absence (Supplementary Witness Statement, **57-79**).

39. In this period the claimant took medication for anxiety, stress and depression. The Tribunal accepted the evidence of the claimant that throughout this period she had no social life and was unable to do activities she previously could do such as exercise and shopping. Throughout that period the claimant was frequently tearful due to the symptoms of her illness.

40. The Tribunal accepted the evidence that in the period January 2010 to April 2012 the claimant attended Harlow College from time to time in her capacity as a Governor there. Further, the claimant attended conferences, sometimes abroad and on occasion gave lectures.

41. However, the Tribunal found that engagement did not take place on a weekly or even on a monthly basis. In respect of her engagement in outside activities was concerned, the Tribunal accepted the evidence of the claimant that sporadic engagement was her “salvation” from her profound mental health issues.

42. On the 14th April 2010 the claimant, along with Professor Andrea Schaefer wrote to the Principal of the University of Edinburgh, Professor Sir Timothy O'Shea and stated:

> "*Dear Tim*
>
> *As the only 2 female Professors remaining from those hired and brought to the UoE in 2006/2007 by the School of Engineering we would like to discuss with you how to make our work viable. Right now, under the current conditions, we are completely disabled in our employment due to:- gender discrimination …*"

The letter went on to state "*To move forward we would like to speak with you in order to find a constructive solution to the above issues which not only hamper our professional life and growth but also severely and adversely impact our health and personal circumstances to an extent we can no longer bear.*" (page 153, **CBD**)

43. The Tribunal were unanimous in their view that it could not be disputed that by 14th April 2010 the claimant had made a grievance the subject matter of which was sex discrimination.

44. As a result of the letter written by the claimant and Andrea Schaefer to the Principal a diversity review of the School of Engineering was instigated in June 2010 and commenced in August 2010 under the auspices of Professor Jo Shaw, a Professor in the Faculty of Law. The Tribunal accepted the evidence that Professor Jo Shaw is a well respected and robust individual who had been selected carefully for her task.

45. In December 2010 Professor Jo Shaw published her report of her review (**309-321 CBD**). In her review, Professor Jo Shaw stated:

> "*13 One document should be mentioned specifically. In late August 2010 I received through the University internal mail an anonymous communication comprising a single piece of paper on which were printed 2 internet addresses. The intention of the communicator was clearly that I should follow those addresses and draw certain conclusions from them which reflected badly upon certain individuals who work in the school. I did follow the links and drew the conclusion from this that there were people in the school who wanted to influence my judgement about these issues in a problematic way, despite the insistence of the Head of School that he was entirely supportive of the Review and despite his encouragement to staff to approach me to provide an input (many did so) or to respond my approaches positively (as many did). I should note that the links encouraged me to look away from systemic and cultural issues with which this review is solely concentrate and to concentrate on the personal and personnel issues which lie outwith its scope. I chose to ignore the content of the web pages referred to in the note.*"

46. The Tribunal accepted the undisputed evidence before them that the anonymous communication comprised an email containing two links to web pages relating to the claimant's time in Australia. The content of the web pages was such that it was likely that an adverse inference would be drawn by the Professor Jo Shaw. The Tribunal was given no reason to doubt the conclusion of Professor Jo Shaw that the author of the anonymous communication came from within the School of Engineering.

47. In her review Professor Jo Shaw referred to findings made by Dr Wendy Faulkner in 2006. A summary of her findings is to be found on page 6 of Professor Jo Shaw's report (**page 314**) and include:

> "*In the focus group with men from the School all appear to have been convinced that the then very recent appointment of 4 women professors in the school was entirely due to what they called "positive*

*discrimination". The disparity and tone of this discussion and the apparent unanimity in the group indicated that there was a widespread and much complained about view within the School that "these women were appointed because they were women, not because they were good enough*".

48. In her section "Findings of the Review Interviews" Dr Jo Shaw included the following paragraphs (**page 315-316**):

"*25 Many of the staff I spoke to had worked for a long time in the school. Overwhelmingly they expressed contentment about their own treatment and what they saw of the treatment of others although many did suggest that approaches to management had changed radically since the appointment of a new Head of School in 2008. There had been a shift from a rather centralised model, one even described by interviewees as "patrician", to a more decentralised model in which much line management responsibility was devolved to Heads of Institute who had participated in turn in a Senior Management Team with the Head of School, School Administrator and Director of Research. … 27 A consistent negative theme expressed by some interviewees was that they were concerned about the presence of an "insiders" culture in the School of Engineering. … Equally it should be noted that there were also expressions of satisfaction about the school and its working environment coming from those whom one might classically have expected to be "outsiders*".

49. In the "summative findings of the review" Professor Jo Shaw stated:

"*34 I concluded that the problems which the school currently faces lie under the shadow of events of 2006 and shortly thereafter when some individuals found their competence negatively judged before they even joined the school. My tentative suggestion is that this is*

*not caused by "gender" bias as such, or at least no more than is (regrettably) still all too prevalent across engineering generally as a profession, and indeed (albeit to a lesser extent) across academic workplaces in STEM fields. Rather I concluded that the school has developed a culture which sometimes draws unhelpful distinctions which individuals often find hard to negotiate, between insiders and outsiders. Gender is one of the vectors along which judgements about whether an individual belongs or is not is transmitted, but it is not the only one … Laudable efforts to change the culture of the school is starting, at least, with it's management structure and style and with a new leadership have yet to bear fruit at least so far as the working experience of some members of staff is concerned.*"

50. The report of Professor Jo Shaw concluded thus:

"*41 All of this work needs to be underpinned by a comprehensive diversity "audit" of the school undertaken in the context of the College in which it sits. The audit should be prepared by a professional team from outside the University. This should include work on retention. It would be useful to discover more about the anecdotal evidence that talented people have left because they find it hard to fit in if indeed it is true. Exit interviews and reconnection with staff members who have left since 2006 would be an important element of this work.*"

51. The Tribunal accepted the evidence of Professor Alan Murray that the review was in fact undertaken by an external company OSDC and was published in April 2011. The report resulting from the review is to be found at the claimant's bundle CBD at **page 420**.

52. The Tribunal accepted the evidence of Alan Murray that Professor Jo Shaw's report was the first he had heard of the comments reported by Dr Wendy Faulkner in 2006. On the 4th of February 2011 (respondent's first bundle

**p151**), Professor Alan Murray wrote to the claimant and Professor Andrea Schaefer in these terms:

*"Dear Roya*

*Review of Diversity in the School of Engineering*

*I am sure that you have read Professor Shaw's report with interest. At this stage, I feel compelled to write to you and to Andrea regarding a set of unwelcome views that came to light as a result of Jo's investigations.*

*I refer to the views expressed to Dr Wendy Faulkner in 2006, during an interview with a group of male staff in the School of Engineering. The meeting discussed the then recent appointment of four women professors in the School. The views are summarised by Professor Shaw in her report, section 20(3) as "…these women were appointed because they were women, not because they were good enough".*

*I am sure you know that I was shocked to hear these views, which I find distasteful and indefensible. Only one of the four appointees had actually worked in Edinburgh at the time. Casting aspersions on her appointment was demonstrably unjustified. Doing so with respect to three further new colleagues who had not even started work here in Edinburgh was preposterous.*

*Sadly, we cannot rewrite the past but I can express my unqualified, personal rejection of such views. I can also, representing the School as its current Head, add regret that such views were once held and their expression felt to be acceptable."*

53. On 31st January 2011 the claimant and Andrea Schaefer wrote to Professor Nigel Brown copying Professor Sir Tim O'Shea, the Principal of the

University. In that letter Professors Shafer and Sheikholeslami made certain suggested recommendations. These recommendations included:

> "*We have discussed with Professor Sir Timothy O'Shea a clear indication of our suggested way forward which entails a move outside of the School of Engineering.*" (**page 324**, **CBD**)

54. The Tribunal accepted the evidence that in January 2011 the claimant wanted to return to work and saw a gradual reintegration via another school to be a way back into the workplace after being absent for a year with work related stress and depression.

55. Professor Nigel Brown replied to the claimant and Professor Shafer on the 16th of February 2011 (**327-328 CBD**). In that letter he stated:

> "*I note your discussions with the Principal and your suggestion of a move outside the School of Engineering. While I support the integration of different areas of science in order to develop interdisciplinary working I would have thought a more positive and productive way forward would be to work in your existing refurbished laboratories in an improved relationship with current colleagues.*"

56. Under cross examination Sheila Gupta agreed that there would have been no work permit issues had the claimant been allowed to move school on a temporary basis. In cross examination Sheila Gupta accepted that Professor Nigel Brown, at that time the Vice Principal and the Head of the College, did not exclude the possibility of such a move in his letter of 6th February 2011 but merely expressed a view that the claimant and Professor Andrea Schaefer could work in their existing schools focussing on an improved relationship with their current colleagues.

57. There was a meeting on the report by Professor Jo Shaw on the 15th February 2011. The Tribunal accepted the evidence of Professor Alan Murray

that at this meeting some members of the School of Engineering made representations about their unhappiness with the review process and in particular that it seemed to have been based on and unfairly influenced by the comments of Dr Wendy Faulkener. The claimant was absent from this meeting as she was still on sick leave.

58. The Tribunal finds that after the meeting on the Professor Jo Shaw report which took place on the 15th of February 2011 the claimant became regarded as an individual to be distrusted and disliked in the School of Engineering. To that end the evidence of Dr Don Glass was that both he and his colleagues had a general feeling that the claimant's allegation on gender had been *overegged*. Their view was that the claimant had not *got her way* in the School of Engineering and her allegations of gender bias were simply a reaction to that. The feeling that the claimant's disputes with the School were actions that were *overegged* formed part of the basis of the *dislike* himself and his colleagues felt towards the claimant (the words in italics are the words used by the witness himself).

59. In 2011 there was an "*injunction"* (in the words of Dr Don Glass) not to contact the claimant as she was in dispute with the respondents. The instruction or *injunction* was that under no circumstances was contact to be made to her other than through solicitors. The *injunction* was given to Don Glass and others verbally, there being in existence no email trail of the same.

60. The "*injunction"* not to contact the claimant was imposed on Dr Don Glass and others who were advised that they should not contact the claimant except through her solicitors as she was in dispute with the School. In 2011 the dispute the claimant had with the school was that of gender equality which she had by then raised on a number of occasions. Indeed, the claimant's dispute along with the dispute of Professor Schaffer had resulted in the report by Professor Jo Shaw whose comments with reference to Dr Wendy Faulkner's findings had not found favour among certain quarters in the School of Engineering.

61. The Tribunal did not have the evidence before it to determine who was involved in imposing the "injunction" to, in effect, send the claimant to Coventry. On their assessment of the evidence the Tribunal concluded that Professor Alan Murray was not so involved. The Tribunal reached this conclusion after having regard to Professor Alan Murray's demeanour whilst giving evidence and his sincerity in recounting the terms of the letter of 4th February 2011.

62. In 2011, following the Jo Shaw report the claimant suffered a deterioration in her health. During this time she continued to supervise the work of her PhD student Emad Alhseinat. However, her supervision was largely conducted from home via email and consisted of contact around twice per week and this was not considered adequate by the respondent.

63. In late 2011 Professor Stefiani approached Professor Alan Murray with a view to allocating part of the claimant's laboratory to a new Carbon Capture consortium led by Professors Gibbins and Brandani. Dr Don Glass assessed the effect of work of any new team might have on Emad Alhseinat's work. Dr Don Glass wrote a note of his views on the 15th December 2011 (**page 404** of CBD). His note commenced with the words:

> "*I take it that this move has already been decided. The only issue is therefore whether and how the work of the sole research student occupant of this suite of laboratories Emad Alhseinat can be protected. Dr Don Glass went on to recommend the purchase of a piece of equipment that would cost £3,595 plus VAT. The equipment was purchased, and the claimant's laboratory started being used by Professors Gibbins and Brandani.*"

64. At the same time as the claimant's laboratory started to be used by Professors Gibbins and Brandani the Head of the Graduate School Professor Ingram along with Professor Stefiani decided that Dr Don Glass should be

asked to act as a new supervisor for Emad Alhseinat. Professor Ingram and Dr Don Glass met with Emad Alhseinat more than once and a change of supervisor was agreed with him. On 10th January 2012 Emad Alhseinat informed the claimant that he had been advised by Dr Don Glass that he had been appointed to act as his third supervisor (**page 479** CBD).

65. The Tribunal accepted the evidence of Dr Don Glass in cross examination that communicating with the claimant regarding the allocation of a laboratory to others and the substitution of himself as Emad Alhseinat's third supervisor would have been something that he would have considered doing but for the fact of the "injunction" not to communicate with her apart from via solicitors. Dr Don Glass accepted that in proceeding as they did to reallocate her lab and to substitute the claimant for another supervisor of her PhD student the actings of the School of Engineering could be seen to be an act of hostility towards the claimant herself. However these acts were not caused by the claimant having made allegations of discrimination nor were they because of her gender or disability.

66. In his evidence Dr Don Glass stated that in his mind the claimant would not be returning to work and therefore the reallocation of her lab and her supervisory duties over her PhD student were, in his words, "*a necessary part of the process of clearing up*". The use of term "clearing up" reflects the general hostile attitude of certain elements of the School of Engineering to the claimant at that time although in the continuing absence of the claimant the process was inevitable.

67. On 23 May 2011, the claimant met with Dr Waldron. In an email of the same date, the claimant proposed a "way forward". This included "providing an acceptable work condition" for the claimant's "gradual reintegration to work"; full coverage of salary and benefits because of work-related illness; and early retirement package for 2 years time and compensation.

68. On 18 July 2011, Dr Waldron responded. That response included a suggestion that the claimant be referred to Occupational health for an assessment to facilitate any phased return. However on 19 July 2011, the claimant replied that until the respondent had agreed to the "substantive issues" that was not "applicable". On 21 July, Dr Waldron wrote to say that the respondent could not begin a scheme for re-integration until they had a clearer picture of the medical and occupational health issues involved. She understood the claimant might be reluctant to engage with the respondent's own occupational health provider and so she wanted to explore whether the claimant would agree to be examined by an independent occupational health adviser. On 10 August 2011, the claimant said that she would need further information including the list of questions and the brief that wold be provided to the examiner. On 19 August, Dr Waldron provided the list of questions. There was then an exchange of correspondence between August and November about wider issues but including the claimant raising concerns about the list of questions and Dr Waldron repeating the need for informed medical guidance if reintegration was to be explored.

69. On 16 December 2011, Dr Waldron wrote to the claimant about a number of matters. In that letter she said that because the claimant was employed under a work permit, the respondent could not simply offer her another post. The claimant would have to apply and be successful after external advertisement for the respondent to support a new work permit. She noted that the claimant's work permit would expire in April 2012 and that this may have implications for the claimant's continued residency in the UK. She noted they were at an impasse and encouraged the claimant to consider the offer previously made by the respondent or to consider mediation.

70. On the 11th of January 2012 June Bell, Head of HR wrote to the claimant. That letter stated:

"*Dear Professor Sheikholeslami*

> *As you will be aware and as was mentioned in the University secretary's letter of 16th December 2011 your work permit expired in April 2012 specifically on 12th April. As it would not be legal for the University to continue to employ you to work without such a permit and in accordance with your terms and conditions of employment I am writing formally to give notice that your contract of employment with the University will terminate for that reason on 12th April 2012. If the status of your entitlement to remain in the UK changes please let me know. Please contact me on the telephone number shown above or at June.Bell@ed.ac.uk with any questions you may have.*"

The claimant's employment with the respondents did terminate on the 12th April 2012.

71. In October 2011 Sheila Gupta, then the Director of HR, prepared the document to be found at the claimant's bundle of documents **CBD 594-595**. In evidence Sheila Gupta admitted that there were possible options to extend the claimant's stay in the UK contained within this document which were not explored by the respondents. Sheila Gupta admitted that there were possible steps which were not taken by her but which could be taken to enable the claimant to stay in the UK.

72. The section "Additional Points" (page **595**) states:

> "*The question is how she has been supporting herself during their unpaid leave. If she has taken secondary employment or is self employed or is unbeknown to us switching category of some kind this is breaching the terms of her work permit. We would be within our rights to report this to the Home Office."*

In evidence Sheila Gupta admitted that this was an adverse and indeed negative conclusion about the claimant made by her. In evidence she

admitted that she had not bothered to check the real position with the claimant herself.

73. Sheila Gupta said in evidence that on reflection she should have written to the claimant about other routes whereby she could retain her employment rather than simply authorising the letter of 11th January 2012.

74. The evidence of Sheila Gupta was that her understanding was that the claimant was seeking a settlement from the University and would not be returning to her previous position. For these reasons she did not explore possible options to extend the claimant's stay in the UK and did not invoke the grievance policy despite communications made by the claimant which were (by her own admission in evidence) clearly grievances.

75. In evidence Sheila Gupta acknowledged the letter of 23rd May 2011 from the claimant to Dr Kim Waldron (**152** first bundle of the respondents) was undoubtedly a grievance and one which was not actioned upon. Her explanation was that she did not consider that the claimant would wish to go through the grievance process due to her ill health.

76. Sheila Gupta acknowledged in evidence that she played a material role in the termination of the claimant's employment and indeed authorised the letter of 12th January 2012. In authorising this letter Sheila Gupta acknowledged in evidence that the respondents did not comply with the ACAS Code of Practice.

77. The Tribunal accepted the evidence of Dr Kim Waldron that the decision to terminate the claimant's employment was taken by Professor Sir Tim O'Shea. To this end the Tribunal did not believe the evidence given by Professor Lesley Yellowlees that she was the individual who took the decision to terminate the claimant's employment.

78. Sheila Gupta also acknowledged that when the claimant refused to attend appointments with occupational health service, the respondents took no further steps to investigate whether or not the claimant was a disabled person despite having been off from her employment at the University for a period of over 2 years with stress and depression. She acknowledged in evidence that she played a material role in the termination of the claimant's employment without knowing whether or not the claimant was disabled in terms of the Equality Act 2010.

79. In her actings from October 2011 (**594-595** CBD) until the termination of the claimant's employment Sheila Gupta never referred to the respondents' own disability policy to be found at **page 337** of the claimant's second witness statement. In evidence she agreed that this was a fundamental omission on her part.

80. The respondents' **Disability Policy 2004** is to be found at **page 337** onwards of the attachments to the claimant's supplementary witness statement. This Policy states:

> "*It should be remembered that the University is required under the law to make any reasonable adjustments to enable the individual to continue in post. There are a number of possible options to consider:*
>
> *(a) continuing in the same post possibly with appropriate adjustment;*
>
> *(b) redeployment;*
>
> *(c) early retirement on grounds of incapacity; and*
>
> *(d) termination of employment*" (supplementary witness statement **page 342**).

81. Sheila Gupta's justification for her failures in not only progressing the claimant's grievances but also in having no regard to the issue of disability in the termination of the claimant's employment was simply that the claimant was seeking settlement from the respondents. However, such negotiations as there were between the claimant were not fruitful and at no point could it be said that a settlement was within contemplation.

82. Insofar as the termination of the claimant's employment was concerned, Sheila Gupta agreed in cross examination that at no point did the claimant say she wanted to relinquish her Chair with the respondents and her position as Professor of Petrochemical Engineering with them.

**Observations on the Evidence**

83. The Tribunal made the undernoted observations on the evidence in general and that of certain key witnesses.

**The Claimant**

84. The claimant's witness statements were taken as read. Her cross examination lasted 13 days, the respondents' evidence commencing in the last week of April 2015. One of the reasons why the cross examination took this length of time was that the claimant was clearly unwell which necessitated regular breaks. Frequently, the Tribunal had to adjourn for the day early as the claimant was simply too unwell to continue.

85. However the Tribunal was of the view that many days were wasted in fruitless cross-examination of the claimant and there was a failure to cross-examine on key points. This largely explains the length of the proceedings relative to the essential Findings in Fact. The approach of the respondent's representative to cross-examination, in circumstances where the claimant was clearly unwell, did not assist the Tribunal in determining the issues. In

particular, in light of the evidence, the Tribunal considered it extraordinary that the issue of disability remained at large.

86. The evidence given by the claimant both in chief and in cross presented a highly intelligent and very well educated woman who was Iranian born and held Canadian and Australian nationality. Prior to coming to Scotland the claimant had worked in both Australia and in Canada.

87. The Tribunal accepted the evidence of the claimant that her life was her work. Indeed this provided an explanation for the Tribunal on the devastating effect to her health following the breakdown of her relationship with the respondents.

88. The claimant presented as a person acutely aware of her status as a world renowned Professor of Petrochemical Engineering. As such, the evidence presented a portrait of her arrival to the University of Edinburgh as an individual with clear boundaries as to what she should or should not be doing in her role as Professor of Petrochemical Engineering. An example of this is the issue of the set up of the laboratory. To this end, the Tribunal accepted the evidence of Professor Alan Murray and Professor Peter Grant that when a new Professor is appointed to the University it is the responsibility of that Professor to set up the lab in which they and their team will be working.

89. The environment in the School of Engineering into which the claimant entered in 2006 was one which was populated by academics who had worked for a number of years together and, by and large, who had gained relevant experience within the UK. The Tribunal observed that the claimant's consciousness of her status and lack of experience within UK academia lent itself to the potential for problems when she arrived in the UK to take up her position in 2007.

90. The claimant was questioned at length on her activities during her period of absence from 2010. She was not, however, questioned about her "day to day" activities. The Tribunal therefore took the claimant's witness statements on the issue of her "day to day activities" to be unchallenged in cross examination.

**Professor Alan Murray**

91. The Tribunal were of the collective opinion Professor Alan Murray came across as an inherently reasonable and measured individual. In his dealings with the claimant the Tribunal concluded that Professor Alan Murray had only attempted to resolve situations and assist the claimant albeit that at times the claimant perceived his correspondence to be patronising.

92. The Tribunal adhered to the views of Professor Jo Shaw when she stated in respect of Alan Murray that his efforts in changing the management structure and style of the School of Engineering were "laudable" (**paragraph V1**).

93. The Tribunal found that the letter of apology written by Professor Alan Murray of 4th February 2011 (respondent's first bundle **p151**) to the claimant and to Professor Andrea Schaefer to be an expression of his genuine and sincerely held views.

94. Against these observations, the Tribunal did not find Professor Alan Murray to be part of the "insider" group referred to by Professor Jo Shaw. Neither did the Tribunal find him to be a part of the group of individuals who deemed it necessary to impose an "injunction" on the claimant following her "dispute" with the School of Engineering.

**Dr Don Glass**

95. Dr Don Glass gave evidence to the Tribunal despite having recent surgical intervention for an intracranial bleed. This caused the Tribunal some concern

and therefore on separate occasions (once on the part of the Employment Judge and the other on the part of Simon Gorton QC) Dr Glass was asked to confirm that he was able, fit and willing to give evidence. On each occasion he indicated his assent.

96. In the course of his evidence Dr Don Glass contradicted himself often as a result of spontaneous statements which later became apparent to him had ramifications. For example, after stating under oath that there was an "injunction" not to contact the claimant about any matter apart from through solicitors as she was in dispute with the respondents, Dr Don Glass tried to retract this to merely an "instruction". Equally, there were contradictions in his evidence as to whether or not HR (and in particular female involvement in HR) were involved in the decision making process in respect of the use of the lab by Professors Gibbins and Brandani in late 2011 and the substitution of himself as Emad Alhseinat's supervisor in the same period.

97. The spontaneous passages of evidence given by Dr Don Glass were indeed very revealing to the Tribunal. Firstly, he was clear in his evidence that by 2011 the claimant was distrusted and unpopular. Later in his evidence he stated that the "injunction" not to contact the claimant about any matter apart from through her solicitors was because the claimant was already in dispute with the respondents and further admitted that it was known that that dispute was over an issue of discrimination. Indeed, the Tribunal concluded that those views pervaded from the report by Professor Jo Shaw in which was expressed therein the views of Dr Wendy Faulkner. To this end the Tribunal noted that at the open meeting on the 15th February 2011 some individuals were unhappy with the review process and in particular that the report seemed to have been based upon Dr Wendy Faulkner's comments that there was prejudice in the School of Engineering.

98. The Tribunal concluded that Dr Don Glass was a prime example of the "insiders" referred to by Professor Jo Shaw in her report. Further, the Tribunal concluded that Dr Don Glass was certainly privy to a body of

individuals that concluded that an "injunction" should be placed on them to refrain from contacting the claimant as she was in dispute with the respondents over issues of discrimination.

**Bridgeen McCloskey**

99. The Tribunal considered that the cross examination of Bridgeen McCloskey revealed her to have a far greater involvement in the treatment by the respondents of the claimant than initially apparent from her witness statement. To this end, the Tribunal found her evidence in cross that her comments in paragraph 11 of her witness statement were tantamount to an accusation of unprofessional behaviour on the part of Professor Jo Shaw to be indicative of her views on equality and diversity as a whole. What came across to the Tribunal was her unswerving loyalty to the School of Engineering under any circumstances.

100. Further, the Tribunal found it revealing that Bridgeen McCloskey did not deny having a conversation with Dr Don Glass in 2011 in which she advised him not to contact the claimant apart from through solicitors. The Tribunal concluded that **esto** there was an "injunction" in place as stated by Dr Don Glass, then Bridgeen McCloskey was a key figure in imposing such orders.

**Sheila Gupta**

101. The Tribunal found the evidence of Sheila Gupta, formerly the Director of Human Resources to be most instructive. For example, Sheila Gupta freely admitted that she played a material role in the termination of the claimant's employment but that she took no steps in the period 2010 to 2012 to investigate whether or not the claimant was a disabled person in terms of the Equality Act 2010. To this end, she was in receipt of the sick notes covering the period of the claimant's absence which articulated the reasons for absence as stress and depression.

102. Sheila Gupta admitted that whilst playing her material role in the termination of the claimant's employment she made no reference to the respondents' own disability policy and admitted under oath that this was a fundamental omission on her part.

103. Sheila Gupta admitted that the claimant's correspondence and in particular her letter of 31st March 2010 (**152 CBD**) could be considered as a written grievance but admitted that she had never treated it as such or indeed invoked the respondents' own grievance policy.

104. The reason given by Sheila Gupta for not invoking the grievance policy was that the claimant was unwell and she did not consider that the claimant would want to go through the grievance procedures. However, she never made enquiries from the claimant directly about whether she did want to pursue a grievance.

105. Sheila Gupta admitted that she was the author of a document recovered under a Subject Access Request to be found at page **594-595 CBD**. She stated in evidence that she wrote this document in October 2011. As regards the content of this document, she admitted that on reflection she should have written to the claimant on the alternative routes to continue to extend her stay in the UK, as outlined in the document. Sheila Gupta admitted that in the section of that document headed "Additional Points" she drew adverse and negative conclusions about the claimant without bothering to contact her and enquire as to the issue on how she was supporting herself during her unpaid leave.

106. Sheila Gupta gave evidence that she dismissed the claimant without considering other options under the respondents Disability Policy as she was of the view of the claimant was only interested in a settlement with the respondents. However, there was no evidence to support the proposition that settlement discussions with the claimant ever came close to fruition. Further, in evidence, Sheila Gupta admitted that the claimant never expressed the

view that she wished to relinquish her position as the Chair of PetroChemical Engineering. In considering this issue the Tribunal concluded that there was no factual basis to support the proposition that the claimant wished to leave the employment of the respondents.

107. In these circumstances the Tribunal considered why Sheila Gupta was of the view that the claimant should be dismissed without looking at alternatives. In answering this question, the Tribunal looked to the evidence of Sheila Gupta that the claimant's grievances were never progressed due to her ill health. From this the Tribunal concluded that there was a view among the respondents that the claimant was never going to return to the employment of the respondents and therefore there was no need to resolve the situation between employer and employee. The view that the claimant was never going to return to the employment of the respondents due to her health was reflected in the material part played by Sheila Gupta in terminating the claimant's employment without consideration of other options (as freely admitted by her in evidence).

108. Sheila Gupta admitted that in dismissing the claimant the respondents did not follow the ACAS guidance.

109. As with the evidence of Dr Don Glass on occasions Sheila Gupta attempted to retract her frank admissions but was unable to do so in any plausible manner.

**Professor David Ingram**

110. In their submissions the respondents stated that in the course of Professor David Ingram's evidence the Tribunal suggested that his evidence was incorrect, even untruthful and that this was indicative of the Tribunal predetermining an important issue in the claim (paragraph 91 and 92 of submissions).

111. The Tribunal are unanimous in observing that the respondents' submissions are factually incorrect on this point. The intervention by the Tribunal (which was made after an adjournment to consider the issue) was out of concern that there had been collusion between witnesses. The response of Professor David Ingram to the comments by the Tribunal was such to allay those concerns.

**Professor Lesley Yellowlees**

112. The Tribunal heard robust evidence from Professor Lesley Yellowlees that the decision to dismiss the claimant was hers and hers alone. However, this evidence contradicted the evidence of Dr Kim Waldron that the decision to dismiss the claimant was that of the Principal, Professor Sir Timothy O'Shea and that Dr Kim Waldron acted at all times on his instructions.

113. The Tribunal believed the evidence of Dr Kim Waldron rather than the evidence of Professor Lesley Yellowlees for two reasons- firstly, Dr Kim Waldron is no longer in post – she left her position with the University of Edinburgh on 8 March 2013 and is now living in the USA. Secondly, it is clear from the evidence of June Bell that Dr Kim Waldron was materially involved in the events leading to the claimant's dismissal. There is no such supporting evidence in respect of the involvement of Professor Lesley Yellowlees at that time.

114. The Tribunal concluded that Professor Lesley Yellowlees chose to be untruthful in this respect due to her continuing employment with the respondents as Vice Principal, Professor Sir Tim O'Shea being the Principal in post at the time of the Tribunal hearing.

**Professor Sir Timothy O'Shea**

115. The Tribunal considered it worthy of observation that Professor Sir Tim O'Shea, an individual who had significant involvement with the claimant and,

furthermore, the individual who the Tribunal found to be the decision maker in the claimant's dismissal was not called as a witness by the respondents.

**Objective Justification**

116. Finally, the Tribunal considered it worthy of observation that the respondents led no evidence on the issue of objective justification in respect of the claim brought forth by the claimant under s15 of the Equality Act 2010.

**The Law**

Direct discrimination

117. Section 13 of the Equality Act 2010 ("the Equality Act") provides that direct discrimination occurs where a person treats another less favourably than he treats or would treat others because of a protected characteristic. It is not necessary to point to an actual person who has been more favourably treated, although how others have in fact been treated may be relevant evidence from which an inference of discrimination may be drawn. The tribunal should construct, if necessary, a hypothetical comparator whose relevant circumstances are not materially different to the claimant's except for the protected characteristic.

118. Tribunals do not have to construct a hypothetical comparator if they are able to make findings as to the "*reason why*" the treatment occurred without doing so. This is clear from the cases of *Shamoon v Chief Constable of the RUC*, *Stockton on Tees Borough Council v Aylott* and *Law Society and Others v Bahl 2003 IRLR 640*.

119. The protected characteristic need not be the only reason for the treatment (Owen *and Briggs v James 1982 ICR 618; O'Neill v Governors of St Thomas More Roman Catholic School* )

Disability status

120. Section 6 of the Equality Act provides that a person has a disability for the purposes of that Act, if she has a physical or mental impairment and the impairment has a substantial and long term adverse effect on her ability to carry out normal day-to -day activities. Schedule 1 to the Act provides further clarification and there is Statutory Guidance on the Matters to be taken into account in determining questions relating to the definition of disability. This Guidance came into effect on 1 May 2011 under enabling regulations (SI 2011/1159). While the Guidance dos not have legal effect, it must be taken into account by tribunals determining this issue.

Duty to make reasonable adjustments

121. Section 20 of the Equality Act provides as follows:

> *"Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*

123. The duty comprises three requirements (of which the first is relevant to this case.) The first requirement is a *"requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

124. Section 21 provides that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments and that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

125. Further provisions in Schedule 8 Part 3 provide that the duty is not triggered if the employer did not know, or could not reasonably be expected to know that the claimant had a disability and that the provision, criteria or practice ("PCP") is likely to place the claimant at the identified substantial disadvantage.

Discrimination arising from disability

126. Section 15 of the Equality Act provides:-

> (1) *A person (A) discriminates against a disabled person (B) if—*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

127. Guidance on how this section should be applies was given by the EAT in *Pnaiser v NHS England UKEAT/0137*. In that case it is pointed out that *"arising in consequence of*" could describe a range of causal links and there may be more than one link. It is a question of fact whether something can properly be said to arise in consequence of disability. There is no need for the alleged discriminator to know that the "something" that causes the treatment arises in consequence of disability. The requirement for knowledge is of the disability only.

Victimisation

128. Section 27 of the Equality Act provides for another type of prohibited conduct, namely victimisation. This is where someone (A) subjects another (B) to a detriment because B has done a protected act, or A believes B has done a protected act.

129. A protected act includes making an allegation (whether or not express) that A or another person has contravened the Equality Act.

130. A's motivation may be subconscious. The key question is why B was treated in the way she was. The protected act need not be the only reason for the detrimental treatment but it must have a "significant influence" on the decision to act in that way. (*Nagarajan v London Regional Transport 1991 ICR 877*.) "Significant" means "more than trivial". (*Igen v Wong 2005 ICR 931*)

Burden of proof under the Equality Act

131. Section 136 of the Equality Act provides for a shifting burden of proof. It is firstly for the claimant to prove facts from which a tribunal could decide that there has been a contravention of the Equality Act. This is often done by drawing inferences from the established facts. If she succeeds in doing that, then the burden shifts to the respondent to prove that the reason for the treatment is not one prohibited by the Act. The respondent does not have to justify the treatment or show that it acted reasonably, although such matters may go to the credibility of the reason put forward.

Unfair dismissal

132. The Employment Rights Act 1996 (the "ERA") sets out the right not to be unfairly dismissed. It is for the respondent to prove that it had a potentially fair reason for dismissal in terms of section 98(1). In the present case it is

contended that the reason is "some other substantial reason" justifying dismissal.

133. If the Tribunal is satisfied there is a potentially fair for dismissal, it must then assess whether in the circumstances (which includes the size and administrative resources of the respondent) the decision to dismiss for that reason was fair or unfair. Section 98(4) provides that the determination of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

134. This test of fairness is really one of reasonableness and the law recognises that different employers acting reasonably may make different decisions based on the same circumstances. It is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law as the Tribunal would have "substituted its own view" for that of the reasonable employer. Rather the question for the Tribunal is whether the decision to dismiss (including the procedure adopted) fell within the "range of reasonable responses" open to a reasonable employer. If so, the dismissal is fair. It is only if the decision to dismiss falls outside that range that the dismissal is unfair. (See for example*, Iceland Frozen Foods Ltd v Jones 1983 ICR 17*).

135. A failure to follow a fair procedure may cast doubt on the reason for dismissal or may, in itself, mean that the decision to dismiss was not reasonable. However, the Tribunal must assess the overall fairness of the procedure and not merely whether there was a failure to comply with a contractual procedure or the ACAS Code.

Holiday pay

136. An employee is entitled under the Working Time Regulations 1998 to payment of accrued but untaken annual leave where employment is terminated. Regulation 13(9) of the Regulations provides that annual leave may only be taken in the leave year in respect of which it is due. That

provision, however, must now be read in the light of the case law of the Court of Justice of the European Union (see *NHS Leeds v Larner [2012] ICR 1389*). So where an employee is on sick leave during the leave year, that employee may be entitled to take annual leave accrued in respect of one year in a later year. In *Plumb v Duncan Print Group Ltd UKEAT 0071/15*, the Employment Appeal Tribunal decided that EU law did not confer an unlimited right to carry over periods of annual leave to subsequent years. The Directive, at most, only required that employees on sick leave were able to take annual leave within a period of 18 months of the end of the leave year in respect of which the annual leave arose. Consequently, Regulation 13(9) of the Regulations was to be read as permitting a worker to take annual leave within 18 months of the end of the leave year in which it was accrued where the worker was unable or unwilling to take annual leave because he was on sick leave and, as a consequence, did not exercise his right to annual leave.

**Claimant's submissions**

137. The claimant's submissions were, in summary, as follows:

Is the claimant a disabled person?

138. It is something of a surprise that this is still an issue when Dr Scott's report concluded that the claimant was a disabled person since at least October 2010. While this is a matter for the tribunal, all the evidence points to the correctness of that conclusion.

139. The claimant's depression was treated with medication before August 2010 and therefore the deduced effects have to be taken into account.

140. The tribunal is invited to conclude that the claimant was a disabled person from October 2010 suffering from a mental impairment namely a depressive and anxiety disorder.

141. In the unlikely event that the tribunal concludes that the claimant was not a disabled person, the evidence of Gupta makes clear that the respondent treated her as if she were and this comes under the definition of discrimination by perception.

142. The respondent plainly had knowledge of the claimant's disability as a matter of fact as defined by her absence and the sick notes and the perception referred to above.

The complaints under the Equality Act

143. The claimant asserts direct discrimination on grounds of her sex; victimisation; section 15 discrimination (arising from disability) and failure to make reasonable adjustments.

Failure to make adjustments

144. It is submitted that the PCP is the respondent's requirement that the claimant attend work and fulfil her role.

145. That PCP put the claimant at a substantial disadvantage.

146. It was reasonable for the respondent to take the following steps:

- to apply its procedures in respect of sickness absence and specifically its disability policy
- to apply or have regard to its procedures including the grievance procedure and dignity and respect policy
- to ensure that the claimant's immigration status (which was intimately intertwined with her employment status) would not be compromised by her absences and to take all reasonable steps to ensure that the claimant would not be at risk of losing her lawful working statue's

- to maintain the claimant's pay when absent through illness and to keep non-payments under review
- to reintegrate the claimant into work
- to contact the claimant's GP in order to assess the claimant's fitness and ability to return to work
- to commission expert medical advice in respect of the claimant's condition, prognosis and return to work
- to provide a brief to the claimant as a condition precedent to the claimant being seen by the respondent's occupational health advisers
- to avoid dismissing the claimant
- to consider moving the claimant to a different place of work outside the school of engineering
- engaged with the claimant in respect of her work permit status fully informing her of options with a view to ensuring the claimant's work status was not lost at the expiration of her 5 year work permit
- creating a new role for the claimant if necessary
- engaged with the claimant in respect of the potential of and warned and informed the claimant of the removal of her laboratory
- engaged with the claimant in respect of the potential of and warned and informed the claimant of the removal of her duties as PHD supervisor for Emad

Section 15 complaint

147. It is submitted that the section 15 complaint applies to all matters referred to under the submissions on reasonable adjustments.

148. Specifically, it is submitted that the claimant's absence and all matters related to it caused the respondent to:

- Dismiss the claimant

- Not to address the issue of the claimant's work permit and seek a perfectly lawful and legitimate extension thereto
- Failed to take steps to apply its own procedures

149. All of these matters involved unfavourable treatment, they arose out of the claimant's disability as she was absence from January 2010.

150. There can be no legitimate aim in what the respondent did.

151. In any event, a failure to make a reasonable adjustment which would have abolished or minimised the unfavourable treatment, then it is difficult to see how there can be objective justification.

Gender discrimination

152. All the matters under reasonable adjustment and the section 15 claims apply equally to the direct gender discrimination claim. Specifically, the claimant's focus is on:

- The removal from her lab and supervision for Emad.
- Dismissal

153. A desire to avoid looking into the claimant's complaints and in effect to see the back of the claimant is intrinsically linked to the claimant's gender.

154. There is no reason for a hypothetical comparator to be constructed when the ET can make findings on the reason why the claimant received the treatment (relying on *Shamoon*).

Victimisation

155. All matters under reasonable adjustments, section 15 and gender discrimination apply equally to the victimisation complaint.

156. The claimant unquestionably did numerous protected acts including alleging she was disabled.

157. Again the fact of the claimant's ongoing complaints and reference to historical complaints materially influenced the respondent's mind in taking the course and that is sufficient for the claimant to succeed in her claims for victimisation.

158. There is an additional matter relating to the 23/1/12 meeting with Sir Tim O'Shea as set out in Waldron's witness statement at paragraph 43. This plainly was threat to the claimant and was an act of victimisation.

Unfair dismissal

159. This can be taken very quickly. No procedure was followed concluding with no right of appeal being afforded. The ACAS code was ignored. The decision cannot possibly be fair. The claimant seeks a finding of unfair dismissal and a finding that the respondent unreasonably failed to follow the ACAS Code.

Holiday pay

160. The claimant has not been paid in accordance with the 18 month decision in *Plumb*. There is no defence to this claim.

Notice Pay

161. This was not paid and it should have been paid. There is no defence to the claim. The respondent objects to the amendment application. These objections miss the point. Ms Gupta accepted that notice pay should have been made but was not. That is the respondent's evidence. It is impossible to see how the respondent is prejudiced by this matter. The respondent has never said that the claimant was in repudiatory breach of contract and she

was not cross-examined on this. The obligation is on the respondent to justify why notice was not paid and its witness has admitted the claim. The suggestion that the claimant should take her claim to another forum involving more expense and judicial time is unrealistic and unreasonable. The matter should be dealt with here. Indeed the fact of non-payment illuminates the respondent's approach to dismissing the claimant and running roughshod over her rights. This is factually relevant to the claims under the Equality Act.

**Respondent's submissions**

162. The respondent's submissions in summary are as follows:

163. The claimant has not been discriminated or victimised under the Equality Act.

Sex discrimination

164. The claim of direct sex discrimination is without foundation. The claimant has not identified a comparator. She was not treated less favourably than any hypothetical comparator.

165. Specifically, the alleged failure to provide research facilities. At all times the respondent took reasonable steps to remedy difficulties in relation to technical support and that difficulty was resolved. Responsibility for delay lies with both the claimant and the respondent and the delay was not related to the claimant's gender.

166. Reduction of pay to half-salary was in accordance with the policy of the respondent and there is no evidence that it was applied in a discriminatory manner.

167. The claimant alleges that less qualified male colleague were preferred to her in relation to decisions regarding the laboratory in late 2011. Dr Glass was suitably qualified to advise on the steps that were necessary to allow Mr

Alhseinat (the PhD student for which she had responsibility) to continue to carry out his research. Mr Alhseinat was able to carry out his research successfully thereafter. The claimant's conduct throughout her employment and throughout these proceedings demonstrates a pattern of unwillingness to accept that others had the authority to make decisions about the use to which the respondent's facilities should be put and to accept that others albeit not sharing the same speciality as the claimant had the technical knowledge and expertise to be able to make properly informed decisions on those matters. The respondent did not treat the claimant unfavourably because of her gender.

168. The laboratory space was needed for other colleagues in late 2011. Only the PhD student was using the space. He was able to continue using it following some adjustments that were the subject of advice from Don Glass.

169. The claimant was replaced as supervisor because the PhD student had no supervisor on campus. His second supervisor was abroad and was due to leave the respondent altogether. At the time the claimant had been absent for nearly two years. The individuals involved in decisions about this matter and in the continued supervision of the student were entirely qualified to do so. The respondent had a duty of care to the student to ensure that he was properly supervised so that he had an opportunity to conclude his research successfully and also in relation to practical matters such as health and safety in his working environment.

170. The claimant was not treated unfavourably because of her gender in relation to the ending of her employment. Her employment ended because she no longer wanted to fulfil the duties of Chair of Chemical Process Engineering. By virtue of the operation of immigration law, any new position had to be advertised so that the respondent complied with its duty to ensure that a post for which a settled employee was qualified was not filled by a non-EEA migrant. The claimant's work permit came to an end and it would thereafter have been an offence to employ her.

Victimisation

171. The claimant alleges detriment in relation to changes to the laboratory, in relation to the allocation of another supervisor to Mr Alhseinat and in relation to the termination of her employment on termination of her work permit. The reasons for these decisions are set out in summary above. There is no foundation for the proposition that she was victimised in these respects.

Disability discrimination

172. The respondent disputes that the claimant has established that she was a disabled person at the material times. If she was so disabled, the respondent did not know and could not reasonably have bene expected to be aware that she was disabled. During her absence from work the claimant continued to supervise Mr Alhseinat and to carry out a range of activities described above. The claimant repeatedly failed to engage with occupational health services despite numerous requests to do so. She inhibited the ability of the respondent to discover whether she was disabled and what reasonable adjustments might have been made.

173. In relation to the claim under section 15, the claimant again focuses on the decision relating to the lab and Mr Alhseinat. The high point of the claimant's case is that these took place while she was absent from work. The respondent does not accept that the claimant was disabled.

174. These decisions did not arise from the claimant's disability (if she was disabled). They arose because of a need for laboratory space and the need to ensure that the student was properly supervised. They were therefore decisions taken in pursuit of a legitimate aim and on a proportionate basis.

175. The issuing of notice was not unfavourable treatment arising in consequence of her disability. The reason for termination has already been set out. Further

the respondent pursued the legitimate aim of complying with immigration law and did so in a proportionate manner.

176. In relation to adjustments, there is reference to unspecified "adjustments requested". The claimant wanted to leave her position and it was not possible, consistently with immigration law, to comply with a request to that effect.

177. For the same reasons the claimant's dismissal did not arise in consequence of her disability. She was dismissed so that the respondent did not breach immigration law. There was no reasonable adjustment that the respondent could have made in the circumstances. The respondent consulted as extensively with the claimant as was practicable in the circumstances. Particular reference is made to the correspondence and meetings involving the claimant; Kim Waldron and Lesley Yellowlees in 2011. The claimant frustrated efforts by the respondent to investigate whether she was disabled and if so what adjustments could be made by her repeated refusals to engage with occupational health advisers.

178. The tribunal should conclude that the claimant wanted to change jobs within the University of Edinburgh. It should reject the claimant's contention that she wanted only to be rehabilitated in a different setting while staying in the same position. The respondent could not provide her with a different position without contravening the immigration laws then in force. It had no option but to terminate her employment when her work permit expired.

Unfair dismissal

179. The reason for the claimant's dismissal is as set out above. If the respondent had continued to employ her after her work permit had expired, it would have been breaching immigration law. There would have been serious and adverse consequences for the resident in the form of criminal liability and withdrawal of its status as a sponsor. It had a potentially fair reason to

dismiss the claimant. The respondent gave the claimant ample notice in correspondence as to the consequences of her work permit expiring. There was nothing more that the respondent could have done by way of procedure. The procedure was fair. The claimant knew why her employment was being terminated and she had the opportunity to make representations. In face of the claimant's refusal to continue with her duties as Chair of Chemical Process Engineering, no additional or alternative procedure would have made any difference to the outcome. The claimant intimated that she did not wish to return to her position and did not state otherwise despite numerous opportunities to do so. In all the circumstances it was reasonable for the respondent not to adopt any additional or alternative procedure. The respondent acted reasonably in treating the reason as sufficient reason to terminate the claimant's employment. Further and in any event, the respondent genuinely and reasonably believed that such a breach would occur on expiration of the work permit. The respondent genuinely and reasonably believed that the claimant was refusing to carry out her contractual duties. Dismissal was for some other substantial reason.

180. Dismissal was inevitable regardless of what procedures might have been followed.

181. The claimant materially contributed to her dismissal. She refused to co-operate in that she failed to engage with occupational health service and failed to reply to correspondence which focussed on the consequence of the expiry of her work permit.

182. It is submitted that the tribunal should conclude that the claimant is and was predisposed to treat any disagreement or suggestion with which she disagrees as a challenge to her authority and professionalism when it is nothing of the kind.

183. Even if the claimant was disabled and the respondent had the requisite knowledge of that there was no adjustment that the respondent could make in the face of the claimant's position. As she wanted to leave her position there was nothing to be done. The suggestion as to advice is misconceived. It is an offence for someone who is not registered with OISC or with a body such as the Law Society of Scotland to provide immigration advice.

184. Any incident or failure to make reasonable adjustments which occurred before the dates of lodging of the claims should be excluded from consideration as time-barred, excluding any incident or failure that occurred more than three months before the lodging of the ET1.

185. On 31 January the claimant wrote to Angi Lamb of UCU suggesting male comparators. The idea that she was being discriminated against because of the gender had crystallised in her mind by that time at the latest. Any claim made more than three months thereafter of gender discrimination is time-barred. Also the claimant wrote to the Principal on 14 April 2010 alleging gender discrimination. The same point arises.

186. The claimant's pay reduced in June 2010. Her claim in relation to that matter is timebarred.

187. The claims are presented as complaints about discrete events rather than about continuing acts and each incident or failure must be viewed separately.

Disability status

188. The respondent has at no time bound itself to accept the conclusions of Dr Scott. There are two reports lodged with the papers but they have not been spoken to and they are not evidence. The tribunal should simply ignore them. The most that can be inferred from the instruction of a single psychiatrist is that the respondent accepted that the effect of the tribunal's decision that a joint report be instructed was that only one psychiatrist would be instructed to

examine the claimant. If the tribunal does not accept that submission, and takes the view that it should treat the reports as evidence, the respondent submits that the reports do not contain evidence on which the tribunal can rely in reaching a view as to whether the claimant as disabled or not at the material times. The following propositions can be drawn from case law:

189. The tribunal cannot be bound by Dr Scott's conclusions. The question as to whether the claimant was disabled is one fro the tribunal alone.

190. In evaluating Dr Scott's report the tribunal should take particular care in examining the strength of her reasoning and the nature of the information on which se proceeded. It is the reasoning and not the conclusion of an expert that has the potential to carry weight.

191. There are deficiencies in Dr Scott's report. Her conclusions rely in large part on information provided to her by the claimant and the history provided by the claimant. The claimant is a dishonest and unreliable witness. She demonstrated that in the course of her oral evidence to the tribunal. The claimant was dishonest when she claimed to have a "glorious" career. Her career had been marked by a judicial finding in Canada that she had been dishonest. It has also included her being dismissed for serious misconduct. Similarly, she is dishonest and unreliable in relation to the nature and extent of any impairments from which she may have suffered during the period of her employment. Dr Scott did not investigate with sufficient rigour the question of the claimant's ability to carry out normal day to day activities at the material times. The respondent points to a lack of care in Dr Scott's report. Although the claimant was absent from work she kept up vigorous and detailed correspondence with the respondent. That is hard to reconcile with the impairments she claims. The claimant continued to supervise Mr Alhseinat and indeed insisted on doing so. She attended a seminar in Algiers in 2011 at which she presented a paper and chaired a session. She gave evidence in Australian court proceedings in 2011 and represented that she would be able to act as supervisor for Pranab Barua. She attended a Science

Workshop in November 2011 and continued to publish papers. She attended meetings are Harlow College where she was a member of the governing body, between 2010 and 2012. Her activities are not consistent with someone who claims to be disabled. There is no suggestion that Dr Scott considered these activities critically before coming to a view about the claimant's impairments. The onus is on the claimant to establish that she was disabled at the material times and she has failed to do so.

**Decision**

**Scope of the Hearing**

192. The tribunal considers it was clear that the hearing was only to determine liability and approached it on that basis. Remedy will have to be determined at a further hearing.

**Victimisation**

193. The tribunal finds that the claimant did a protected act on 14 April 2010 and that the claimant was subjected to a detriment in a number of instances because she had done that protected act. Specifically, after the meeting on 15 February 2011, the claimant was regarded by a number of colleagues in the School of Engineering as an individual to be distrusted and disliked. The respondent issued an instruction that no contact was to be made with the claimant other than through her solicitors. This meant that when it was decided that the claimant was to be replaced as supervisor for Emad Alhseinat and when it was decided that laboratory space would be allocated to others, these decisions were not communicated to her. The tribunal has found as a fact that the failure to communicate the decisions was because there was an instruction not to contact the claimant and that instruction came about because the claimant had done a protected act.

194. However, the tribunal did not consider that these decisions themselves were influenced by the allegations of discrimination that had been made by the claimant. The respondent appointed another supervisor for Mr Alhseinat because it did not expect the claimant to return to work and it had a duty to assist the student to complete his PHD. There was a need for a supervisor to be present for health and safety reasons. The lab space was reallocated due to the operational needs of the respondent.

**Direct sex discrimination**

195. As is evident from the findings in fact, the Tribunal finds that the treatment of the claimant during her employment with the respondent was not because of her sex. There was a mismatch of expectations between the claimant and the respondent as to what each expected from the claimant in her role as a Professor within the School of Engineering and miscommunication between the parties involved. This was found by the Tribunal to be because of a difference in culture and expectation, specifically the shared collective of academia within the UK by the incumbents in the School of Engineering and the fact that the claimant had no experience of UK academia. As the tribunal was able to make positive findings as to the "reason why" the alleged less favourable treatment took place, and that this was not the claimant's gender, there is no need to consider further the shifting onus of proof. The claim of sex discrimination is dismissed.

**Unfair dismissal**

196. The tribunal considered that the respondent had a potentially fair reason for dismissal which was a belief that the claimant could no longer legally continue to work in the UK. However, the tribunal considered that dismissal for this reason was not within the band of reasonable responses because of the procedure adopted. It is true that the claimant did not co-operate with the respondent's requests to attend occupational health or to obtain independent medical advice. However, the respondent simply stopped pursuing that

course when it realised that the claimant's work permit was shortly to expire. The tribunal considered that once the issue of the work permit was raised, no further attempts were made to explore the options that might have allowed the claimant to stay in the UK or to engage with the claimant about her medical condition or whether she could return to work. They didn't offer a meeting to discuss the termination nor did they offer an appeal. They had not followed their own disability policies or the ACAS Code of Practice. The respondent acted on an adverse and negative assumption that the claimant had taken on secondary employment without bothering to check the true position. They did not follow their own grievance policy when the claimant lodged a grievance with Kim Waldron in May 2011. In these circumstances, the tribunal concludes that the claim of unfair dismissal succeeds.

**Disability**

197. The tribunal considers it is established that from January 2010 that the claimant was a disabled person in terms of the Equality Act. The tribunal did not base this on the content of Dr Scott's report as it considered this report had not been introduced into evidence. Although it was a jointly instructed report, the respondent did not accept its findings and Dr Scott did not attend the hearing. She did not speak to the report and the respondent did not have the opportunity to cross-examine her on its findings. The tribunal therefore took no account of it. The claimant gave unchallenged evidence that she had been diagnosed with anxiety and depression and the tribunal was satisfied were this was a mental impairment. The condition was clearly long-term. The tribunal had to consider whether the impairments had a substantial long-term adverse effect on the claimant's ability to carry out normal day to day activities. There was evidence that the claimant had been carrying out other activities at this time, such as traveling, lecturing and attending conferences and the tribunal was invited by the respondent to conclude that this meant the claimant could do normal day-to day activities. However, the claimant gave evidence, again unchallenged, that she was unable to do activities such as exercise and shopping and that she had no social life. The Statutory

Guidance on the definition of Disability (2011) stresses that it is important to consider the things that a person cannot do, or can only do with difficulty (B9). This is not offset by things that the person can do. The tribunal also considered it relevant that the claimant was on medication during the relevant period and that the effect of the impairment was likely to have been more substantial if she had not had that medication. The tribunal therefore concluded that the impairment did have a substantial adverse effect on the claimant's ability to carry out normal day to day activities and that the claimant was a disabled person.

**Knowledge of disability**

198. The tribunal considered that the respondent did know that the claimant was a disabled person by 14 April 2010 when she wrote to Sir Tim O'Shea and stated that the issues at work were "severely and adversely "impacting on her health. Sick notes were also received from 2010 to 2012 which stated the reason for absence was stress and depression. The claimant was absent for a significant period of time. The respondent did not follow its own procedure in its disability policy to establish if the claimant was disabled. Therefore, if they did not, in fact, know she was disabled, they could reasonably have been expected to have known.

**Reasonable adjustments**

199. It is important in a claim for failure to make reasonable adjustments to follow a structured approach. The first consideration is whether the respondent applied a PCP that the claimant should attend work at the School of Engineering. The tribunal were satisfied that it did.

200. The second question is whether that PCP placed the claimant at a substantial disadvantage because of her disability. The tribunal found this a difficult question. It is possible that the claimant found it difficult to work in the School of Engineering, because she believed that she had been discriminated

against or because her colleagues may have been hostile to her on her return. However that is not a relevant disadvantage for the purpose of a reasonable adjustments complaint. The claimant has to prove facts from which the tribunal could conclude that the claimant would be placed at a substantial disadvantage by that PCP because of her disability. The lack of medical evidence was a problem. The tribunal could speculate about whether there was a potential disadvantage to someone with the claimant's disability but there was no evidence of that before the tribunal. Further, the claimant's submissions did not address what the disadvantage was said to be. There is merely a bald statement that "That PCP put the claimant at a disadvantage substantial disadvantage". If it is unable to make a clear finding of what the substantial disadvantage is and that this was because of the claimant's disability, it is simply impossible for a tribunal to assess whether the duty arose at all, whether the respondent knew (or should have known) of the disadvantage and whether the proposed adjustments were reasonable for the respondent to have to take to avoid that disadvantage.

201. In these circumstances, the tribunal considers that the claim for failure to make reasonable adjustments is not established and is dismissed.

**Discrimination arising from disability**

202. The first question is whether there was unfavourable treatment arising in consequence of the claimant's disability and if so, was that justified.

203. The unfavourable treatment is said to be:

- Dismissal
- Failure to address the claimant's work permit and seek an extension
- Failure to apply the respondent's own procedures.

204. The tribunal does not consider there is any evidence that would allow it to conclude that the respondent did not seek an extension of the claimant's work permit because of her disability (or because of anything arising in consequence of it such as her period of absence) nor that it failed to follow its procedure because of her disability. On the contrary, the tribunal accepted that the respondent believed that the claimant was not prepared to return to work in the position for which the work permit had been granted and that, in these circumstances, it believed that there was no possibility of the claimant's work permit being extended.

205. With regard to her dismissal, the claimant submits that she was dismissed because she was absent and she was absent because of her disability and this is therefore covered by section 15. If that were a true description of the factual position, then that would be discrimination arising from disability. However, the tribunal does not consider that the claimant was dismissed because she was absent. She was dismissed because she was unwilling or unable to return to work in her existing post and this triggered issues with her work permit. In considering any causal connection, the tribunal is faced with the same difficulty as it was when considering whether the duty to make reasonable adjustments was triggered. There is no evidence before the tribunal that there was a causal link between the claimant's disability and her refusal to return to her post in the School of Engineering. This was not a case where the claimant was absent and unable to return to work because of her disability. It appears that she was able to return to work (or at least was asserting that she was) but that she would not return to her previous role based in the School of Engineering. The critical question was whether that was because of her disability or because of some other reason, such as she considered she had been badly treated in that department. The tribunal considers that there was insufficient evidence before it to make the necessary link with her disability. The claim for disability arising from disability is dismissed.

**Reduction in pay**

206. It is suggested that it would have been a reasonable adjustment to maintain the claimants pay during her absence and to keep it under review. As the duty is not triggered in this case that has not been considered under that head of claim. It is unclear whether it was also intended to form part of the complaint under section 15. If it was, the tribunal considers it is out of time as the reduction occurred more than 3 months before the complaint was presented. The tribunal has not been invited to extend time but, for the avoidance of doubt, it does not consider it is just and equitable to do so, not least because no explanation has been given for the delay in raising that complaint and because it considers that the claim has no real prospect of success.

**Holiday pay**

207. The claim is based on the fact that the claimant was not paid any holiday pay from the time of her incapacity in early 2010 and on termination was only paid accrued holiday pay for the current year of 2012. The claimant submits that there is no defence to such a claim based on *Plumb v Duncan Print Group Ltd*. The respondent's submissions do not address this point. In these circumstances the claim for holiday pay succeeds with the amount payable to be determined at the remedy hearing if it cannot be agreed between the parties.

**Notice pay**

208. The claimant's application to amend the claim to include a claim for notice pay was refused at the start of the hearing as the respondent had not come prepared to deal with the matter. The claimant applied for the decision to be reconsidered on the grounds that the proceedings had been delayed and so there was no disadvantage to the respondent. The claimant also submitted that, as the respondent has accepted through its witnesses that the claimant

should have been paid notice pay and she was not, there is no rational reason why the application should be resisted.

209. The respondent contends that the claimant has not demonstrated that it would be in the interests of justice that the decision to refuse the amendment be reconsidered. The respondent's position is that the claimant was in fact given notice. Further the claims were brought in 2012 and only in 2015 did the claimant seek to amend. The respondent's witness statements did not deal with a claim for notice pay because none was made. To carry out investigations at this late stage would not be proportionate and not in accordance with the overriding objective. At the time the claim was lodged the claimant was represented by senior counsel and solicitors. If they failed to include this complaint in the claim, the claimant's remedy lies against them. Further, the claimant has the option to raise the claim in another forum.

210. The tribunal's decision is that it is not in the interests of justice to vary the earlier decision. The application to amend came very late and there has been no explanation for that delay. The claimant was legally represented when the claims were presented, the claimant has another remedy in the civil court or, potentially against her advisers. Further the claim is disputed and additional evidence would be required. For all these reasons, the tribunal does not consider it is in the interests of justice to vary its earlier decision and the application is refused.

**Further procedure**

211. Once parties have had an opportunity to consider this decision a hearing on remedy will be fixed. The administration will write to the parties in about 8 weeks time to canvass suitable dates for that remedy hearing unless they are advised before then that parties have agreed remedy or that an appeal has been intimated. Evidence may be adduced at the remedy hearing if it relates specifically to remedy and only if no relevant finding has been made about the matter in this judgment. The findings in fact in this judgment, so far as

relevant will otherwise apply in connection with remedy. At the remedy hearing the tribunal will require to be addressed on all matters relevant to their determination of an appropriate remedy including whether any compensation for unfair dismissal should be reduced because of contributory conduct or because of the application of the principle in *Polkey v AE Dayton Services Ltd.*

Employment Judge: Jane Porter
Date of Judgement: 15 March 2017
Entered in Register: 16 March 2017
and Copied to Parties