



EMPLOYMENT TRIBUNALS

Claimant

Dr Calbert Graham

Respondent

v

(1) The Chancellor, Masters and
Scholars of the University of
Cambridge;
(2) Ms Thuy Niven

Heard at: Cambridge

On: 24, 25, 26 and 27 June 2024
5 August 2024

In Chambers: 6 August 2024

Before: Employment Judge Tynan

Members: Ms V Pratley and Mr D Snashall

Appearances

For the Claimant: Mr Tom Kirk, Counsel

For the Respondent: Mr Paul Wilson, Counsel

RESERVED JUDGMENT

The Claimant's claims against the Respondents are not well founded and are dismissed.

REASONS

Background

1. Dr Graham, a scholar of some distinction, brings a claim against the Chancellor, Masters and Scholars of the University of Cambridge ("the University") and its Deputy Director of HR, Thuy Niven. He complains that he was directly discriminated against because of his race, victimised and subjected to detriments because he made a protected disclosure. His claim has its origins in the University's decision not to invite him for interview in connection with a vacancy within the Faculty of Education for an Associate Professor in Second Language Education. The decision in that regard was taken by Professor Linda Fisher, Professor Ricardo

Sabates Aysa, Professor Andreas Stylianides and Professor Yongcan Liu: we shall refer to them collectively hereafter as either the “four Professors” or the “Selection Committee”, the latter in reference to their part in shortlisting candidates for interview as part of the appointment process.

2. Dr Graham was a ‘priority candidate’ for certain roles within the University because his substantive post was then at risk of redundancy. A central issue in this case is whether the four Professors, or any one or more of them, racially discriminated against him in determining (should we accept that they genuinely did so determine) that he did not meet, and could not with a reasonable amount of training meet, the essential criteria for appointment.

Evidence

3. Dr Graham has made a detailed statement in support of his claim and gave evidence at Tribunal. In addition to Ms Niven and the four Professors, we heard evidence and had written statements on behalf of the University from Andrea Hudson, Director of HR and Dr Tamsin O’Connell, Head of the Department of Archaeology at the University. Dr O’Connell chaired the panel that considered Dr Graham’s grievance regarding his alleged treatment. Although Dr Graham claims to have been victimised and subjected to detrimental treatment as a whistleblower because of how the grievance was dealt with, he does not pursue any legal complaints in respect of the decision itself even if he disagrees with it.
4. The University additionally submitted a witness statement by Dr Peter Hedges who chaired the panel that heard Dr Graham’s appeal against the outcome of his grievance. No legal complaints are pursued in respect of the appeal, again even if Dr Graham disagrees with the decision itself. The parties had under-estimated the time that would be required for the final hearing. In order that all the evidence could be heard within the four-day hearing allocation, the University decided not to call Dr Hedges. The hearing was adjourned to 5 August 2024 for closing submissions.
5. The Hearing Bundle extends to five lever arch files and 1,885 numbered pages of documents. Any page references in this judgment correspond to the Hearing Bundle. As we shall come back to, there was some additional disclosure in the course of the hearing.

The Claim

6. Dr Graham’s complaints are pursuant to sections 13 and 27 of the Equality Act 2010 (“EqA”) and section 47B of the Employment Rights Act 1996 (“ERA”). Our findings and conclusions are structured by reference to the agreed List of Issues in the case
7. Mr Kirk has set out the law and the relevant legal authorities and principles in his comprehensive written submissions. Amongst other things, in setting out the relevant law in relation to direct discrimination, he has

reminded the Tribunal of important observations made by Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR, by Baroness Hale in R (on the Application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and Others [2010] IRLR 136, and by Sedley LJ in Anya v University of Oxford [2001] ICR 847.

8. Whilst Dr Graham asserts that a conscious racial bias was operating in particular in Professor Fisher's mind at the relevant time, we have given careful consideration to whether, even unconsciously, she or indeed any one or more of her three colleagues was materially influenced by Dr Graham's race when they assessed his application for the post of Associate Professor and decided he should not be invited to interview, or subsequently when Professor Fisher and Professor Liu revisited his application a few weeks later after he had raised a complaint with the University about the matter.
9. As Mr Kirk notes, in claims for direct discrimination, Tribunals can sometimes avoid arid and confusing disputes about the identification of an appropriate comparator by concentrating primarily on *the reason why* the claimant was treated as they were: Shamoon v Chief Constable of Royal Ulster Constabulary [2003] ICR 337. This focus on *the reason why* can also help to guide Tribunals when considering claims under s.27 EqA 2010 and s.47B ERA 1996, since the Tribunal is concerned respectively with whether the respondent has subjected the claimant to detriment *because* they did a protected act or because they made a protected disclosure. We shall come back to this.
10. The relevant statutory provisions are as follows:

Equality Act 2010

13 Direct discrimination

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

27 Victimisation

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
 - (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
 - (a) bringing proceedings under this Act;

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

Employment Rights Act 1996

43B Disclosures qualifying for protection

- (1) In this Part a “ qualifying disclosure ” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
 - (a) ...

47B Protected disclosures

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

11. Dr Graham initially pursued his s.13 EqA 2010 complaints by reference to the protected characteristics of race and disability. On the first day of the final hearing Mr Kirk informed the Tribunal that the disability discrimination complaints were withdrawn.

Preliminary Issues

Protected Acts

12. Dr Graham claims to have done five protected acts. They are recorded in paragraph 7 of the List of Issues. Mr Wilson’s closing submissions address three of the five claimed protected acts. The University accepts that Dr Graham did protected acts on 7 June 2022 when his solicitor, Mr Jackson sent an email to Ms Hudson in which he raised concerns regarding the University’s failure to invite Dr Graham to interview and in November 2022 when Dr Graham made a statement of case in connection with his grievance about the matter (Issues 7(a) and (d)). The University disputes that a further email from Mr Jackson to Ms Hudson, sent on 7 July 2022 (Issue 7(b)) was a protected act: Mr Wilson submits that it does not set out facts or make an allegation of discriminatory treatment

expressly or impliedly because of any protected characteristic. It seems to us that s.27 EqA 2010 differs from s.43B ERA 1996, in that a disclosure only qualifies for protection under s.43B if it involves the disclosure of information that, in the reasonable belief of the person making the disclosure, tends to show one or more of the prescribed matters. There is no such threshold test in s.27. In order for the act in question to be protected under s.27 it is not necessary for a claimant to have identified precisely how or why the 2010 Act has been contravened, as long as they are clearly asserting a contravention. Mr Jackson set out the grievance largely in Dr Graham's own words. In our judgement, this is not a case, such as Durrani v London Borough of Ealing EAT 0454/12, where the term 'discrimination' was used by Dr Graham to describe general unfairness. In our judgement, as a linguist but also in circumstances where he was being legally advised in the matter, Dr Graham understood the distinction between unfairness and discrimination, and intended to maintain that distinction. In any event, the email of 7 July 2022 (pages 372 and 373) can only properly be understood in the context of the emails that preceded it, in particular Mr Jackson's email of 7 June 2022, which the University accepts was a protected act. The email of 7 July 2022 referred to Ms Niven's failure to investigate the discrimination alleged and accused her of an abuse of power in that regard. Dr Graham specifically asserted that her failure to investigate the matter and to take appropriate action was an act of victimisation. In our judgement that was sufficient for the email to be a protected act. But in any event, we are satisfied that Dr Graham was asserting a direct connection between the fact concerns had been raised and how those concerns had been dealt with, reinforcing that s.27(2)(d) EqA 2010 was engaged.

13. As regards the remaining two claimed protected acts, we agree with Mr Kirk that Mr Jackson's email of 8 August 2022 to Andrea Hudson (page 391) (Issue 7(c)) described both alleged racism in the recruitment process and an intention to take this complaint to a Tribunal, thereby engaging s.27(2)(d) and s.27(2)(a) of EqA 2010 (the latter on the grounds that the University believed Dr Graham may do a protected act by bringing proceedings - s.27(1)(b)). Turning finally to Issue 7(e), Dr Graham made various oral allegations of unlawful discrimination in the course of the grievance hearing on 3 November 2022, for example he said that "he felt he had been treated unfairly and discriminated against, so TN's failure to investigate was a continuation of that discrimination" (page 458). In which case s.27(2)(d) EqA 2010 was again engaged.
14. We uphold therefore that Dr Graham did the five protected acts identified in paragraph 7 of the List of Issues.

Protected Disclosure

15. Dr Graham claims that Mr Jackson's email of 7 June 2022 was both a protected act and a protected disclosure. Mr Jackson wrote:

"The public interest disclosure being made is that the recruitment process is debased, discriminatory and corrupt. Examples of what is wrong with the

recruitment process are set out in the accompanying response and feedback. The fact that a department within the University is recruiting in this way is a matter of public interest. It is unlikely that Dr Graham is the only person affected.”

16. The University does not accept that it was a qualifying disclosure within the meaning in s.43B(1) ERA 1996. Specifically, it does not accept that Dr Graham reasonably believed the disclosure relied upon was in the public interest. Although Mr Kirk has addressed all of the elements that need to be established in order for a disclosure to satisfy the requirements in s.43B(1), given that the other elements are conceded by the University we limit ourselves to the question of whether Dr Graham reasonably believed his disclosure to have been made in the public interest.
17. We note, firstly, that the fact the disclosure relied upon by a claimant touches upon their personal situation and is being pursued as a workplace grievance does not preclude it from also being made in the public interest: the two are not mutually exclusive. Secondly, a person need not be right in order to enjoy protection as a whistleblower.
18. Mr Wilson submits that Dr Graham could not reasonably have believed that his disclosure was being made in the public interest, because he says it was unreasonable for him to assert that there had been a shifting of the goalposts in terms of the essential criteria used for shortlisting purposes. In particular, he submits that it was obvious that differences between the essential criteria said to have been applied to Dr Graham in feedback provided to him on 1 June 2022 and the description of the criteria set out in information for applicants took account of the context in which the criteria had to be applied. Dr Graham clearly understood that the essential criteria had to be seen in context, since he framed his application by reference to the work of the Faculty. However, his concerns extended beyond questions of context. He believed that the extent to which the Selection Committee had departed from the advertised and subsequently notified criteria suggested that the Faculty was not conducting an open or transparent recruitment process. He expressed his concerns in the matter on 6 June 2022 in the following terms:

“Please find attached the document I prepared that sets out how the criteria have changed from what started in the advert/further particulars, after advertising the role, to make it appear so narrow that only someone from the Faculty of Education could do it.”

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19. For some months thereafter Dr Graham would continue to claim that the hiring environment at the Faculty of Education was such that internal candidates were favoured, thereby excluding external candidates from underrepresented groups such as himself. In his November 2022 statement of case referred to above, he referred to this environment as indirectly discriminatory.

20. We agree with Mr Kirk when he says that a complaint about a recruitment process which not only affected Dr Graham but which was applied to many other candidates, specifically from underrepresented groups, was plainly a disclosure in the public interest, particularly where it concerned the practices, including equal opportunities' practices, of a world renowned educational institution. Ms Hudson, who was of course the recipient of the disclosure and is an experienced HR professional, agreed at Tribunal that Mr Jackson's email raised matters that were in the public interest. In our judgement, Dr Graham was reasonably of that view too, particularly given his assessment as to the extent to which the essential criteria seemed to depart from the notified criteria by reference to which he had tailored his application, and his belief that this was intended to support applications by candidates from within the Faculty at the expense of disadvantaged groups. The fact, as we shall return to, that he was mistaken in that regard, that Mr Jackson expressed himself in the matter in intemperate terms, and that Dr Graham did not pursue a claim of indirect discrimination does not alter or undermine that conclusion.

The Selection Committee's decision not to shortlist Dr Graham – Issue 2(a)

21. Dr Graham is black. He was born in Jamaica and has dual British and Jamaican nationality. We refer to him in these Reasons as a person of Afro-Caribbean heritage. With good reason the Details of Claim refer to Dr Graham's academic achievements and experience as "outstanding". Amongst other things, he holds:
- 21.1. a First Class BA in Language and Linguistics from the University of West Indies;
 - 21.2. a Diploma in Japanese Language and Linguistics (High Distinction) from Keiro University, Japan;
 - 21.3. an MA in Foreign Language Acquisition and Education and Language Technologies (High Distinction) from Kyoto University, Japan;
 - 21.4. an MPhil in English and Applied Linguistics (Distinction) from the University of Cambridge;
 - 21.5. a PhD in Theoretical and Applied Linguistics (Phonetics and Second Language Acquisition) also from the University of Cambridge; and
 - 21.6. a MSc in Computer Science and Machine Learning (Distinction) from Queen Mary, University of London.
22. Dr Graham has been working at the University as a Senior Research Associate. His continuous service dates back to 29 September 2014. We do not know his current employment status: in his witness statement he said that his current role was likely to terminate on 31 July 2024, but we have not been updated in that regard.

23. It is common ground that at the relevant time, Dr Graham was a 'priority candidate' for the purposes of the University's Redeployment Framework (pages 79 – 89). The University has issued Redeployment Procedural Guidance in order to provide further information around the consideration of redeployment applications as part of any recruitment process (pages 93 – 109).
24. Section 4 of the Redeployment Framework includes the following provisions:-

Actions for Priority Candidates and Departments

- 4.3 Where a recruiting department receives an application for a vacancy from a priority candidate who meets the essential criteria of the post (based on the evidence provided in the application), the recruiting manager must ensure that they shortlist the priority candidate for interview. Any prior knowledge of the priority candidate that is not included in the application, should not be used in the short listing process. It may not be possible for recruiting managers to assess each essential criterion at the shortlisting stage (for example there may be criteria which can only be assessed at interview). In such cases, they should ensure that priority candidates are shortlisted where they meet the essential criteria which can be assessed at that stage. They should also consider whether the candidate might meet the essential criteria with reasonable training.
- 4.4 Essential criteria outline the minimum knowledge, skills and experience to be considered for the post. For further detail on essential criteria, please see the University's Recruitment Guidance. It is important to note that the requirement of a specific criterion to be essential cannot be changed once the position is advertised. Whether training is reasonable will depend on a number of factors: the nature and extent of the training required; the time needed to complete it before the priority candidate can perform the post to the required standard; and to what extent the training period will affect the delivery of any time critical work. Training could include on-the-job mentoring, courses or formal qualifications.
- 4.6 In order to enable objective decision making, the usual selection methods should be used to determine candidates' suitability for the post, i.e. interviews and also assessments where appropriate. For further guidance see the University's Recruitment Guidance. Wherever possible, priority candidates should be interviewed prior to other candidates to enable them to demonstrate their suitability to departments ahead of others (although departments are not required to wait until they have interviewed a priority candidate before they can advertise the post). To ensure consistency and fairness, priority candidates must be measured against the same selection criteria and with the same selection methods intended for other candidates.
- 4.7 Where the recruiting manager is satisfied that, following the usual selection arrangements, the priority candidate has the capability,

skills, knowledge and experience to perform the role (or could do so with reasonable training if necessary) to the required standard, they should be offered the post. However, see sections 4.18 for details of where the University reserves the right to select other candidates ahead of a priority candidate.

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25. Sections 4.28 to 4.30 of the Redeployment Framework make provision for complaints and appeals:-

Complaints and Appeals

- 4.28 Priority candidates who feel that they are being treated unfairly under this framework should raise the matter with their line manager, recruiting manager or the relevant HR School Team without delay in order that the matter can be addressed expediently. They may also seek the support of the trade unions.
- 4.29 In cases of dismissal, priority candidates have the right to appeal against a decision to be dismissed in accordance with the relevant University policy, for instance: the Organisational Change Policy; Sickness Absence Policy; Guidance on the use of fixed-term and open-ended contracts; Capability Policy; or Disability and Employment Policy as applicable, where they feel that they were unfairly denied a suitable redeployment opportunity.
- 4.30 In other cases not falling within 4.29, they may raise a grievance under the procedure relevant to their staff category.

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26. Section 4.28 offers no further clarity as to what, if any, decision making powers the candidate's line manager, the recruitment manager or the relevant HR School Team respectively have where they receive a complaint, nor does the Redeployment Framework indicate what procedure will be adopted to ensure the matter is addressed expediently. There is no explanation as to how any complaints procedure dovetails with the grievance procedures that are available to employees. The University may want to give further thought and attention to these matters.

27. The Redeployment Procedural Guidance provides as follows:-

3.5 Selection Methods and Criteria

Prior to considering applications for the role, the recruiting Institution should define what selection criteria they are going to assess and how these will be assessed. For instance, where written communication is an essential criterion, this might be assessed through the applicant's application, whereas verbal communication might be assessed at interview. Institutions can use the HR6 – Selection Criteria template to plan and record the selection criteria being used for their particular vacancy.

The essential criteria are used to outline the minimum knowledge, skills and experience to be considered suitable for the post. For further detail on essential criteria, please see the [Recruitment Guidance](#). It is important to note that the requirement of a specific criterion to be essential cannot be changed once the position is advertised.

It is also important to agree, before the longlisting / shortlisting process, what method will be used to evaluate how well the application meets the criteria for the role and apply this consistently to all applications. Scoring systems are commonly used as a systematic means of indicating how well a candidate has met a particular selection criterion and can help to simplify the process, as well as making it more consistent and objective. More information on scoring applications can be found within the [Recruitment Guidance](#).

3.7 Interviews and Assessment

In order to enable objective decision making, the usual selection methods should be used to determine candidates' suitability for the post. As a minimum requirement, a panel interview should form part of the assessment process. More information on the constitution of the panel, and guidance on conducting interviews, can be found in the [Recruitment policy and Guidance](#).

The assessment process should be the same for priority applicants as it would be for non-priority applicants. For example, if a non-priority applicant would be expected to deliver a presentation and then a panel interview as part of the assessment process, priority applicants would be asked to do the same.

During the assessment process, applicants must be assessed objectively against the selection criteria which have been agreed in advance. Judgements must be based on evidence gathered during the assessment process only.

Wherever possible, priority candidates should be interviewed prior to other candidates to enable them to demonstrate their suitability to departments ahead of others (although departments are not required to wait until they have interviewed a priority candidate before they can advertise the post). Where possible, the interview should be on a different day, as this will prevent the need to interview non-priority candidates if one of the priority candidates is deemed suitable for the role. Where convening the selection panel over multiple days is not possible, priority candidates should be scheduled for their assessment first in the day, with non-priority candidates scheduled afterwards.

To ensure fairness and objectivity, it is recommended that selection panel members work individually to allocate provisional scores for each candidate in the first instance, using the scoring system agreed in advance. Areas of disagreement should then be discussed and

final scores agreed. Comments against each criterion must reflect the evidence presented, such as examples of past performance, relevant skills, experience and attitudes. The method for combining the scores from each assessor should have been agreed in advance.

Institutions can use the Selection Assessments Record template (HR10) to record their selection decisions. Further guidance is available in the Recruitment Guidance.

(pages 99 – 101)

28. We were not taken to any provisions in the Redeployment Procedural Guidance which deal with complaints, or which expand upon sections 4.28 – 4.30 of the Redeployment Framework referred to above.
29. The University has a detailed Dignity at Work Policy (pages 110 – 121). Although it refers to both discrimination and harassment as being unacceptable, the Policy is evidently focused upon dignity within the workplace and ensuring that members of the University community treat one another with respect, courtesy and consideration. It is not obviously apt for the circumstances which arose in this case and neither party made any reference to its provisions in the course of the hearing.
30. At the time of the events with which we are concerned, Dr Graham was employed under the University's Standard Terms and Conditions for the Employment of Unestablished and Research Staff. These provide that if an employee has a grievance relating to their employment they should raise it first with their head of institution, the procedure in this regard being stated to be available on the University's website. We have not been provided with a copy of it.
31. Dr Graham was employed within the Department of Theoretical and Applied Linguistics, which forms part of the School of Arts and Humanities. He was employed at Grade 9 (page 159).
32. In 2022, the Faculty of Education (part of the School of Humanities and Social Sciences) sought to appoint an Assistant Professor in Second Language Education. The position was advertised as follows:-

University Assistant Professor in Second Language Education

The Faculty of Education in central Cambridge seeks to appoint an Assistant Professor who specialises in second language education and has particular expertise in quantitative methods in applied / educational linguistics. It offers an exciting opportunity for a research-active educator to join a leading national and international centre engaged in teaching and educational research.

The successful candidate will work closely with a multi-disciplinary team of Faculty colleagues, who broadly specialise in second or foreign language education. The person appointed will be expected to contribute to the

international profile of the Faculty through research publications, grant capture, impactful dissemination and public engagement.

Candidates should be enthusiastic contributors to a wide variety of courses, alongside bringing a specialist focus on second or foreign language education. The main teaching duties connected with this post are teaching and supervision on the full-time MPhil and part-time MEd Research in Second Language Education (RSLE) programmes, as well as supervision of PhD and EdD students in related fields. The faculty has a very successful initial teacher education programme in modern languages and a three-year undergraduate programme in education. There may also be opportunities to contribute to work in the areas of languages and literacies on both programmes.

Applications are particularly welcome from those who can bring a strong methodological element around quantitative methods in applied and / or educational linguistics and lead the relevant teaching on the master's course. Applications are also particularly welcome from researchers who have expertise in instructed second language acquisition and language assessment, digital technology or CALL and have a strong background in educational and social science research.

Candidates will hold a PhD in a relevant subject, or be close to completion in their doctoral studies and have a record of internationally excellent research in their field. Contributions to excellence in research will be through peer-reviewed publications and other activities of a kind and quality that meet international standards as assessed in national research assessment exercises.

The successful candidate will have relevant experience of working with postgraduate students, including teaching or supervising master's and PhD students. The ability to manage a diverse workload and work cooperatively with academic colleagues and support staff is essential. The Faculty is committed to creating a diverse and inclusive environment. All members of our community are expected to engage with developing and raising awareness of equality, diversity and inclusion in the Faculty.

For full details of the responsibilities of the post and the person specification, please see the further particulars. The post is available from 01 September 2022.

Applications are particularly encouraged from candidates from a BAME background. ...

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33. In a departure from the Redeployment Framework and related Guidance, which envisage that the essential criteria for appointment to the post will be settled by the point at which the post is advertised, the advert did not clearly identify the essential criteria. The narrative style was borne of a desire to attract the widest possible pool of applicants. It was an

established approach for which none of the Selection Committee was responsible.

34. The detailed information for applicants is at pages 228 – 235 of the Hearing Bundle. It included the following details:-

1. The Faculty of Education

Background

The Faculty of Education is a member of the School of Humanities and Social Sciences (SHSS) at the University of Cambridge. It is one of the largest groups of educational researchers and teacher educators in the country. Currently, the Faculty has an academic staff of 21 Professors and over 30 Assistant and Associate Professors, alongside over 90 research and teaching staff. There are approximately 70 assistant staff in support of teaching, research, outreach projects, finance, library, IT, audio-visual, buildings, etc.

The wide range of academic expertise covers all stages of formal education from the early years to the primary and secondary stages of schooling. We are therefore well placed to make major contributions both to the advancement of knowledge and practice about issues of contemporary significance and to the development of individuals and educational institutions.

...

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2. The Post

The Faculty of Education is seeking to fill an academic position at Assistant Professor level (formally known as University Lecturer level). The position is a permanent, established post. It offers an exciting opportunity for a research-active educator to join a leading national and international centre for educational research, teacher development and the study of education. Working with other colleagues, the successful candidate will be expected to make an immediate contribution to the Faculty's teaching and research including supervision of postgraduate research students.

The successful candidate will work closely with a team of Faculty colleagues, who specialise in the field of second or foreign language education. The Second Language Education Group (SLEG) constitutes a strong research community in the Faculty and has an international reputation in researching multilingualism and language learning. The SLEG group is also well connected with different interdisciplinary initiatives within the University and beyond, including the Interdisciplinary Centre for Language Sciences and the Centre for the Study of Global Human Movement. The successful candidate will be expected to engage fully in the research activities in the field and to make a strong contribution to strengthening the international profile of research within the Faculty.

Candidates should be enthusiastic contributors to a wide variety of courses, alongside bringing a specialist focus on second or foreign language education. The main teaching duties connected with this post are teaching and supervision on the full-time MPhil and part-time MEd in Research in Second Language Education (RSLE) programmes which focus on issues relating to second language acquisition, use, pedagogy and policy, as well as supervision of PhD and EdD students in related fields. The faculty has a very successful initial teacher education programme in modern languages and a three-year undergraduate programme in education. There may also be opportunities to contribute to work in the areas of languages and literacies on both programmes.

We particularly invite applications from interested candidates who can bring a strong methodological element around quantitative methods in applied / educational linguistics and lead the relevant teaching on the master's course. Applications are also particularly welcome from researchers who have expertise in instructed second language acquisition and language assessment, digital technology or CALL and have a strong background in educational and social science research.

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4. Criteria for Appointment

Candidates will hold a PhD in a relevant subject, or be close to completion in their doctoral studies and have a record of internationally excellent research in their field. Contributions to excellence in research will be through peer-reviewed publications and other activities of a kind and quality that meet international standards as assessed in national research assessment exercises.

The successful candidate will have relevant experience of working with postgraduate students, including teaching or supervising master's and PhD students. The ability to manage a diverse workload and work cooperatively with academic colleagues and support staff is essential. The Faculty is committed to creating a diverse and inclusive environment. All members of our community are expected to engage with developing and raising awareness of equality, diversity and inclusion in the Faculty.

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35. Having regard to section 4 immediately above, it seems to us that the documented criteria for appointment at that point were as follows:-
- 35.1. Holding a PhD in a relevant subject, or close to completion of doctoral studies;
 - 35.2. Having a record of internationally excellent research in their field;
 - 35.3. Relevant experience of working with postgraduate students, including teaching or supervising master's and PhD students;

- 35.4. Ability to manage a diverse workload and work cooperatively with academic colleagues and support staff; and
- 35.5. Ability to engage with developing and raising awareness of equality, diversity and inclusion in the Faculty.
36. Dr Graham's application (pages 263 – 266) was structured under the following headings: Overview; Academic Background; Research Profile and Impact; Teaching and Supervising; Equality, Diversity and Inclusion; and Summary. Although Dr Graham did not directly address the fourth criterion above, nothing turns on this since the criterion was not used in the shortlisting process. We shall come back to Dr Graham's application in a moment.
37. On 4 May 2022, Zoe Matthews, an HR Assistant within the Faculty of Education scheduled a 3-hour shortlisting meeting with the four Professors for 20 May 2022. If, which we do not know, she considered the possibility that applications might come from priority candidates there is no evidence as to whether she thought to defer the shortlisting to allow priority candidates to be identified and, as appropriate, taken to interview. There is no requirement or expectation under the Redeployment Framework that this should be the approach and we recognise that it would have served to extend what was a potentially time sensitive exercise if the successful candidate was to be in post by the end of the summer. In her email confirming the date for the shortlisting meeting, Ms Matthews reminded the four Professors that the Faculty strongly encourages members of selection committees to complete online training for both 'Equality & diversity' and 'Understanding Unconscious / Implicit Bias'. Each course takes approximately 45 minutes to complete. In addition to these two recommended courses, they were required to have completed the 'Recruitment Essentials' training course. All four Professors completed the recommended training, meaning that they embarked upon the recruitment process with a heightened awareness of the biases that can operate in the minds of decision makers. As we shall come back to it, it is at least a relevant factor when we come to consider one of Mr Kirk's principle areas of submission as to why this is a case in which discrimination should be inferred.
38. Dr Graham submitted his application for the post on 15 May 2022. He was in contact with Katie Cobley, an HR Adviser within the School of Arts and Humanities in the following days for details of someone in HR who might provide support and guidance in terms of the process, given his health issues and priority status. He received a detailed response from her on 20 May 2022 in which she confirmed that she had been in contact with Emma Frampton, HR Business Manager for Arts and Humanities. Dr Graham described her response as "very helpful" and went on to say,
- "I'm not at all worried about meeting the basic requirements for the job, because the advertised job is precisely I've been doing for the last 13 years or so (only in another Cambridge department), including my PhD work and

my eight years in the Theoretical & Applied Linguistics Department at Cambridge.”

39. Before he submitted his application Dr Graham was in contact with Professor Fisher. They exchanged emails between 10 and 13 May 2022. We accept that, as with a great many employees at the University, Dr Graham had set up his email account so that his image was included to the left of his name at the top of emails sent by him. Accordingly, on reading his emails Professor Fisher would almost certainly have seen that he was black, even if there was no further indication as to his ethnicity or nationality. Professor Fisher responded promptly to Dr Graham’s enquiries, specifically within little more than an hour following his initial email to her. Her tone was friendly and informal and, perhaps more significantly, she provided some direction to Dr Graham in terms of any application he might submit, telling him,

“... The main criteria are specialism in second and foreign language education and a facility with quantitative methods.

Thanks again and we look forward to receiving your application.

Best wishes
Linda.”

(page 258)

40. In paragraph 13 of his submissions, Mr Kirk reminds us that Tribunals should look for indicators from before or after the decision complained of which might demonstrate that an ostensibly fair-minded decision was, or was not, affected by racial bias. If, as Dr Graham asserts, Professor Fisher consciously discriminated against him, any such bias or indeed even some unconscious response to the fact he was a person of colour, is not indicated by her emails at this time. Dr Graham raised two further matters with Professor Fisher on 13 May 2022. She responded promptly, later the same morning. In the case of these further matters, she had checked the position first with HR as they related to the process rather than to the position being recruited to. The fact that she took the time to follow the matter up with HR evidences to us that she was endeavouring to be helpful. She might instead for example have asked Dr Graham to contact HR himself. He had briefly mentioned in his second enquiry that he was unwell and her response on 13 May 2022 concluded with the hope that he would feel better soon. Again, therefore, there is nothing to indicate any conscious bias on her part or subconscious internal dysregulation around the fact that he intended to apply for the role. Dr Graham thanked her for her prompt response and kind wishes.
41. At 10:08 on 13 May 2022, Ms Matthews emailed the Selection Committee to let them know that she had granted them early access to review applications in the system, though reminded them that the vacancy did not formally close to applications until midnight on 15 May 2022 and accordingly that shortlisting should not commence until all applications had

been received. Access was granted to support initial reading of the materials. In the event, 53 applications would be received. We calculate from the Hearing Bundle Index that nearly 1,200 pages of materials were submitted by the candidates for consideration.

42. Dr Graham's application is dated 14 May 2022, though as we have noted already was submitted by him on 15 May 2022. The application ran to four pages in total with a five-page CV appended to it and included the following information:-

Research profile & impact

I became a Research Associate (2014 – 18) on the Automated Language Teaching and Assessment (ALTA) project based at several departments (TAL, Computer Science & Technology and Engineering). This role allowed me to pursue my own independent research interests, expanding from the foundations built during my PhD. Here I gained experience in handling and analysing a wide range of second language datasets (of spoken and written English) and to develop my quantitative skills (e.g. statistical methods, machine learning and cloud computing). More specifically, I worked with colleagues and international collaborators in several companies (e.g. Amazon and Google) on automated assessment and feedback tools based on learner variables such as proficiency level, learning goals, native language, native dialect and so on. Our work on ALTA facilitated the successful deployment of automated ESL (English as a Second Language) tools for speaking and writing assessment and feedback (i.e. 'Speak & Improve' and 'Write & Improve') by Cambridge University Press and Assessment (CUPA). My work during this time has been published in several leading outlets including INTERSPEECH, the International Conference on Computational Linguistics, LREC, Journal of Phonetics and Studies in Second Language Acquisition. Being on this project also provided me with an exceptional insight into what is required to manage and coordinate a large interdisciplinary team based in 4 different institutions of the University (CUPA, as well as the Schools of Arts & Humanities and Technology). It also gave me the opportunity to properly understand what large-scale synthetic research can offer foreign language education and assessment.

In 2018, I was awarded a prestigious Leverhulme Early Career Fellowship (co-funded by Cambridge's Isaac Newton Trust) to conduct a research project in second language speech analysis. This project used quantitative methods to explore the development of proficiency in second language learners and the specific ways in which the native language features are transferred to an individual learner's second language. I used machine learning tools to uncover these specific spoken language features and identify whether and in what way they develop with proficiency in the second language. This has applications for language teaching and assessment, the development of automated CALL tools and forensic speech sciences. I was honoured to have had my research achievements formally recognised as "future shaping" by the University of Cambridge in 2018. This was later featured as part of the 2018 Black History Month celebration of cutting edge and impactful research being conducted at Cambridge.¹

¹ <https://www.cam.ac.uk/research/features/black-researchers-shaping-the-future>

(page 264)

Teaching and supervising

During the past 8 years I have lectured and supervised undergraduate and graduate students' dissertation projects on various topics in second language acquisition, automated assessment (CALL), phonology, phonetics, sociolinguistics, learner-corpus research, speech technology, psycholinguistics, among others at the University of Cambridge. Many of my students have gone on to pursue further research in academia or to develop successful careers in industry. I have also supported my department in several administrative roles, including Tripos examiner, Paper (course) coordinator, MPhil seminars convenor (quantitative methods in second language research), Co-organiser of the Cambridge Linguistics Forum, Co-ordinator of the Phonetics & Phonology seminar series, Tripos admissions exam marker and interviewer and equality officer. I supervised / advised a range of undergraduate, MPhil and PhD projects in the various areas of my teaching and research interests. I have regularly volunteered to provide Tripos supervision on a variety of papers (including phonetics and second language acquisition) in each of the past 8 years I have been at TAL.

(page 265)

Equality, diversity and inclusion (EDI)

I am a member of my college's (St John's) EDI strategic working group and my Faculty's EDI committee. As someone affected in a very personal way by Windrush, I am a passionate advocate of a fairer society for all. Studies have shown that learning a second or foreign language can enhance knowledge of English structure and vocabulary, as well as help students to improve their performance in STEM and language arts subjects. I have a keen interest in uncovering / examining the causes of inequalities in educational outcomes and the effect of intersectionality (e.g. the relation between ethnicity and gender), including differential effects of forms of assessment. This underscores the importance, as an EDI objective, of the issue of diversifying assessment that I mentioned earlier. I believe my interest and expertise in this area could further contribute to the Faculty of Education's primary EDI objectives.

(page 266)

43. As we have touched upon already, the criteria against which Dr Graham and the other candidates were assessed did not correspond exactly to the criteria set out in the information for candidates referred to in paragraphs 34 and 35 above. With the exception of the fourth criterion, which as we say was not used in the shortlisting process, the changes are summarised in paragraph 19(c) of Mr Kirk's submissions. In the course of Professor Fisher's evidence we sought a clearer understanding as to when and how the criteria, including the scoring matrix, had been determined. This led to the production of previously undisclosed emails between the four

Professors which were plainly within the ambit of the University's disclosure obligations. We do not consider this to have been a deliberate omission on the four Professors' part, not least because the emails in question are helpful to the University's case since they materially undermine Dr Graham's assertion that the selection criteria were deliberately altered, even manipulated, he suggests by Professor Fisher, in order to avoid having to invite him to interview. The emails evidence that at 17:10 on 13 May 2022 Professor Aysa initiated an email discussion with his three colleagues regarding the criteria by reference to which they would narrow the pool of candidates. He wrote,

"Dear Linda

Sorry for the late email on Friday. As we start to engage with our review of the applications, in addition to the general research, teaching and contribution to the field, I assume that we are putting attention to:

- specialisation on second or foreign language education;
- strong quantitative methods in applied or educational linguistics;
- expertise in instructed second language and language assessment;
- expertise in digital technology (with the respect to second language of course); and
- strong background in education and social science research.

Please let me know if this is the case. I may start browsing the candidates as next week is really busy and I want to start preparing for our meeting."

(page 389R)

44. In the course of the hearing significant time and questions were directed to the issue of whether and to what extent instructed second language acquisition formed part of the essential criteria for appointment. We are satisfied, and Professor Aysa's email evidences, that it was a particular area of focus for the Selection Committee when they assessed Dr Graham and others in terms of their academic qualifications, research and experience of teaching and supervising Master's and PhD students. We further note that Professor Aysa wrote of "the general research, teaching and contribution to *the* field" (our emphasis), suggesting a focus on the field of Education rather than a candidate's own particular field. It is one of the changes noted by Mr Kirk in paragraph 19(c) of his submissions and it would seem therefore to have originated from Professor Aysa, at a point in time when Professor Aysa did not have access to any of the candidates' applications (and indeed when Dr Graham had yet to submit his application).
45. Professor Fisher responded to Professor Aysa's email at 17:32 on 13 May 2022 (page 389Q of the Bundle). We can see from a further email sent on 17 May 2022 that she first started reviewing candidate applications on the

morning of 17 May 2022. As we have noted already, Dr Graham did not submit his application until relatively late on 15 May 2022 in which case, save for the relatively limited information in his initial email to Professor Fisher of 10 May 2022, she did not know on 13 May 2022 that he would be a priority candidate or have any other material information about him that might have enabled or even subconsciously led her to craft the selection criteria in such a way as to exclude or prejudice his application. On the contrary, insofar as he had written on 10 May 2022 that his background was “mainly in applied linguistics (specifically second language acquisition/education)”, the criteria could be said to have evolved so as to be more aligned to what he was then saying about himself. Furthermore, a fifth criterion was added which benefitted Dr Graham as he received the maximum possible score for it. In any event, the Selection Committee’s focus on second language education, rather than simply its acquisition regardless of setting or situation, was consistent with Professor Fisher’s very first communication with Dr Graham referred to in paragraph 40 above. Whether or not there is consistency between the job advert and the information for candidates and the selection criteria eventually settled upon, we are satisfied that Professor Fisher and her colleagues have been consistent in terms of what they considered to be the relevant criteria by reference to which the appointment should be made.

46. In her email of 17 May 2022, Professor Fisher articulated the essential criteria as follows:-

Criterion 1: PhD (or nearly completed)

Criterion 2: supervision experience of masters/phd

Criterion 3: teaching experience relevant to second language education courses currently taught in faculty

Criterion 4: research record

Criterion 5: quantitative methods

As regards Criterion 3 she referred to a candidate’s experience to date as suggesting they would be “easily able to contribute to RSLE” (Research in Second Language Education). As regards Criterion 4 she referred to publication in relevant journals, specifically “education/social science or language education”. She did not elaborate as to what would likely meet the test of ‘relevance’ in terms of a candidate’s PhD, though as we say Professor Aysa had referred to contribution to the field.

47. Over the following days the four Professors provisionally scored the candidates using a Selection Results Grid that had been provided to them. They effectively had two and a half days in which to review 53 applications and nearly 1,200 pages of materials. We do not have Professor Fisher’s provisional scoring as she edited her copy of the grid in order to produce the final agreed scores for all the candidates which emerged from the Selection Committee’s discussions on 20 May 2022. It is apparent from

the others' completed grids that they were aware that Dr Graham had been identified as a priority candidate. We note the following:-

- 47.1. Professor Stylianides did not assign scores to eight of the candidates and just a single score to a ninth candidate. He added the comment, "poor fit" in the comments section for one of those candidates.
- 47.2. Professor Stylianides did not assign a score to most of the candidates, including Dr Graham, for knowledge, skills and experience of quantitative research methods.
- 47.3. Professor Stylianides assigned scores of between 1 and 4 against each of the selection criteria, failing to appreciate that a score of 0 was to be given to candidates who did not meet the requirements (or who had failed to provide evidence in that regard).
- 47.4. Professor Aysa listed the criteria in a different order to the others (though in the order these had been set out by Professor Fisher in her email of 17 May 2022 already referred to). Professor Aysa added the criteria and, in each case, what might indicate a score of 3 or 4, to the grid so that he had a ready reference point as he worked his way through the candidates. The indicators corresponded to those identified by Professor Fisher in her email of 17 May 2022.
- 47.5. It is a moot point, albeit seemingly not picked up by Mr Kirk, whether the indicators correspond exactly to the suggested scoring system in the University's Recruitment Guidance.
- 47.6. Professor Aysa did not assign scores against all five criteria in the case of 29 candidates. To the extent that scores were assigned to those candidates they were mainly given a score of 0 or 1, meaning at best that they met the relevant requirements in some but not most or all respects.
- 47.7. Professor Liu completed the grid by hand, fully scoring 52 of the 53 candidates.
- 47.8. Professor Liu's comments in relation to Dr Graham were as follows,

"good background in linguistics; qualifications; limited experience working in education; strong technology; not aligned"

47.9. The scores initially given to Dr Graham were as follows:-

	Criteria 1 (PhD in a relevant subject)	Criteria 2 (excellence in research in field)	Criteria 3 (relevant teaching experience)	Criteria 4 (relevant supervision experience)	Criteria 5 (relevant knowledge, skills & experience of quantitative research methods)	TOTAL SCORE
Professor Stylianides	3	2	1	2	No entry	
Professor Aysa	0	0	1	2	4	7
Professor Liu	0	3	1	3	4	11

47.10. Given his misunderstanding in relation to the scoring system, Professor Stylianides' scores were possibly equivalent to 2 – 1 - 0 - 1. If so, that would mean that Professor Liu initially gave Dr Graham the highest total score against the first four criteria.

47.11. Dr Graham's scores at the conclusion of the meeting on 20 May 2020 were as follows:-

	Criteria 1 (PhD in a relevant subject)	Criteria 2 (excellence in research in field)	Criteria 3 (relevant teaching experience)	Criteria 4 (relevant supervision experience)	Criteria 5 (relevant knowledge, skills & experience of quantitative research methods)	TOTAL SCORE
Professor Stylianides	0	1	0	0	4	5

48. The minutes of the meeting evidence that Professor Fisher took the lead as Chair in producing feedback for Dr Graham, in case this should be requested by him. For convenience, we shall refer to this feedback as the "shortlisting notes" to distinguish it from the feedback subsequently provided to Dr Graham by Ms Coussell (even if that feedback essentially replicated the shortlisting notes). As we shall come back to, in an email to her colleagues on 24 May 2022, in which she sought their input to her first draft of the shortlisting notes, Professor Fisher wrote,

“... Amy has asked for a document outlining why criteria are not met that she can send to HR as soon as possible who will decide whether we need to interview.”

(page 324)

49. The Selection Committee produced a reasonably detailed explanation for its decision including what seems to us to be the first written iteration of the precise criteria that had been used for shortlisting candidates, namely:-
- 49.1. PhD held in a relevant subject (Language Education and Social Science);
 - 49.2. Record of excellence in research in the field;
 - 49.3. Relevant teaching experience with Post Graduate students in the education field so that the applicant may be able to make an immediate contribution to the Faculty’s teaching with specialist focus on second or foreign language education;
 - 49.4. Relevant teaching experience so that the successful candidate will be able to make an immediate contribution to supervision of students on the full time MPhil and part time MEd in Research in Second Language Education (RSLE) and PhD programmes; and
 - 49.5. Relevant knowledge, skills and experience of quantitative research methods.

(page 317 of the Bundle). Particularly given that the shortlisting notes were prepared within a matter of days of the shortlisting meeting, we accept that they accurately capture the criteria used by the Selection Committee in its discussions on 20 May 2022. They are consistent with the email discussions we have referred to.

50. At the point at which the shortlisting notes were drafted and finalised, Dr Graham was unaware that his application would not be taken forward and accordingly had not raised any concerns with the University, let alone asserted, that he had been discriminated against. We bear in mind that the Selection Committee were aware that he was potentially a priority candidate (there are emails after 20 May 2022 in the Hearing Bundle which indicate that final confirmation of his status was still outstanding), and accordingly that they understood he might seek feedback on his application. Whilst we recognise the potential therefore for the notes to be self-serving, nevertheless the documented reasons agreed amongst the Selection Committee as to why Dr Graham did not meet the essential criteria are a contemporaneous record of their thinking in the matter. Moreover and significantly, the four Professors’ evidence in these proceedings remains consistent with their immediate feedback. Inconsistency can often lead a Tribunal to draw adverse inferences: this is not a case in which any of the four Professors has been inconsistent in

their accounts or explanations as to why Dr Graham was not invited to interview.

51. Given in particular the assertions directed at Professor Fisher, we note that Professor Aysa provided significant input to the final shortlisting notes. We refer in particular to his email of 25 May 2022 at page 323 of the Hearing Bundle in which he expressed himself fairly directly in the matter. In combination with his email of 17 May 2022 already referred to (page 389R) it reinforces all four Professors' evidence that the shortlisting exercise was collaborative, rather than driven by Professor Fisher. If anything, the emails point to Professor Aysa taking the lead in terms of identifying the essential criteria, and thereafter in articulating why Dr Graham had not met them.
52. It is worth noting what the Selection Committee fed back in relation to each criterion:-

Criterion 1. PhD held in a relevant subject (language education and social science)

The candidate's PhD, awarded in 2014, is in Theoretical & Applied Linguistics (Phonetics and Phonology). While the PhD is in the wide cognate field of Language the expertise here falls outside of the key criteria of relevance in that it is lacking a "educational and social science" dimension. The criterion is therefore not met.

Criterion 2. Record of excellence in research in the field. Contributions to excellence in research will be through peer-reviewed publications and other activities of a kind and quality that meet international standards as assessed in national research assessment exercises.

The candidate has a growing profile of publications during their postdoctoral career, predominantly in phonetics and phonology and their implications for areas such as forensic linguistics, speech segmentation / detection, natural language processing, neural spectrogram analysis, and automated assessment of phonetic and prosodic features.

While clearly an excellent scholar in their field, currently the candidate has no publications in education related journals. The evidence suggests that criterion is met to a limited degree and substantial training would be needed that would allow the candidate to meet this criterion fully within a reasonable timeframe.

Criterion 3. Relevant teaching experience with postgraduate students in the education field so that applicant may be able to make an immediate contribution to the Faculty's teaching with a specialist focus on second or foreign language education.

The candidate has taught some courses in the Theoretical and Applied Linguistics division of the Faculty of Modern and Medieval Languages and Linguistics. The lack of evidence that the candidate possesses the minimum relevant knowledge, skills and experience to immediately contribute to the

teaching requirements of the MPhil RSLE course, means the criterion is not met.

As to training, SLE requires doctoral level specialist knowledge to be able to teach these graduate students and therefore there is no reasonable training in the short term that would allow the candidate to perform the duties of the role.

Criterion 4. *Relevant supervision experience so that the successful candidate will be able to make an immediate contribution to supervision of students on the full time MPhil and part time MEd in Research in Second Language Education (RSLE) and PhD programmes.*

The candidate has a record of supervision, mainly in the area of linguistics and phonetics in the Faculty of Modern and Medieval Languages and Linguistics. The lack of evidence that the candidate possesses the minimum relevant knowledge, skills and experience to immediately contribute to the supervision requirements of the graduate students following the MPhil RSLE and PhD programmes, means the criterion is not met.

As to training, SLE requires doctoral level specialist knowledge to be able to supervise these graduate students and therefore there is no reasonable training in the short term that would allow the candidate to perform the duties of the role.

Criterion 5. *Relevant knowledge, skills and experience of quantitative research methods.*

The candidate has taught quantitative research methods on the MPhil programme in the Theoretical and Applied Linguistics division. There is strong evidence of a range of quantitative methods in the candidate's research. This criterion is securely met.

(pages 318 – 319)

53. On 31 May 2022, Dr Graham was informed by Ms Matthews that his application would not be taken further. She confirmed that should he wish to receive any feedback regarding his application he should let her know.

What the Selection Committee knew in terms of Dr Graham's race

54. A number of Mr Kirk's submissions are directed to the question of whether the Selection Committee knew of Dr Graham's race when they scored him, including whether adverse inferences should be drawn from how they address this issue in their witness statements and when questioned at Tribunal.
55. There are undoubtedly indicators within Dr Graham's application and accompanying CV that he was black and of Afro-Caribbean heritage. His undergraduate degree was obtained from the University of the West Indies, he disclosed that his research achievements had been featured as part of the 2018 Black History Month celebration of cutting edge and

impactful research being conducted at Cambridge, and he described himself as someone,

“affected in a very personal way by Windrush”.

56. Less prominent within his application was a footnote link in a slightly reduced font size, to the Black History Month celebration with the tag,

<https://www.cam.ac.uk/research/features/black-researchers-shaping-the-future>

The letter ‘l’ was missing from “black” in the footnote.

57. In our judgement these are no more than indicators, even if in combination they point more obviously or strongly towards a particular conclusion.

58. As we have noted already, the four Professors had each completed the recommended training in Understanding Unconscious / Implicit Bias. .

59. We accept each of the four Professors’ evidence that the training was fresh in their minds when they met on 20 May 2022. The meeting minutes evidence that Professor Fisher established at the outset of the meeting that the participants had undertaken the recommended training and, further, that she reiterated the guidance. In our judgement, that reiteration, as well as the fact that each member of the Selection Committee had completed the training notwithstanding it was not mandatory, evidences to us that the Selection Committee embarked upon the shortlisting process mindful of the need to remain focused on the essential criteria, rather than extraneous matters, and that they should avoid making assumptions.

60. Mr Kirk submits that the Tribunal can readily infer that the Selection Committee,

“... clearly had knowledge of Dr Graham’s race from the time of receiving his application, yet tried to hide that fact.”

In our judgement, and as we shall come back to, the position is more nuanced than he suggests. We are unpersuaded by his further submission that if the Selection Committee’s decision was genuinely free from bias it would have been transparent about its knowledge of Dr Graham’s race from the outset. There is a risk in that submission of the Tribunal being encouraged to infer discrimination from the Selection Committee’s failure to make assumptions in relation to Dr Graham. For example, we think it highly unwise to assume anything about a person’s race from the University they attended as an undergraduate. To do so would be to fail to have regard to racial diversity within academic institutions and the countries and regions from which they draw their students. We have been provided with no diversity information in relation to the University of the West Indies and none of the four Professors was asked at Tribunal whether they had any knowledge of that institution and its student demographic or about racial diversity more generally within

Jamaica. As regards Dr Graham's reference to Black History Month, the study of and research into issues of race and racial identity are plainly not the exclusive preserve of those who are black, of colour or might otherwise identify as BAME. As we explored with Mr Kirk, a person might be personally affected by Windrush in myriad ways, for example through their partner or partner's family, or because their parent or other close relative is in a relationship with someone directly affected by Windrush. Mr Kirk says the facts taken together "could only be consistent with Dr Graham being a black applicant" (paragraph 18(a) of his submissions). But what if, for example, Dr Graham had been brought up by his white British mother and black, Jamaican step-father, or he had spent his teenage years in Jamaica as a result of his parents' work or diplomatic posting? These scenarios might provide a ready explanation for how Dr Graham had come to study at the University of the West Indies and, in the first scenario, depending upon his step-father's personal or family experiences, why he might be affected in a very personal way by Windrush and be motivated to focus his studies and research on issues relating to race. We identified other possible scenarios with Mr Kirk. On this issue we think he has unfortunately made an unwise assumption as to what should be inferred from the information contained in Dr Graham's application.

61. That is not to detract from Mr Kirk's other weighty submissions, including what might be inferred from how the issue of knowledge is addressed in the four Professor's witness statements and how they addressed the matter at Tribunal. His submissions in this regard proceed on the basis that the Selection Committee,

"... firmly denied any knowledge of Dr Graham's race in their witness statements."

Again, the position is more nuanced than the submission suggests. We shall deal with the four Professors' evidence and our conclusions in turn.

Professor Fisher

62. Regardless of whether or not Professor Fisher gave conscious thought to the matter, we have referred already to the fact that Dr Graham had included a picture of himself when setting up his University email account. Given their exchanges, we find that that she is more likely to have remembered him three days later on 16 May 2022 when she was informed that he was a priority candidate, subsequently when she reviewed his application and thereafter on 20 May 2022 when the Selection Committee devoted some time to Dr Graham's application. If she did not consciously give any initial or further thought to his race, at the very least it was information that sat within her subconscious mind.
63. In paragraph 13 of her witness statement, Professor Fisher refers to the fact that the Selection Committee was not provided with information about applicants' protected characteristics and that the only way the Selection Committee could know for example a candidate's race would be if they self-disclosed it (something Dr Graham had not done even if there were

the various indicators referred to). That is as far as her evidence extends on the matter. We do not consider that she has sought to mislead by omission or that she was evasive, as Mr Kirk submits. He refers to allegedly long pauses in her evidence at Tribunal, something we did not observe. Of all of the University's witnesses, we were particularly struck by her measured tone and approach. She listened carefully to Mr Kirk's questions and consistently engaged with them. Unsurprisingly, she came across as an intelligent individual, but more than that she was reflective and thoughtful in her choice of words. We do not regard that as evidence of evasiveness. On the contrary, we found Professor Fisher to be open and consistent throughout her relatively lengthy cross examination. There was no point in her evidence when we perceived her to be evasive, equivocal or defensive. In summary, she was a credible witness. We accept, for example, that she has a collaborative approach and find that she facilitated an open discussion on 20 May 2022 rather than directing or even controlling it. That was also the evidence of her colleagues. Notwithstanding our observations at paragraph 62 above, we accept as credible her evidence at Tribunal that she found it hard to say whether she knew of Dr Graham's race at the time. She said that all she could say was that when she had reviewed the paperwork she did not recall focusing on the indicators referred to above. Instead, she said she had looked for key features indicating a candidate's suitability. We find that she was looking for positive indicators rather than assessing candidates in a negative way. In response to Mr Kirk's questions, she accepted more than once that one could potentially infer from the application that Dr Graham is black. She simply said, and we accept, that it was not at the forefront of her mind. The difficulty for Professor Fisher and her three colleagues is that they do now know Dr Graham's racial origin, making it difficult for them to pin point exactly when they first became aware, or consciously aware of his protected characteristics, particularly when asked about the matter some two years later. We asked Professor Fisher whether she could recall a moment when it might have fully dawned on her that Dr Graham was black. She said she could recall some "response" when she learned that Dr Graham was saying that he had been discriminated against, but she could not be certain whether it was simply a response to the allegation or because it had then become clear to her that he was black when this had not previously been something she had consciously considered. Again, we found the way she expressed herself in the matter to be measured, reflective and credible, but also consistent with her initial interactions with Dr Graham on 10 and 13 May 2022 when she was not only friendly towards him, but gave him a helpful steer in terms of focusing his application towards second language education. In our judgement it is her actions in that regard which have probative value in terms of what was in Professor Fisher's mind as she embarked upon the shortlisting exercise at a point in time when Dr Graham's image was immediately available to alert her to his colour.

Professor Liu

64. Professor Liu referred to Dr Graham at Tribunal as “an excellent scholar of colour”, further noting that there were some indicators that seemed to suggest he was Jamaican. Mr Kirk contrasts this with what Professor Liu says in his witness statement, denying having any information about race. That is not in fact quite how Professor Liu expresses himself on the matter in his witness statement. He says,

“We did not receive any information in relation to the candidates’ ethnicities or disabilities”.

He is correct in that regard. If there were indicators in the application that does not alter that information on candidates’ race, including their ethnicity, colour and nationality, was not provided even if the candidate had supplied that information as part of monitoring of diversity.

65. As with Professor Fisher, we do not consider that Professor Liu has sought to mislead by omitting to address the indicators in the application. He did not deny that he was aware there were indicators or seek to equivocate on the issue.

Professor Aysa

66. Mr Kirk submits that Professor Aysa expressed at Tribunal that there,

“could have been a level of awareness where C was black”.

He contrasts this with paragraph 8 of Professor Aysa’s witness statement. We noted Professor Aysa’s evidence differently, namely “there could be a level of awareness”, i.e. that he was acknowledging the potential indicators in Dr Graham’s application when taken to them by Mr Kirk at Tribunal, rather than necessarily accepting a level of awareness at the time. With the application in front of him at Tribunal he went on to say that he could pick up the characteristics that were there, but then stressed that one should not make assumptions. As with Professor Liu and Professor Stylianides, English is not Professor Aysa’s first language even if he has good spoken English. Our understanding of how he was expressing himself on the matter was that he was considering the matter on the evidence before him at Tribunal, rather than describing what he recalled he knew, believed or suspected at the time. He went on to say,

“we do not in discussion say race”,

from which we understood that the various candidates’ race had not been discussed or alluded to at any point on 20 May 2022 or indeed at any other time. He emphasised that his focus was on the suitability of candidates and referred in this regard to his experience from sitting on other Selection Committees. He was equally emphatic, indeed animated, in stating that he would not allow others to discriminate.

67. In paragraph 8 of his witness statement Professor Aysa says,

“We did not know Dr Graham’s race, and had no knowledge of his disability from his application so these did not inform our decision.”

We accept, as factually accurate, his statement that he did not know Dr Graham’s race or disability. As with Professor Fisher and Professor Liu, we do not consider that he has sought to mislead by omission.

Professor Stylianides

68. Professor Stylianides observed that there was a great deal of material and information to review and that he would not spend time looking for information for example in relation to gender. He said that,

“if you do detective work then you are going against advice”.

69. When taken to the indicators of race in relation to Dr Graham, he said he could not recall paying particular attention to the passages in question, and that it did not reflect how he had analysed the applications. His evidence in his witness statement is that the Selection Committee had not received any information in relation to candidates’ ethnicities or disabilities (he is correct in that regard) and

“the recollection there was nothing in Dr Graham’s application pack which specifically stated these protected characteristics”.

70. Mr Kirk submits that Professor Stylianides tried to claim, unsustainably, that it was possible for a non-black candidate to make the references that Dr Graham did to Windrush. For the reasons above, we consider that it was sustainable for a non-black candidate to make the references to Windrush that Dr Graham did. As regards the footnote, given that he and his colleagues had upwards of 1,200 pages of materials to review, we are not persuaded that Professor Stylianides saw the footnote let alone that he took from it that Dr Graham was black. As with his colleagues, we do not consider there has been any attempt to mislead by omission. We accept Professor Stylianides genuinely does not recall anything in Dr Graham’s application pack that alerted him to his race.

The Selection Committee’s assessment of Dr Graham’s application

71. We turn then to the Selection Committee’s assessment of Dr Graham’s application against the essential criteria. As we have noted above, Dr Graham was scored ‘0 – 1 – 0 – 0 – 4’ against the five criteria. The Redeployment Framework provides that priority candidates are to be shortlisted,

“... where they meet the essential criteria which can be assessed at that stage. They should also consider whether the candidate might meet the essential criteria with reasonable training”

(paragraph 4.3, page 83)

72. The Framework does not identify the threshold test for determining whether a candidate “meets” the essential criteria. The University’s own suggested scoring system allocates scores of between ‘0’ and ‘4’ on the following basis:-
- 72.1. 0 – does not meet the requirements / no evidence provided;
 - 72.2. 1 – meets the requirements in some respects;
 - 72.3. 2 – meets the requirements in most respects;
 - 72.4. 3 – meets the requirements effectively; and
 - 72.5. 4 – exceeds requirements.
73. A candidate may therefore be assessed as meeting the essential requirements to varying degrees. Whilst it is only a suggested scoring system, it was seemingly adopted by the Selection Committee. We explored the issue further with Professor Fisher who offered the view that a score of ‘1’ against each criterion would be sufficient for a priority candidate to be taken forward to interview. Whilst she was not, of course, responsible for the Redeployment Framework, it is notable that she effectively set the bar higher in terms of the University’s ability to justify the Selection Committee’s decision not to take Dr Graham to interview. For example, it would be easier for the University to justify the Selection Committee’s decision if a score of ‘2’ or even ‘3’ was said to correspond to “meets” for the purposes of the Redeployment Framework. What is clear is that no-one gave active thought to this issue in May 2022. The point was picked up by Professor Stylianides in the course of his evidence: he said that he did not necessarily share Professor Fisher’s view in the matter, though readily volunteered that he was not an expert on the Redeployment Framework. He questioned whether a priority candidate who received a score of ‘1’ against each of the essential criteria should be progressed to interview. He said that he would ultimately need further HR advice in that hypothetical scenario. We note on this issue that although Dr Graham received a score of ‘1’ for the second criterion: ‘Record of excellence in research in the field’, in its feedback the Selection Committee noted that the criterion had been met to a limited degree and substantial training would be needed to allow Dr Graham to meet the criterion fully within a reasonable time frame. In which case, that points to a score of ‘1’ as potentially falling short of ‘meets’ for the purposes of the Redeployment Framework and would tend to support Professor Stylianides’ view in the matter.
74. In the course of these proceedings and during cross examination of the University’s witnesses, there has been a particular focus on the question of whether second language education and second language acquisition are synonymous and, related to this, how Education, Applied Linguistics and other branches of Linguistics overlap and interrelate. In an email to Ms Frampton on 6 June 2022, Dr Graham referred to various senior colleagues of his being,

“... shocked by the incredible and frankly ridiculous suggestion that applied linguistics and second language education are not related fields.”

There had in fact been no such suggestion by the Selection Committee and no reason therefore for Dr Graham’s colleagues to be “shocked”. Professor Fisher provides a measured and readily accessible, exposition in paragraph 15 of her witness statement, and she talked eloquently on the subject at Tribunal. Professor Liu, the other second language educationalist amongst the four Professors, was animated on the subject at Tribunal, to the point that it was sometimes difficult to keep pace with his enthusiastic, engaging comments. We note that before the Selection Committee met, when Professor Stylianides was provisionally scoring the candidates he referred to one candidate in the comments section as an applied linguist before going on to note that they had,

“pubs [publications] and experience in education / teaching / teaching education / dialogue.”

We conclude that Professor Stylianides likewise understood there to be a distinction and that the focus, as Professor Fisher had said in her email of 13 May 2022, would be on “education / people who can do social science”. The point had also been made by Professor Aysa in his email of 13 May 2022 already referred to.

75. We are satisfied that each of the four Professors genuinely regards applied linguistics and education as discrete, albeit closely related, subject areas, and that during the recruitment process they were focused on candidates who were experts in instructed second language and could “do social science”.
76. Mr Kirk’s submissions steer away from the debate and focus instead in particular on whether it was credible for the Selection Committee to have scored Dr Graham ‘0’ against Criterion 1. He says that the Committee “pointedly mis-described” Dr Graham’s PhD as being in Theoretical and Applied Linguistics (Phonetics and Phonology), as opposed to Theoretical and Applied Linguistics (Phonetics and Second Language Acquisition). If it is thereby suggested that this was deliberate on the Selection Committee’s part, we do not agree. We regard it as a simple error: the Selection Committee understood that the feedback might be provided to Dr Graham, so there was no reason for it to wilfully or pointedly mis-describe his PhD. In any event, it does not reflect our view as to the dynamic operating within the Selection Committee or how it went about its task. There is no evidence that it set out to block or discredit Dr Graham’s application or to undermine him by mis-describing his academic record.
77. Mr Kirk makes a number of pertinent observations at paragraph 23(c) of his submissions as to Dr Graham’s credentials in relation to foreign language education, including a one year Research Fellowship at Berkley conducting field work on English Language Education in Mexico and Spanish Language Education in California, and an award for outstanding contribution to Foreign Language Education. His various submissions

have weighed heavily in our deliberations, particularly in the context that Candidate 9, the successful candidate, scored '3' against Criterion 1, yet like Dr Graham had a PhD in Applied Linguistics. However, having given careful thought to Candidate 9's application and CV, we are satisfied that there was sufficient information available to the Selection Committee to distinguish the candidates and justify the scores given to each of them. Candidate 9 specifically identified that their PhD in Applied Linguistics was with a specialism in Quantitative Research methods and *Instructed Second Language Acquisition* (our emphasis), before going on to observe that they were thereby well versed in current Second Language Education theories (page 874). Mr Kirk contrasts Dr Graham's predoctoral experience of language education. Whilst predoctoral and indeed postdoctoral experience of language education might touch upon other of the essential criteria, the first criterion was squarely focused upon a candidate's PhD. The candidates had been informed that they would need to hold a PhD in a 'relevant subject'. In that regard, there is a weight of evidence in the Hearing Bundle that the Selection Committee was focused on second language education, including the social science around second language education, and that this informed their individual and collective view as to what was 'relevant' in terms of a candidate's PhD subject matter. In our judgement, the Selection Committee not unreasonably concluded that Candidate 9 met the requirements effectively. We agree with the observations at paragraphs 24 and 25 of Mr Wilson written submissions that Dr Graham's response to the Selection Committee's feedback in effect concedes that the Faculty's adoption of the University's generalised criteria had to be read in their context and that Dr Graham read Criterion 1 as applying to a "related field" (page 365). Ultimately, it was for the Faculty, rather than Dr Graham, to determine what was a relevant subject, provided that it acted genuinely and lawfully in the matter: a related field did not meet the Selection Committee's evaluation that a relevant subject would be Language Education and Social Science.

78. Neither Dr Graham nor Mr Kirk have identified what score they say should have been awarded to Dr Graham against Criterion 1, though it may be inferred that they contend he should have been scored '1' as a minimum. It is worth noting in this regard that a score of '0' meant that a candidate either did not meet the requirements, or that no evidence had been provided in that regard. Professor Fisher explained more than once at Tribunal that in her view Dr Graham's application failed to demonstrate that he met Criterion 1.
79. The greater the disparity between Dr Graham's actual score and, if relevant, the score he ought reasonably to have been allocated, the more we might look to the University to provide a non-discriminatory explanation for that disparity. In coming to this judgment, we have held in mind Sedley LJ's important observation in Anya v University of Oxford [2001] ICR 847, that a judgement between two comparably well qualified candidates is notoriously capable of being influenced by idiosyncratic factors. Of course, as a priority candidate, Dr Graham was not even required to

satisfy the Selection Committee that he was equally well or even better qualified than any other candidate, merely that he met the essential criteria in order to be offered an interview. However if, as we accept, the Selection Committee assessed candidates, including Dr Graham, by reference to whether they held a PhD in Language Education and Social Science, we do not consider that the Committee acted unreasonably or outside the margin of appreciation in awarding Dr Graham a score of '0' against Criterion 1, in circumstances where he had described his PhD as being in Theoretical and Applied Linguistics (Phonetics and Second Language Acquisition). Bearing in mind that Professor Aysa was focused from the outset on expertise in instructed second language with a strong background in education and social science research, it is relevant we think that when he provisionally scored the candidates he gave Dr Graham a score of '0' for his PhD and a score of '4' to Candidate 9. Likewise, Professor Liu, who was as we have said the other language educationalist on the Selection Committee, gave Dr Graham a score of '0' and a score of '4' to Candidate 9. Only Professor Stylianides, who is a Professor of Mathematics Education, initially assessed Dr Graham as meeting the criterion effectively (and even then the score of '3' may have been inflated by reason that Professor Stylianides scored candidates on a more narrow range of between '1' and '4'). By comparison, Professor Stylianides gave Candidate 9, the successful candidate a score of '4'.

80. As regards Criterion 2, Mr Kirk refers to the criterion as being slightly less important in the context of this case as Dr Graham was adjudged by the Selection Committee to meet the essential criterion in order to be considered for interview. The debate at Tribunal focused on whether the journals in which Dr Graham had been published are education related journals and it mirrored to an extent the debate as to the overlap and interaction between applied linguistics and second language education. Having first identified where Dr Graham has been published, Mr Kirk submits that the publications relate "to an analysis of second language pronunciation – which is a major field of second language education and applied linguistics". We find ourselves in agreement with Mr Wilson that Dr Graham was describing how his work in linguistics could have a relevance to second language education. As Mr Wilson does, we note that when questioned on the matter Professor Fisher was able to identify a number of specialist educational journals, in none of which Dr Graham had been published. Professor Aysa told the Tribunal that the publications, "didn't speak to my students".
81. We are satisfied by the Selection Committee's explanation in their feedback document for the score they gave Dr Graham in respect of Criterion 2. They acknowledged his growing profile but provided a clear, indeed we think cogent explanation as to why the publications were predominantly in phonetics and phonology, and as they saw it,

"... their implications for areas such as forensic linguistics, speech segmentation / detection, natural language processing, neural spectrogram analysis, and automated assessment of phonetic and prosodic features."

(page 331)

82. In their further feedback document, Professors Fisher and Liu elaborated that it was important for the appointed candidate to contribute to the Faculty of Education's research profile by providing 4* publications recognised as education research by the education research REF panel. Although Dr Graham later questioned Professor Fisher's and others' own record in this regard in 2021, in our judgement this does not alter that it represented a genuine benchmark against which candidates were judged and that it was reasonably capable of objective evaluation. We are satisfied that the score of '1' sat comfortably within the margin of appreciation.
83. Mr Kirk addresses the third and fourth criteria in combination, framing his submissions by reference to the job advert rather than the essential criteria that were settled upon, namely:-
- Criterion 3: Relevant teaching experience with postgraduate students in the education field so that the applicant may be able to make an immediate contribution to the Faculty's teaching, with a specialist focus on second or foreign language education.
- Criterion 4: Relevant supervision experience so that the successful candidate will be able to make an immediate contribution to supervision of students on the full-time MPhil and part-time MEd in Research in Second Language Education (RSLE) and PhD programmes.
84. As with Criterion 2, the Selection Committee provided a clear and cogent explanation as to why Dr Graham was assessed not to have met each criterion, with specific reference in the case of Criterion 3 to the teaching requirements of the MPhil / MEd RSLE course, including identified core modules, and in the case of Criterion 4, to the lack of evidence that Dr Graham possessed the minimum relevant knowledge, skills and experience to immediately contribute to the supervision requirements of the graduate students following the MPhil and MEd RSLE and PhD programmes in the Faculty who research second language education issues in the areas that were outlined. Their explanations in that regard are consistent with how the position was advertised: the teaching and supervision duties were clearly stated in the third paragraph of the advert, in which reference was also made to the Faculty's successful initial teacher education programme in modern languages and its undergraduate programme in education.
85. Professors Stylianides, Aysa and Liu initially scored Dr Graham '2', '2' and '3' for Criterion 4 (possibly '1' in the case of Professor Stylianides): the reduction in Dr Graham's score to '0' represented the most significant adjustment to his scores following the shortlisting discussion on 20 May 2022. Professor Liu had given him the highest initial score, assessing him as meeting the requirements effectively. We note by comparison that Professor Liu gave Candidate 7 the same scores as Dr Graham against

each of the criteria. Following the shortlisting meeting, Candidate 7's scores reduced to 0 – 1 – 0 – 1 – 3, giving them the same total score as Dr Graham. It provides at least some further evidence that Dr Graham was not being targeted or consciously excluded from consideration. More pertinently as regards Criterion 4, we note that Dr Graham's CV confirms that he had advised, but not that he had supervised PhD students, and that he had no documented experience of supervising undergraduates following MEd RSLE programmes (one of the advertised main supervision duties). Reading Dr Graham's relatively brief response to the Selection Committee's feedback on this issue, he seems to have asserted his credentials in fairly general terms without evidencing his specific experience of advising and supervising.

86. Professor Stylianides initially gave Dr Graham scores of '1' and '2' respectively for Criterion 3 and 4, but for the reasons already identified these scores may have overstated the extent to which Dr Graham was assessed by Professor Stylianides to have met the relevant requirements. Professor Aysa scored Dr Graham '1' and '2' and Professor Liu scored him '1' and '3'. Accordingly there was a consistency of view ahead of the meeting on 20 May 2022 that Dr Graham had evidenced at most that he was meeting the requirements in relation to Criterion 3 in some respects. We do not consider that the Selection Committee acted unreasonably in moderating that score down to '0' in light of the identified need for candidates to make an immediate contribution to the teaching requirements of the MPhil and MEd RSLE programmes, and their assessment that his lack of doctoral level specialist knowledge meant that training could not be provided within a suitable timeframe to enable him to perform the duties of the role to the required standard.

Other relevant considerations in our deliberations

87. Save that all the candidates might be said to have been treated equally unfairly in so far as the essential criteria could be said to have evolved or even changed from the advertised or communicated criteria, as Mr Kirk acknowledges they do not amount to exact statutory comparators, because none were priority candidates. However, he submits that they are nonetheless useful to consider because in other respects they were in similar circumstances to Dr Graham, namely applying for the same job and against the same set of criteria. We have touched briefly upon Candidate 7's scores, but ultimately we have derived limited evidential value from how the non-shortlisted candidates were scored. The Selection Committee had a very limited amount of time in which to review 53 applications and upwards of 1,200 pages of materials. In his email of 13 May 2022 (page 389R), Professor Aysa said that "next week is already busy". The Selection Committee's focus on 20 May 2022 was on producing a longlist and then whittling this down to a shortlist, including giving careful consideration to Dr Graham's application as a priority candidate. They met on 20 May 2022 for approximately three and a half hours. Given their focus, it seems to us that many of the candidates would have been discussed only very briefly, possibly for as little as a couple of

minutes. It seems to us inevitable that this could produce anomalies. We have noted already that Professors Stylianides and Aysa did not allocate scores, or complete scores to a number of the candidates. We have taken full account of what Mr Kirk says in paragraph 26 of his submissions regarding the scores that were given to five non-shortlisted candidates against certain of the criteria. To put this in context, he is contrasting the scores given to Dr Graham with just six out of a total of 240 scores allocated to non-shortlisted candidates. In our judgement, it is not particularly useful to look at the candidates who did not reach the shortlist in seeking to understand how a hypothetical comparator might have been treated. The non-shortlisted candidates may have been applying for the same job against the same set of criteria, but their applications were not examined in anything like the detail that Dr Graham's was.

88. In contrast, it might be useful to consider the four shortlisted or even the seven longlisted candidates since their applications were scrutinised more closely. We have already addressed the score of '3' that was given to the successful candidate, Candidate 9 in relation to Criterion 1. We have not been invited by Mr Kirk to consider Candidate 9's other scores or the scores of the other long and shortlisted candidates notwithstanding their circumstances were closer to Dr Graham's.
89. We have touched upon the fact that all the candidates might be said to have been treated unfairly in so far as the essential criteria could be said to have evolved or even changed from the advertised or communicated criteria. But these and the other matters identified in paragraph 19 of Mr Kirk's submissions did not disadvantage Dr Graham, whether as a black candidate, a black priority candidate or a black priority candidate of Afro-Caribbean heritage, and in our judgement do not support an inference of discrimination. They disadvantaged the candidates in equal measure. Indeed it might be said that those candidates who placed greater emphasis upon their ability to manage a diverse workload and work cooperatively with academic colleagues and support staff (Criterion 4, which Dr Graham seemingly did not address in his application) and/or who scored poorly against introduced Criterion 5 were disadvantaged more than Dr Graham and others.
90. Finally, this is not a case in which discriminatory comments are alleged to have been made by any of the four Professors or in which they are alleged to have discriminated against others on other occasions, such as might support an adverse inference. Although regrettable, we do not draw any adverse inference from the University's late disclosure of emails between the four Professors: as we say, these were supportive of the University's case.

Conclusion

91. In our judgement, Professors Fisher, Liu, Stylianides and Aysa were not influenced in any way by Dr Graham's race when they assessed his application and determined that he did not meet the essential criteria to be taken forward to interview (and could not meet them with reasonable

training). We reject any lingering suggestion that the selection criteria were changed in order to exclude or prejudice his application, or that Professor Fisher drove or influenced the process. We are amply satisfied that the shortlisting was a collaborative exercise involving four independent-minded academics who were accustomed to and comfortable with group decision making structures and practices. Mr Kirk refers to Sedley LJ's observations in Anya: in terms of the surrounding circumstances and background we attach some weight to how Professor Fisher interacted with Dr Graham on 10 and 13 May 2022, actively steering him in the right direction. If she had his image in front of her at that time by reason that it was included at the top of his email, then to the extent she consciously or even sub-consciously considered that he was a black candidate, her immediate reaction was to be friendly and helpful and indeed to go out of her way by following up with HR on matters of process. In our judgement these were not the actions of someone who was reacting consciously or otherwise to a candidate's race. As we say, we consider her evidence to have been consistent and credible and not evasive as has been suggested. If there were any failings in the process they were procedural matters under the Redeployment Framework rather than a departure from proper equal opportunity procedures. As we have said, the changes to the essential criteria affected all candidates equally rather than Dr Graham individually as a black priority candidate. We have found the scores given to Dr Graham to sit within the margin of appreciation so that this is not a case where we consider that discrimination might be inferred because there is no explanation for unreasonable scores having been given to Dr Graham. In any event, we are satisfied by the explanations that have been provided by each of the four Professors as to why Dr Graham was scored as he was. As regards the departures from the Redeployment Framework, some responsibility in the matter must surely rest with the relevant HR professionals within the School of Humanities and Social Sciences who seemingly failed to keep the Selection Committee fully on track by focusing their attention from the outset on the need to finalise the essential criteria at an earlier stage, certainly before the information for candidates was finalised and distributed, and in terms of what "meets" meant under the Redeployment Framework. But we do not infer from this that the Selection Committee itself thereby discriminated against Dr Graham. We do not uphold Issue 2(a).

The University's failure to subsequently invite Dr Graham to interview and Ms Niven's handling of his complaint - Issues 2b, 9a, 9b, 16a and 16b

92. Within less than an hour of being informed that his application would not be taken forward, Dr Graham emailed Ms Matthews, copying in Professor Fisher. He said that the decision would,

"... constitute an egregious breach of my rights under the redeployment scheme and will ultimately lead to unfair dismissal by the University."

(page 334)

Whilst he did not immediately allege that he had been discriminated against, nevertheless he was asserting an egregious breach of his rights without first seeking feedback on his application. Particularly given that Ms Matthews had specifically asked him to let her know if he wished to receive feedback, the feedback might have allowed to him to arrive at a more informed understanding as to why and in what respects the Selection Committee had come to the conclusion that he did not meet the essential criteria. He did not then know, for example, that the criteria did not fully accord with the criteria that had been provided in the information for candidates. Nor did he then know whether he had been assessed as having not met one or more of the criteria, and by what margin. In our judgement, even allowing for the fact that he may have felt confident about his application, he was not then realistically in a position to suggest that there had been an egregious breach of his rights. Dr Graham informed Ms Matthews that he would be retaining a lawyer though concluded his email by asking for feedback on his application.

93. Ms Matthews seems to have escalated the matter to Ms Coussell, who responded promptly the following morning at 10:15. She asked Dr Graham whether he wished to receive feedback in a meeting with Professor Fisher, or in writing with the option of a follow up meeting if desired. Dr Graham responded at 10:53. He wrote,

“ ... I have been advised by solicitor, Mr Paul Jackson, that I should receive all feedback in writing as he will need this information to continue preparing my case.”

(page 333)

94. The impression was that Dr Graham already had legal action in mind, even if he had yet to receive any feedback on his application. Indeed, he went on to say that the key question was whether the recruitment process would be paused,

“or whether we may need to apply for an emergency court injunction to achieve this outcome”.

95. The Hearing Bundle contains various email chains from this time involving different individuals within the University, so that it is not always easy to place them in chronological order. However, we can see that Dr Graham had emailed Ms Frampton at 08:57 that morning also identifying the potential for an emergency court injunction (page 343). We shall come back to his correspondence with Ms Frampton in a moment.

96. Even if Dr Graham regarded the situation on the morning of 1 June 2022 as time sensitive, or even time critical, in our view the suggestion that consideration might be given to an application for an emergency injunction was a disproportionate response in circumstances where he was only then asking for feedback and had been encouraged by Ms Frampton to see what the feedback said and to let her know if he wished to discuss it

further (page 346). It is apparent from Ms Frampton's emails that she was seeking to maintain a constructive dialogue with him.

97. The feedback itself was provided to Dr Graham by Ms Coussell later on 1 June 2022: to all intents and purposes it mirrored the three-page shortlisting notes. Ms Coussell informed Dr Graham that she was seeking advice from the Central HR Division with regards to his query on the recruitment process (page 332). Dr Graham responded thirty minutes or so later to say that Mr Jackson would be in touch, but in the meantime said he was certain on the basis of the feedback that his rights under the Redeployment Framework had been infringed. He said he would appreciate if HR would set out how it intended to proceed with his complaint.
98. Dr Graham had copied Ms Frampton and Ms Cobley into his initial email of 31 May 2022 to Ms Matthews. Further emails then ensued between Dr Graham and Ms Frampton, with Ms Frampton and Professor Fisher additionally being brought into copy on other emails at this time. Ms Frampton's emails are notable for the sensitive and professional way in which she endeavoured to engage with Dr Graham. As we say, she was evidently seeking to maintain a constructive dialogue with him. In their initial interactions Ms Frampton was evidently hopeful that the feedback would address his concerns, since she did not say what would happen if he remained dissatisfied, other than to note that an offer had been made for Professor Fisher to discuss the feedback with him. The emails also evidence that Ms Frampton was pro-active in the matter. For example, she contacted Dr Graham at 15:40 on 1 June 2022 to ask if he had received the feedback: separate emails in the Hearing Bundle show that she effectively asked colleagues for this to be expedited. Ms Frampton also endeavoured to reassure Dr Graham in terms of the overall process, informing him that interviews with candidates were planned for 10 June 2022, allowing time therefore for him to review the feedback.
99. Dr Graham responded to Ms Frampton's 15:40 email within a few minutes, moments before the feedback was provided by Ms Coussell. He wrote,
- "It so happens that I am more than qualified for this job and I am sure that my lawyer will have something to say about that ...
- Can you please confirm what HR intends to do if I receive the feedback and remain unhappy with the decision? ..."
- (pages 341 and 342)
100. Whilst his initial comment might be said to have pre-empted the feedback, we do not think it was unreasonable for Dr Graham to ask what would happen if he remained unhappy once he received the feedback. In any event, before the day was out, Ms Frampton knew that Dr Graham's concerns had not been met: within about half an hour of receiving the feedback from Ms Coussell, Dr Graham copied Ms Frampton into a short email to Ms Coussell in which he said that there were various inaccuracies

in the summary of his profile and that he was certain his rights had been infringed. He asked Ms Coussell to set out how HR intended to proceed with his complaint (page 330). Ms Frampton emailed him at 18:06 to request that he forward a summary of his concerns to enable these to be considered.

101. As far as we can see from the various emails in the Hearing Bundle, the next communication was an email from Dr Graham to Ms Frampton on 6 June (page 339), to which he attached a document setting out his response to the feedback. At that point he did not say, or at least did not state in terms, that the criteria had been designed to exclude him, rather that they had been changed,

“... to make it appear so narrow that only someone from the Faculty of Education could do it.”

102. Mr Kirk briefly explored with Professor Fisher whether the Selection Committee had identified a preferred candidate ahead of or at an early stage in the recruitment process, something she denied, but the point was not explored further with the other witnesses. In his closing written submissions, Mr Kirk suggests that one inference that can be drawn is that the Selection Committee moved to change the criteria because it liked the look of some of the candidates. For the same reasons set out above in relation to Issue 2(a), we consider there is no evidence that the Selection Committee, or any one of them, embarked upon the shortlisting process with a preferred candidate in mind, let alone that the criteria were altered to promote that person’s candidacy.

103. In his email to Ms Frampton of 6 June 2022, Dr Graham wrote that he did not consider it fruitful,

“... to engage in any further back and forth with the selection committee (or the select members of the committee who did the shortlisting), as I feel they will yet again come up with a rebuttal. **To that end, I have marked the response document central HR only.** I would therefore, once again, appeal to you to exercise your good judgement in the interest of fairness to suspend the interviews so that my concerns can be properly addressed.”

(page 340)

104. Even if it was not immediately apparent to Dr Graham, we think Mr Jackson would have understood that if the response to feedback was not shared with the Selection Committee, Ms Frampton and her HR colleagues might be limited to considering whether the recruitment process had been conducted in accordance with the University’s procedures, including the Framework Agreement. We certainly do not think that Dr Graham was intending to be difficult or obstructive, but, on reflection and with the benefit of advice, he might have taken a step back and recognised that he was placing constraints on the University’s ability to deal with his concerns. We agree with Ms Niven and Ms Hudson (respectively paragraphs 3 and 4 of their witness statements) that it left Ms

Frampton and her HR colleagues in a potentially difficult position. We accept that they were of the view that the question of whether he met the essential criteria for the position (or could do so with reasonable training) was a matter for academic judgement. Ms Frampton made the point in an email to Dr Graham on 6 June 2022, in which she wrote,

“... However, the points you are raising need to be referred to the shortlisting group of the Selection Committee so that they can be carefully considered and so that the decision not to shortlist you can be reviewed... There is time to ask for your response to the feedback to be considered before the interviews on Friday and for the decision to be taken on whether or not you should be interviewed in light of the points you have raised.

Would you give your permission for me to forward your document on to Education? Without being able to do so it won't be possible to ask for the decision to be reviewed. It is not possible for HR to review your document and make a decision on behalf of the Selection Committee, this does need to be referred to Education.”

(page 339)

105. This prompted an emphatic and unambiguous response from Dr Graham a few minutes later,

“My simple answer is no, I cannot partake in such a farce.”

106. At 18:23 the following day, 7 June 2022, Mr Jackson sent a detailed email to Ms Hudson copying in: Professor Kamal Munir, the Pro Vice Chancellor and Head of HR Committee; Professor Fisher; Ms Frampton; and Ms Coussell (pages 355 – 356).

107. We have referred already to the passage in Mr Jackson's email relied upon by Dr Graham as his protected disclosure. We asked Mr Kirk in the course of his closing submissions whether it remained Dr Graham's case that the recruitment process was “debased” and “corrupt”. He sought to avoid the question before eventually offering that it had been reasonable in the circumstances for Mr Jackson to describe the process in those terms. Whilst we make no criticism of Mr Jackson or Dr Graham for bringing pressure to bear in the matter, particularly if time was thought to be of the essence, in our judgement the use of such intemperate language was unfounded, even if there was a great deal more in the email to which no objection could reasonably be taken. His email followed on the heels of Dr Graham's two emails of 1 June 2022 in which he had suggested, seemingly on advice, without having had feedback on his application, that an emergency injunction might be sought.

108. Ms Niven accepted, all other things being equal, that it was not unreasonable for Mr Jackson to bring Professor Munir, Professor Fisher, Ms Frampton and Ms Coussell into copy, albeit at the time she had not understood why Professor Munir had been copied into the email as she was then unaware that he had been apprised of Dr Graham's situation.

However, Ms Niven's concerns relate to the "combative terms" in which he had expressed himself. In our judgment, it was not unreasonable for her to perceive his correspondence as combative, even if, as we say, there was a great deal in his email to which no objection could reasonably be taken. As regards Mr Jackson's actions in copying others into the email, in our collective experience, once solicitors are instructed on an employment dispute they will typically address their correspondence to the legal or HR professionals directly involved, rather than to the relevant managers or other decision makers who are effectively the advisor's client in the matter. Others might have let the matter go or simply have informed Mr Jackson that going forward they would be his single point of contact: however, we do not infer that Ms Niven was reacting to the protected acts or the protected disclosure insofar as she may have wanted to shield others at the University from what she perceived to be hostile correspondence from a solicitor. However, that still leaves unanswered the question of whether Ms Niven discriminated against Dr Graham and/or victimised him and/or subjected him to detriment as a whistleblower in terms of how she investigated his concerns, including the time taken by her in that regard. We return below to how she expressed herself in the matter to Mr Jackson on 5 July 2022 and what might be inferred from her comments.

109. On 15 June 2022, Mr Jackson sent a further email to Ms Hudson having not heard from her, he wrote,

Dear Ms Hudson,

I am concerned that despite overwhelming evidence that Dr Graham suits the selection criteria for the job in the Faculty of Education he has not yet been invited to interview. Please confirm when he will be interviewed and what action has been taken since my email below."

(page 354)

110. Ms Hudson responded on 19 June 2022 apologising for the delay and said the department's comments were being sought and that she would be in touch in due course. Given that Dr Graham was adamant that his response to the Selection Committee's feedback should not be shared with the Faculty, we can only conclude that Ms Hudson was either unaware that this was the case or had failed to appreciate the point. It suggests to us that it was a holding response to buy Ms Hudson some additional time as she had yet to familiarise herself with the issues.
111. Her email prompted a further email from Mr Jackson on 20 June 2022, not unreasonably expressing concern about the interview process and asking amongst other things whether the department had appointed its preferred candidate. There was no immediate response from Ms Hudson, leaving Mr Jackson to follow up again on 1 July 2022 reiterating the questions in his email of 20 June 2022. He wrote,

"Sadly this is heading for the Employment Tribunals."

He said that early conciliation would be commenced the following week. Ms Hudson was in fact on leave by then – the ongoing correspondence had coincided with the end of term. She had delegated the matter to Ms Niven before going on leave on 24 June 2022 without, however, advising Mr Jackson of this fact.

112. There is no evidence, nor do we understand it to be suggested by Dr Graham that there was some communicated or explicit expectation on Ms Hudson's part as to how Ms Niven should deal with his complaint. On the contrary, Ms Hudson's email above evidences little, if any, substantive engagement by her with the issues raised by Dr Graham, something we shall come back to later in this judgment.
113. Ms Niven's evidence at Tribunal was that it was not her role to undertake a formal investigation in the absence of a formal grievance. Whilst that approach sits a little uncomfortably with her senior strategic role within the University, ultimately we accept that was genuinely how she saw the situation, particularly in the absence of any mandated procedure within the Redeployment Framework. We also accept that she believed she was not in a position to make any decision on the merits or otherwise of Dr Graham's application, this being a matter for academic judgement. As we say, the same point was made by Ms Frampton to Dr Graham on 6 June 2022 and reiterated twice by Ms Frampton on 7 June 2022 (pages 336 – 337). All the while the question of making the feedback available to the Selection Committee remained unresolved, we can understand why Ms Niven was potentially limited in terms of the ambit of her enquiries. She confirmed at Tribunal that she had spoken with Ms Frampton and Ms Hodgson (HR Business Partner for the School of Humanities and Social Sciences) during the last week of June 2022 to gain a better understanding of the recruitment process, in order she says to satisfy herself whether the correct procedures had been followed. Amongst other things, she was able to establish that the Selection Committee had had the benefit of HR advice and support throughout the recruitment process. In that regard, there are various emails in the Hearing Bundle which evidence Ms Coussell and Ms Matthew's involvement and advice, and which confirm that Ms Coussell attended the shortlisting meeting on 20 May 2020.
114. Ms Niven's investigation into Dr Graham's concerns was not quite a desk-top assessment, but it was certainly no more than a high level review. We find that Ms Niven effectively relied upon Ms Frampton and Ms Hodgson to alert her to any potential issues and accepted their reassurances that due process had been followed. Whilst, at one level, we can understand that the relevant information sat with her HR colleagues, there is no evidence of any critical examination of the issues on her part, or even that Ms Hodgson, or even Ms Frampton, were asked by her to secure Ms Matthews' and Ms Coussell's direct feedback as to how the process had been handled, including whether Ms Coussell had observed anything in the course of the Selection Committee's lengthy meeting and discussions on 20 May 2022 that might suggest potential biases or, more specifically, a

racially discriminatory mindset, particularly when discussing Dr Graham's application. Even allowing for the fact that the Redeployment Framework itself does not mandate how complaints are to be dealt with, we are critical of how Ms Niven approached the matter, essentially relying upon what she was told by Ms Frampton and Ms Hodgson, however competent they may have been and however confident she may have been in their abilities, rather than bringing some independent analysis and evaluation to bear. Mr Kirk identifies what he describes as four simple steps that would have been taken by any employer who he says was genuinely interested to establish whether discrimination had occurred and who was acting free from a motivation to victimise, namely they would have asked the Selection Committee: whether they knew Dr Graham was black; if they were in any way influenced by his race in taking their decision not to interview; if they knew of his disability; and if they were influenced by his disability.

115. Although this is not documented within the Hearing Bundle, Dr Graham eventually agreed for the Selection Committee to be provided with his response to their feedback. Professor Fisher and Professor Liu were tasked with reviewing his response. Again, it is not documented within the Hearing Bundle why Professors Stylianides and Aysa were not involved in the matter: the matter was not explored further at Tribunal.
116. Ms Niven says that she satisfied herself that the Selection Committee had been provided with Dr Graham's response to feedback. Although Professor Fisher could not recall precisely when this had been made available to herself and Professor Liu, it was certainly before Ms Niven responded to Mr Jackson on 5 July 2022. Absent, as she saw it, any procedural shortcomings, Ms Niven deferred entirely to the Selection Committee both in terms of the chosen selection criteria and whether Dr Graham's response to feedback warranted reconsideration of the decision not to offer him an interview. She did not direct any questions to the Selection Committee in that regard, but effectively accepted their academic judgement in the matter without question, having been informed by Ms Frampton and Ms Hodgson that there was nothing in Dr Graham's comments that caused the Selection Committee to alter its decision not to shortlist Dr Graham. It is unclear whether Ms Niven read their further feedback, though as we set out below, she sent a copy of it to Mr Jackson.
117. Dr Graham makes three closely related complaints, namely regarding the University's failure to invite him for interview following his solicitor's emails of 7 and 15 June 2022 and Ms Niven's alleged failure to investigate his concerns properly and to do so in a timely fashion. As regards Ms Niven's alleged failure to investigate his concerns properly, particular reliance is placed upon the contents of Ms Niven's email of 5 July 2022. She wrote,

Dear Mr Jackson

Further to your email of 7 June 2022, which has been passed to me, I have made enquiries regarding the allegations made on behalf of your client, Dr Graham.

I would firstly draw to your attention §3.6 of the University's Redeployment Policy, which states as follows:

Under the University's Redeployment Framework, any priority applicant **who meets the essential criteria for the post** (or could do so with a reasonable amount of training) must be offered an interview for the role.

It is the Faculty's position, for the reasons set out in the attached document, that Dr Graham did not meet the essential criteria for this particular post. This is absolutely no reflection on Dr Graham's academic ability – it is about suitability for the role in question.

The University entirely refutes your allegations of discrimination for the reason set out above. Similarly, it will refute any allegations of detriment following a public interest disclosure or of unfair dismissal. We also strongly deny any allegations that the recruitment process is debased, discriminatory and corrupt; this is entirely unfounded. The applicants were assessed against the same Shortlisting Criteria which were drawn from the Further Particulars document and the advertisement. Unfortunately Dr Graham did not meet some of the essential criteria.

I can therefore confirm that the Faculty will not be interviewing Dr Graham on this occasion. The Department will however continue to look for ways to avoid Dr Graham's redundancy and he is of course entitled to apply for any further roles which come up in the Faculty, the Department or elsewhere.

The department had not made any decisions regarding the recruitment process and the successful candidate, pending its consideration of Dr Graham's allegations. It will however now be proceeding to make an offer to the successful candidate.

Best wishes,

Thuy Niven
Interim Assistant Director of Human Resources (Operations)

(page 357)

118. Mr Kirk's respective submissions in respect of the three complaints are at paragraphs 28 – 32, 38 – 40 and 41 – 53 of his written submissions.
119. The fact that an employee is treated unreasonably does not of itself suffice to justify an inference of unlawful discrimination: Zafar v Glasgow City Council [1998] ICR 120). Paragraphs 98 to 101 of the Court of Appeal's judgement in Bahl v The Law Society and others [2004] IRLR 799 are also instructive on this issue. Nevertheless, discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it.

120. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16, it was held that a Tribunal had impermissibly inferred direct race discrimination solely from evidence of procedural failings in dealing with the claimant's grievances, including their appeal against the rejection of those grievances. The EAT said:

'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristics.'

121. As we have observed already, the change to the essential criteria was not something that only affected Dr Graham, whether as a black candidate, a black priority candidate or a black priority candidate of Afro-Caribbean heritage. It impacted all the candidates equally and, if relevant, equally unfairly. It was not, as Mr Jackson asserted on 7 June 2022 (and, as we shall come back to, in subsequent correspondence) and Dr Graham has continued to assert throughout the proceedings that the feedback omitted or added details to the job description against each criterion for the specific purposes of rejecting his application. Insofar as the University would not agree to offer Dr Graham an interview in order to correct actual or perceived changes to the selection criteria, whatever arguments might be pursued as to the fairness of that decision, in our judgement it was not because Dr Graham was black or of Afro-Caribbean heritage. Mr Kirk submits that the University should have been focused on ensuring that he had a proper opportunity to demonstrate his suitability. Whilst that is correct, in our judgement it did not require that he should be taken to interview if the Selection Committee genuinely believed he did not meet the essential criteria and they came to that view without being influenced by his race, his protected acts or his protected disclosure. As Professor Fisher observed, faced with Dr Graham's concerns and solicitor's correspondence it might have been expedient to simply offer Dr Graham an interview.
122. Mr Kirk says there is inconsistency as to who had responsibility for offering a solution. As we see it, the matter "fell between two stools" partly because the Redeployment Framework fails to identify a procedure for dealing with complaints, including who is ultimately responsible for determining complaints, but also because Dr Graham was initially adamant that the Selection Committee should not be further involved in the matter and should not have sight of his response to their feedback. We conclude that by the time Dr Graham gave consent to this being shared with the Selection Committee, a course had been set, with the primary responsibility for responding to the complaint sitting with Ms Niven. Against that background, we can understand why, when Professor Fisher was questioned about the matter at Tribunal, she was not entirely confident as to the Selection Committee's authority in the matter. We have already noted her email of 25 May 2022 at page 324 of the Hearing Bundle in which she said that HR would need to decide whether Dr

Graham should be interviewed. Be that as it may, ultimately nothing turns on the point, since we are satisfied that Professor Fisher and Professor Liu's further feedback, certainly as relayed by Ms Frampton and Ms Hodgson, materially informed Ms Niven's response to Dr Graham's complaint, so that we should examine the two Professors' motives and mindset in deciding whether Dr Graham was directly discriminated against and/or victimised and/or subjected to detriment as a whistleblower in so far as he was not invited for interview following Mr Jackson's emails of 7 and 15 June 2022. However, we do so in the further context that they evidently did not receive any further direction from Ms Niven in the matter. Specifically, we find that their attention was not drawn to paragraph 3.5 of the Redeployment Procedural Guidance, nor were they invited to consider what they and their two colleagues knew or understood in terms of Dr Graham's protected characteristics when they were scoring and shortlisting candidates, or to reflect on the dynamic of the discussions on 20 May 2022 including, for example, whether anything had been said that, with hindsight, might indicate that irrelevant, even discriminatory considerations or assumptions had come into play. We find that they were simply asked to respond to Dr Graham's comments without any structured direction as to the specific issues they ought to consider and address.

123. In their further feedback document, Professor Fisher and Professor Liu addressed the essential criteria in turn, both in terms of how they were applied in the context of the specific post being recruited to and why Dr Graham was not considered to meet them. They engaged fully with Dr Graham's comments. Their further feedback is consistent with their initial feedback, with the emails of 13 and 17 May 2022 in which the criteria were finessed, and with their accounts in their witness statements and at Tribunal. In our judgement they provided a credible, weighty and objective (that is to say evidence based explanation) for why Dr Graham had not been shortlisted. Neither Professor Fisher nor Professor Liu were questioned at Tribunal about Dr Graham's seven page response to the feedback or their further feedback. Mr Kirk's limited questions on these further issues were directed to Professor Fisher and were concerned with whether she understood she had the power to offer Dr Graham an interview. We accept that within an institution such as the University of Cambridge, with its various committees (including committees to appoint committees), detailed procedures and group decision making structures and traditions, it was not, as Professor Fisher said at Tribunal and understood, a straight forward request to grant. In any event, she was not obviously directed by Ms Niven or others to consider that question, rather it seems to us merely to address Dr Graham's response to the feedback. Of course, it may be inferred that had the question been specifically asked of her and Professor Liu (and indeed of the others) they would have said that he should still not be progressed to interview, but there is no evidence that they were asked to engage with the issue in that structured way. Instead, we conclude that they were being asked to justify, and as appropriate elaborate upon, their original decision including why the criteria had potentially changed from those notified to the candidates.

124. When she was being questioned by Mr Kirk regarding Dr Graham's expertise in second language education, Professor Fisher said that the evidence in that regard had not been presented in his application or later when he provided his response to the Selection Committee's feedback. This latter point was not pursued further by Mr Kirk. A positive case was effectively not put to either Professor Fisher or Professor Liu that they had discriminated against Dr Graham in terms of their input to the complaints process, or that they had victimised him or subjected him to detriment as a whistleblower.
125. We accept that Professor Fisher believes it would not have been within her gift to offer Dr Graham an interview. If she was not specifically directed to consider the matter at the time, this represents an obvious shortcoming in a process which, as we say, fell between two stools, but in our judgement it does not support an adverse inference. In essence, she and Professor Liu reiterated and elaborated further in terms of the earlier decision. For the reasons they did not directly discriminate against Dr Graham in their original decision we conclude they did not directly discriminate against him in reaffirming their decision. Mr Kirk submits that we can readily infer that a non-black priority candidate who had similarly identified a clear error in the way their application had been scored against changed criteria would have been offered an interview. We disagree. We are certain that in the circumstances we have described, a non-black priority candidate's response to feedback would have been considered and addressed by Professor Fisher and Professor Liu in exactly the same way.
126. Mr Kirk's invites the Tribunal to infer that Professor Fisher was at least partially influenced, in not offering Dr Graham an interview, by the fact he was alleging discrimination, something which could lead to litigation. He relies upon comments by Professor Fisher when he put it to her in the course of cross examination that the reason the solution of an interview was not offered to Dr Graham was the fact that she knew he was making a serious allegation of race discrimination. He noted her response as having been, "I suppose my instinct would be, are we going to be sued if we bring him to interview". Whilst the Tribunal does not have a uniform note of her evidence on this point, we each understood Professor Fisher to be offering her views on the matter when asked about it at Tribunal rather than to be giving evidence as to what she had in mind at the time, and further that she was expressing the view that had they offered Dr Graham an interview because it was considered expedient to do so rather than because he met the essential criteria, whether that might lead others, for example the successful candidate, to take legal action. They are not comments from which we infer that Professor Fisher or Professor Liu victimised Dr Graham or subjected him to detriment because he made a protected disclosure.
127. Mr Kirk additionally relies upon comments at paragraph 8 of Ms Hudson's witness statement that the allegations in Mr Jackson's email were "baseless". Putting aside that the allegation of corruption was baseless, if Ms Hudson was of the view at the time that the discrimination allegations

and/or the protected disclosures were baseless that is not a reason for us to impute a discriminatory or retaliatory mindset to Ms Niven, given we are satisfied that she made the decision on Dr Graham's complaint without direction or any material input from Ms Hudson, nor for the avoidance of doubt does it assist us on the question of whether Professor Fisher and Professor Liu acted for a proscribed reason. As we have observed, a positive case was effectively not put to either Professor Fisher or Professor Liu that they had discriminated against Dr Graham in terms of their input to the complaints process, or that they had victimised him or subjected him to detriment as a whistleblower.

128. We do not uphold Issues 2(b), 9(a) and 16(a) in so far as they relate to any acts or omissions of the Selection Committee.
129. That still leaves the question of whether Ms Niven directly discriminated against Dr Graham or was materially influenced by the fact that he had done protected acts and / or had made a protected disclosure. Mr Kirk reminds the Tribunal that under s.48(2) of the Employment Rights Act 1996 it is for the employer to show the ground under which any act or failure to act was done. He has also drawn our attention to the observations of Underhill P in Martin v Devonshires Solicitors [2011] ICR 352, regarding those cases where the reason for the detriment is said not to be the protected act itself but some feature of it which can properly be treated as separable. We set out Underhill P's observations a little more fully than Mr Kirk has in his written submissions:

"Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle."

Underhill P went on to observe that,

"... tribunals will generally not go far wrong if they ask the question suggested by Lord Nicholls in Nagarajan, namely whether the proscribed ground or protected act "had a significant influence on the outcome":

130. Dr Graham has not pursued a claim directly in respect of Ms Niven's email of 5 July 2022, for example that it was an act of harassment or victimisation in itself, but instead relies upon it to support an inference that her alleged failure to properly investigate Dr Graham's concerns was for a proscribed reason. Nevertheless, Underhill P's observations remain pertinent. He also made often-cited observations in his judgment about

the role of the burden of proof provisions in discrimination cases (which are effectively mirrored in s.48(2)). He said:

“39. ... Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination—generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head—“the devil himself knoweth not the mind of man” (per Brian CJ, YB Pas 17 Edw IV f1, pl 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other ...”

131. We observe that simple incompetence in dealing with matters, including failing to deal with them on a timely basis, may be an effective defence for an employer. However, where those who do protected acts or make protected disclosures are subjected to detriment without being at fault, Tribunals need to look with a critical – indeed sceptical – eye to see whether the innocent explanation by the employer for the adverse treatment is indeed the genuine explanation.
132. As to whether Ms Niven directly discriminated against Dr Graham, she deferred entirely to the Selection Committee on the issue of whether Dr Graham should be invited for an interview. As Ms Frampton and Ms Hudson did, she saw it as a matter for academic judgement. Whilst the complaint of direct discrimination is not explicitly pursued on the basis of her alleged failure to determine that question independently of the Selection Committee, for completeness and for the avoidance of doubt, we are certain that she would have approached the matter in the same way regardless of the race or other protected characteristics of a complainant. For example, had a white priority candidate raised concerns, whether through a solicitor or otherwise, we conclude that she would have deferred to the Selection Committee in terms of any issues involving the exercise of academic judgment and limited herself to matters of procedure. Ms Frampton's emails of 6 and 7 June 2022 corroborate her approach, for which we are satisfied there is an entirely non-discriminatory explanation.
133. The question then is whether Ms Niven contravened s.27 of the Equality Act 2010 or s.47B(1) of the Employment Rights Act 1996.
134. Returning to Underhill P's observations in Martin, in one sense Mr Jackson was simply communicating his client's instructions in the matter and if, as we conclude, he used intemperate language and made at the very least an inaccurate statement when he said that the recruitment process was corrupt, he could be said to have simply been speaking for Dr Graham. But in our judgment, the fact this was a communication from an experienced, senior solicitor advocate took the matter outside the ambit of the "ordinary" unreasonable behaviour referred to in Martin. Ms Niven says that her response was,

“direct and in my opinion used reasonable language given the aggressive and combative tone of Mr Jackson's email.”

She also makes the point that it was not sent directly to or directed at Dr Graham. She took the opportunity at the Grievance Committee Hearing to apologise to Dr Graham if he had been impacted by reading her email and reiterated that it had not been directed at him.

135. In a subsequent email to Ms Frampton dated 14 December 2022, Dr Graham wrote,

“On a human level and perhaps for your sake, given its your colleague, I would happily drop the grievance against Ms Niven because I recognise that perhaps her main mistake was in believing what Prof Fisher told her.”

(page 537)

He seemed to accept at that point in time that she had not victimised him.

136. In paragraph 21 of her witness statement, Ms Niven refers to Mr Jackson as someone,

“Who has a track record of sending hostile and unpleasant emails to members of the HR department at the University.”

It was something that Ms Niven also touched upon at Tribunal. Perhaps it was an oversight on his part, but Mr Kirk did not challenge her evidence. Her comments are revealing, albeit they ultimately lead us to conclude that Ms Niven’s response on 5 July 2022 was driven by a professional disdain for Mr Jackson. She perceived his email as hostile and intimidating and, we conclude that she felt the need to send an equally robust response. As Mr Jackson did in the course of this dispute (something we shall come back to), she failed to bring the requisite objectivity to the situation that would otherwise be expected of someone in her position. In the heat of the moment she lost sight of Dr Graham and of both her own and the University’s responsibilities in relation to him. If it might be said that she was ‘affronted’, we conclude that she was affronted not by any protected acts or disclosure of Dr Graham’s but by Mr Jackson at a professional level. Whilst any prior ‘form’ on the part of Mr Jackson, or any inflammatory language of his does not excuse her loss of perspective in the matter, nevertheless, and as we shall come back to there is various evidence within the Hearing Bundle of Mr Jackson’s communication style. Whilst it post-dates Ms Niven’s email of 5 July 2022 and therefore cannot be said to have provoked her response, it lends weight to Ms Niven’s allegation that he has a track record of sending hostile and unpleasant emails to members of the HR department and it points to why she was inclined to react to the individual rather than to the issues of substance being raised. We refer to Mr Jackson’s correspondence in a little more detail later in this judgment, but note for the time being his email of 11 October 2022 to Ms Cobley at page 411 of the Hearing Bundle: the tone is hectoring and in it Mr Jackson refers to the grievance process as,

“looking like a rigged and bent procedure”.

We question whether such comments have a proper place in solicitors' correspondence, even on instruction. Previously, on 9 September 2022 he had written,

" I do not have trust and confidence in this process" (our emphasis)

suggesting that he may have become overly invested in the matter at a personal level. He went on to say,

"Your request for documentation below to be provided by today suggests that this hearing will be like all the other University hearings in which I have been involved – a whitewash and a sham ...

(page 425)

Again, the choice of language is unfortunate. It evidences some loss of objectivity in his dealings with the University. If that was his experience in other matters (he made similar comments to Ms Hudson on 22 July 2022 – page 372), it does not necessarily assist Dr Graham in coming to an informed and objective view as to how he had been treated on this occasion.

137. It is relevant, we think, that by November 2022, once the facts were reasonably well established and the Grievance Committee had reported on the matter, Dr Graham's considered view was that Ms Niven's error was to believe what she had been told by Professor Fisher. He wrote on 23 January 2023 of having tremendous sympathy for Ms Niven and in a further email of 3 February 2023 he wrote that he regarded Professor Fisher as "the villain of the piece" and that she exemplified senior academics at the University who,

"are perfectly happy simply to blame HR or admin staff for everything."

(page 553)

The inference is that he believed Ms Niven and others were being made "to carry the can" rather than that she was personally at fault in the matter.

138. Four months on, Dr Graham continued to regard Professor Fisher as responsible for what had happened. On 1 June 2023 he wrote in an email to Sarah Spira, HR Business Partner, School of Humanities and Social Sciences,

"Personally, I have tremendous sympathy for Ms Niven and believe that the actions of Professor Fisher have had a corrosive effect on our processes. Once the University is able to see that I was more than qualified to be invited to an interview, then it will be clear to all that Prof Fisher is entirely responsible for this unpleasant mess"

(page 606)

In a further email an hour or so later he wrote,

“It is my wish to soften the approach I take with Ms Niven, as I genuinely believe that Prof Fisher is the architect of all this misery”

(page 604)

Conclusion

139. In circumstances where she genuinely considered the choice of selection criteria and the question of whether Dr Graham met the essential criteria in order to be taken forward to interview was a matter for the Selection Committee’s academic judgement, we can understand why Ms Niven approached her task as she did even if criticisms can undoubtedly be levelled at her in terms of the adequacy of her investigation into how the recruitment process was managed. However, the various shortcomings we have identified do not lead us to infer that Ms Niven approached the task as she did because Dr Graham had done protected acts or made a protected disclosure. She might be said to have proceeded unreasonably in the matter, but in our judgement that is explicable by reference to the absence of any documented complaints procedure, her reliance upon the Selection Committee to explain and justify its decision, her relatively late direct involvement in the matter as a result of Ms Hudson’s leave, and permitting herself to be distracted and provoked by what she perceived to be the hostile and intimidating tone of Mr Jackson’s correspondence. As we say, she rather lost sight of Dr Graham in the matter. But we do not consider that she was seeking to close down his concerns, or that she was affronted by the substantive complaints such that they materially informed how she went about the matter. In our judgement, whatever the nature of a priority candidate’s concerns and however expressed, in a case involving questions of academic judgement, in a similar situation in which time was increasingly of the essence, she would have approached the complaint in the same somewhat light touch way that she did.
140. We do not uphold the complaints identified as Issues: 2(b), 9(a), 9(b), 16(a) and 16(b).

The University’s alleged failure to address Dr Graham’s grievances in a timely way and to provide requested information – Issues 9c (a) and (b), 9d, 16c (a) and (b), and 16d.

The time taken to hear the grievances

141. As regards the University’s alleged failure to address Dr Graham’s grievance in a timely way (Issues 9(c)(a) and 16(c)(a)), Mr Kirk’s limited submissions on the issue contrast with his more detailed submissions on the other issues in the case. He says:

“Regarding the issue of delay, C was not invited to a grievance hearing until 14 October 2022 [435]. This hearing took place on 3 November 2022, some 4 months after putting in his initial grievance, an inordinate delay. C’s position is that this delay has not been sufficiently explained by R.”

142. One potential explanation is provided by Mr Jackson, who as early as 22 July 2022 wrote to Ms Hudson:

“I know that the University regularly fails to meet the procedural standards that apply to other organisations in terms of the way it treats staff, but I like to think that someone is trying to do something about the problem ...”

(page 372)

143. In any event, Mr Kirk’s submission does not reflect the complete timeline of events. We have considered the matter over three discrete periods of time, namely: following Ms Hudson’s receipt of the grievances until she handed the matter over to Ms Frampton to take forward; whilst the Grievance Committee was constituted; and thereafter once the Committee had been constituted until it produced its outcome report on 9 December 2022.

144. Within a little over an hour of receiving Ms Niven’s email of 5 July 2022, Mr Jackson sent a strongly worded response. Reference was made to Ms Niven having highlighted in her email that the requirement to offer a priority candidate an interview only arose where the candidate met the essential criteria for the post. Mr Jackson wrote,

“Dr Graham meets the essential criteria for the advertised jobs so that quoting, as you have, the University’s Redeployment Policy merely aggravates an already litigious situation. The next stage is to get this into a public forum. I shall put this matter into ACAS Early Conciliation.”

Whatever other criticisms might be directed at Ms Niven and regardless of the fact Dr Graham believed he met the essential criteria, we do not understand why exception was taken to Ms Niven highlighting the relevant provisions of the Redeployment Framework, how this aggravated the situation or why reference was made to putting the matter into a public forum. Mr Jackson’s email concluded with a request that the complaints already submitted should be addressed as a formal grievance. To reinforce the point the email itself was titled “FORMAL GRIEVANCE: Dr Calbert Graham and Faculty of Education’.

145. Two days later, on 7 July 2022 Mr Jackson raised a second grievance on Dr Graham’s behalf in respect of Ms Niven. He largely set out the grievance in Dr Graham’s own words, referring to Ms Niven’s email of 5 July 2022 as,

“... most unkind, unnecessarily combative, and lacking in empathy and has triggered my new mental health crisis... I think that Ms Niven’s words are unreasonable, stress inducing, and constitute an egregious abuse of power and I wish to make a complaint about her behaviour... I think that Ms Niven’s failure to investigate my complaint or take appropriate action constitutes an act of unlawful victimisation by both the University and her.”

(page 373)

146. Faced with two grievances in the space of less than 48 hours, the second of which concerned her Deputy, there is little evidence that Ms Hudson took a more proactive lead in the matter. Although she sets out the chronology of events in her witness statement, there was little or no substantive input on her part. Whilst we can appreciate the likely demands on her time and accept her evidence that she does not generally get involved in case work, which instead is typically handled by the Lead HR Business Partners for the relevant service area, nevertheless, particularly at the point at which criticisms were being directed at her Deputy, she might have become more involved in the matter. Instead, it took her just over a further four weeks to respond substantively to Mr Jackson. It is apparent from her carefully worded response on 8 August 2022 that she sought to tread a delicate path and that she was hoping to take some of the heat out of the situation by focusing upon Dr Graham's original concerns. Whilst she took issue with Mr Jackson's reference to the recruitment process as having been corrupt, she went on to say,

"I therefore suggest we focus on your client's substantive complaint, as set out in your email of 5 July 2022, to ensure we can address his concerns as quickly as possible, without instigating secondary formal processes arising from correspondence in connection with the primary process."

(page 390)

147. Mr Jackson responded within an hour. He wrote,

"Ms Niven's response did not address any of the evidence put to the University. We know *"computer says no"*. In the context of what we believe is a corrupt process (advertising a job for which the applicant has already been selected) and racism, my client maintains that Thuy Niven was unkind, at the very least, in concluding. ..."

(page 391).

148. Ms Hudson responded to him the following day. She continued to strike a conciliatory tone (page 392).

149. Had she acted a little more promptly in the matter, Ms Hudson might have responded to Mr Jackson's emails of 5 and 7 July 2022 within perhaps a week or so. But in our judgement her failure to do so does not lead us to infer something more, namely that she was victimising Dr Graham or subjecting him to detriment as a whistleblower by failing to grip the matter. We have regard to the fact that she is the Director of HR of an institution which has over 13,000 employees: that speaks of itself to the likely demands on her time. We further note in this regard that on 10 August 2022, Mr Jackson wrote in an email to Ms Frampton,

"Notwithstanding, what I see as corruption, I don't doubt that there are some good and principled people in HR. I have a high regard for Andi Hudson. I do not believe that she would ever encourage malpractice..."

(page 395)

When he made those unsolicited observations about Ms Hudson, Mr Jackson was aware that she had failed to respond or to respond substantively and/or on a timely basis to various emails he had sent her over the preceding two months. Yet he still seemingly regarded her as one of the 'good and principled' people in HR. His comments sit uneasily with the assertion that delays in the process were because Dr Graham had done protected acts and made a protected disclosure, certainly in so far as those delays were attributable to Ms Hudson.

150. On 10 August 2022, Ms Frampton contacted Mr Jackson to let him know that she was in the process of making arrangements for Dr Graham's grievances to be heard. As the second grievance email had been titled "FORMAL GRIEVANCES" Ms Frampton said it was assumed that both grievances were to be treated as formal grievances, though she added,

"However, do let me know if Dr Graham would like to explore an informal resolution in the first instance."

(page 393)

Ms Frampton went on to explain that a Grievance Committee would need to be constituted through the HR Committee and that once this had been done she would update Mr Jackson and arrange a date for the grievance hearing, as well as provide further information on next steps. It was a friendly and professional communication, entirely in keeping with her earlier communications: neither it nor they indicate a victimising or retaliatory mindset.

151. Mr Jackson responded to Ms Frampton later that afternoon. He wrote,

"I anticipate that these claims will go to Employment Tribunal and I shall be dealing again with Shakespeare Martineau as the University's Lawyers in due course. For that reason the informal route does not assist. I would like to get the Grievance and Appeal over, so we can litigate.

This is not a case where the University has any credible defence. It is also not a case where the University can admit that it had already chosen a candidate for the job and that public advertising to suggest there was an open competition was actually a sham. It was a sham. No question of it. I have seen a range of defences from the University. These days the University sometimes uses Barristers to deal with Grievances in the hope that the Claimant will be deterred and that more elaborate cover ups can be effected. A sham is a sham whoever the University uses in support.

I recently spoke to a member of the University's HR staff who confirmed that the practice of advertising jobs to make them look open to competition is common when the job has effectively already been filled because there is a preferred candidate. Whether or not that is what happened here doesn't interest me. No one on your side is ever likely to tell the truth on that topic..."

(page 395)

152. It is difficult to understand why it was thought appropriate or advisable to send an email in those terms. It was provocative and suggested that Mr Jackson had some personal desire for litigation. Certainly as expressed, it failed to distinguish between Mr Jackson's personal views and his client's instructions in the matter and pointed once more to some ongoing loss of objectivity, including his apparent personal belief, on the strength of an alleged conversation with an unidentified member of the University's HR staff, that there was widespread recruitment malpractice as well as a ready willingness across the University to lie about those alleged practices and to deploy barristers to cover them up and deter potential litigants. His emails may be contrasted with Dr Graham's emails at this time. We note for example Dr Graham's friendly email to Ms Frampton of 17 August 2022 (page 396) in which he thanked her,

"... for always being polite and prompt with your responses".

There is no suggestion there that any delays at that point in time were because Dr Graham had done protected acts or made a protected disclosure.

153. The emails from this time in the Hearing Bundle evidence that Ms Frampton kept Mr Jackson updated on progress in identifying potential members of the Grievance Committee. She noted, for example, that this had been delayed as she was waiting for people to return from holiday. Even then, Mr Jackson continued to send unhelpfully worded emails: whilst he thanked her for keeping him informed in the matter, he wrote on 16 August 2022,

"From my perspective you could use almost anyone as we know the outcome before we even start the process."

Again, his comments suggest a willingness to express his personal views rather than necessarily Dr Graham's instructions in the matter.

154. The membership of the Grievance Committee was approved on or around 30 August 2022 and comprised: Dr O'Connell as the Chair, together with Professor Manali Desai, Head of the Department of Sociology; and Mr Ben Warn, School Secretary, School of Arts and Humanities. The three week or so delay in that regard reflects the University's established procedure for appointing Grievance Committees, a constitutional matter entirely unrelated to Dr Graham's protected acts and protected disclosure.
155. We accept that following her appointment Dr O'Connell sought to progress the matter on a timely basis, meeting with Ms Frampton and another HR colleague, Justin Greene, at an early point to discuss her role in the process. In the event, the grievance hearing could not be scheduled until 3 November 2022 reflecting, we accept, not only the Grievance Committee's other commitments, particularly immediately prior to and in the initial weeks of Michaelmas Term, but also the availability of Dr Graham and his trade union representative, Mr Dale. A date of 27 September 2022 had originally been mooted, but by 20 September 2022

the date was in the balance as documentation was still being collated for the hearing. Ms Cobley said that they were doing all they could to progress the arrangements for the hearing to avoid having to suggest a postponement. It has not been suggested by Dr Graham that Ms Cobley was being untruthful or that documents were deliberately being withheld. Once the planned hearing date of 27 September 2022 was lost, a new date obviously had to be identified that suited everyone. As we say, this then coincided with the start of Michaelmas Term. Against that background and given the number of attendees, we do not consider that the University delayed unreasonably in rescheduling the grievance hearing five weeks later on 3 November 2022. There is no evidence, and it was not suggested, that any of the Grievance Committee or other attendees made themselves unavailable or even that they failed to prioritise the matter because Dr Graham had done protected acts or made a protected disclosure.

156. In paragraphs 7 – 24 of her witness statement, Dr O’Connell describes in some detail how she prepared for the grievance hearing, how the hearing itself was conducted and how the Grievance Committee came to its decision and produced its outcome report over the course of three further meetings on 9, 17 and 24 November 2022. Dr O’Connell took responsibility as Chair for producing the draft outcome report. Her evidence on these matters as well as the detailed notes of the grievance hearing and the Grievance Committee’s report on Dr Graham’s grievances, paint a clear picture as to the seriousness with which the Grievance Committee approached its task and engaged with the issues, even if it took nearly three months from the date the Committee was constituted for its final report to be issued. We are unaltered in that view notwithstanding Dr O’Connell’s regrettable comment during the appeal stage that it was “the gift that keeps on giving” (for which comment she offered Dr Graham an unprompted and fulsome apology at Tribunal). It is at least relevant we think that no complaint is pursued in respect of the decision itself, even if Dr Graham disagrees with the outcome. If he does not consider that he was victimised or subjected to detriment as a whistleblower in terms of the outcome, it begs the question why he believes the time taken to hear the grievance and provide the decision was for a proscribed reason. The fact that the Grievance Committee originally committed to hearing the grievance within four weeks of confirmation of their appointment, arranged three meetings in short succession following the rescheduled hearing on 3 November 2022 to discuss their findings and conclusions, and finalised their outcome report within three working days of their final meeting evidences to us their focus and purpose. If the grievance hearing can be said to have been delayed, in our judgement there is no evidence whatsoever that this had anything to do with Dr Graham’s protected acts and protected disclosure. We do not uphold the complaints identified as Issues 9c(a) and 16c(a).

The University's alleged failure to provide requested information

157. We turn finally to Issues 9(c)(b), 9(d), 16(c)(b) and 16(d).
158. In his written submissions, Mr Kirk states that the allegations can conveniently be dealt with together since they contain a similar allegation about the University's failure to provide necessary information about the other candidates during the course of the grievance process. As far as we can tell, the requests in question have never been particularised. Furthermore, Mr Kirk's submissions, the Details of Claim and the List of Issues do not distinguish which requests and alleged failures fall within the ambit of which issues. Since Mr Dale is specifically named in paragraph 34 of the Details of Claim and paragraphs 9(d) and 16(d) of the List of Issues, it may be inferred that any requests by him are within the ambit of those issues and accordingly that we are concerned with the University's alleged failure to provide information before the grievance meeting on 3 November 2022, this being the pleaded complaint. Paragraphs 9(c)(b) and 16(c)(b) of the List of Issues do not identify a specific time period to which the complaint relates. However, on the basis that the claim was presented to the Employment Tribunals on 9 November 2022, and has not since been amended to add any new complaints, at most we are concerned with any alleged ongoing failures on the part of the University up to and including that date.
159. Given that we are concerned with the reasons why any requests were dealt with as they were, it necessarily means that we must identify who at the University was responsible for dealing with those requests.
160. On 1 September 2022, Mr Jackson emailed Ms Cobley in response to her email to him the previous day in which she had been seeking potential dates for the grievance hearing. He wrote:
- "The grievance concerns unlawful discrimination. That involves a comparison between Dr Graham and those who were successful in being invited to interview. We therefore require disclosure of details of how each of those candidates satisfied the selection criteria and their ethnicities and whether any of them had disabilities."

(page 408)

He made other requests which it is not necessary to detail here.

161. Ms Cobley responded to Mr Jackson the same day, acknowledging receipt of certain documents from him and noting his request for additional documentation/information. She said this would be forwarded to the Grievance Committee who were due to meet at the end of the following week and would be considering at their meeting if there was any further information they themselves required. Emails in the Hearing Bundle evidence that although the Grievance Committee met as planned, the request for information seemingly remained outstanding following their meeting, since Ms Cobley relayed Mr Jackson's request to the Grievance

Committee by email on 13 September 2022 and asked if they would like her to contact the Faculty of Education to see if they had any relevant information about it or indeed any other matters of interest to the Committee. The emails evidence that Ms Cobley was progressing various other issues at this time, including collating documents for the grievance process that would in due course be shared with all concerned.

162. It may reasonably be assumed that the Grievance Committee asked Ms Cobley to follow the matter up with the Faculty of Education, since emails at pages 429 to 431 of the Hearing Bundle show that Ms Cobley was in contact with Meglena Slovoa, a temporary cover Human Resources Manager within the Faculty of Education. In an email to Ms Slovoa dated 16 September 2022, she explained that it concerned a grievance but she did not identify Dr Graham as the person who was aggrieved nor did she tell Ms Slovoa that it involved alleged discrimination or a protected disclosure. She identified four matters in respect of which she required information and documentation, including:

“The selection criteria for this specific post and the positive indicators of how they were judged (possibly an HR6)

Any information the Faculty received in relation to the ethnicity or disabilities of the candidates.”

(page 431)

She requested this information as a matter of urgency. The second question might have alerted Ms Slovoa to at least the possibility that concerns may have arisen related to a candidate’s ethnicity or disability, but it did not do so in terms.

163. As expressed, the second request above did not exactly replicate what had been asked for by Mr Jackson in his email of 1 September 2022 (see paragraph 161 above). There is nothing to suggest this was deliberate on Ms Cobley’s part. On the contrary, she additionally failed to explain to Ms Slovoa that the request for information as to how candidates were adjudged to have met the essential criteria was intended be limited to the shortlisted candidates, thereby extending the ambit of Mr Jackson’s request. As regards the ethnicity and disability data, her request was worded a little ambiguously. We find that she inadvertently pointed Ms Slovoa away from the candidates’ ethnicities and disabilities towards the question instead of what information had been provided to the Faculty about those matters. In our judgement, the wording in her email provides a ready explanation for any misunderstandings or concerns that then followed. There is no evidence that Ms Cobley was being obstructive or that she was victimising Dr Graham or subjecting him detriment as a whistleblower. On the contrary, as numerous emails in the Hearing Bundle evidence, she set about the matter diligently with a view to providing the information that had been requested. Whilst we think this effectively disposes of Dr Graham’s complaints in their entirety, nevertheless for completeness we shall set out what happened next.

164. On 23 September 2022 and then again on 3 October 2022, Ms Cobley chased Ms Slovoa for the information and documentation requested in her email of 16 September 2022. She asked for another member of the team to progress the matter if Ms Slovoa could not do so. Her emails evidence her increasing frustration. In our judgment, these were not the actions of someone who was seeking to deny Dr Graham access to potentially relevant information and data. Ms Slovoa apologised to Ms Cobley on 3 October for her delay in responding and explained that she had been unwell. She responded more substantively that evening, providing the following response:

“After discussing this with the individuals involved in the process, it was confirmed that the Faculty did not received any information in relation to the ethnicity or disabilities of the candidate. The chair of the panel has also confirmed that these were not referred to in the candidate’s application either.

(page 429)

Bearing in mind how the question had been posed in Ms Cobley’s email, Professor Fisher and the other unidentified individuals referred to had clearly answered the question that had been put to them. There is no basis for us to infer from their accurate response to a specific question that they acted unlawfully in relation to Dr Graham.

165. Ms Slovoa additionally provided Ms Cobley with a copy of what she described as ‘the longlist document’, which we understand to have been the completed Selection Results Grid. As we have noted already, this went significantly beyond what had been requested by Mr Jackson. It reinforces that the University was endeavouring to be transparent and seeking to meet Mr Jackson’s requests rather than to delay or obfuscate.
166. In the meantime, on 22 September 2022 Mr Dale had suggested in an email (page 416) that the delay in providing information (it is likely he was referring to the information requested by Mr Jackson, though his email failed to make this clear) was a “deliberate act”. However, he did not state in terms that this was because Dr Graham had done protected acts and made a protected disclosure.
167. Mr Jackson took the matter up on 29 September 2022, bringing the focus back to the information requested by him on 1 September 2022. He said that without it the Grievance Committee would be in the dark. When Ms Cobley then sent an entirely innocuous email to Mr Jackson and Mr Dale, referring amongst other things to the fact she had received documentation from the Faculty which was being forwarded to Dr O’Connell so that it could be included in the pack of papers that would be circulated to everyone, this provoked an entirely unwarranted suggestion from Mr Dale that her actions were suspicious. He asked, accusingly,

“Is this so they can redact and remove evidence that supports Calbert’s grievance?”

(page 412)

We have no hesitation in rejecting this slur upon the Grievance Committee.

168. Notwithstanding Mr Dale's comments were unwarranted, Ms Cobley sent a short, friendly response. We find that she sought to allay any concerns on Dr Graham's side, whether or not these were well-founded. She explained,

"I just wanted to first check that the Chair is happy that all of the relevant information is included in this."

169. Ms Cobley was making clear that she wanted Dr O'Connell to check that she had not overlooked anything, yet it drew a stinging rebuke from Mr Jackson who wrote,

"It is for us not the panel to determine what evidence we want to be considered at the hearing and whether or not we are happy with it. ..

... This has the appearance of collusion between the University's HR team and the Panel. It looks like a rigged and bent procedure ..."

(page 411)

We have already indicated our views as to Mr Jackson's choice of language. The suggestion of collusion was without foundation.

170. On 14 October 2022, Ms Cobley emailed Mr Jackson and Mr Dale with the documentation for the grievance hearing. The University's responses to the various requests for information were identified as the fourteenth attachment to the email. Mr Jackson's request of 1 September 2022 was answered in the following terms:

"The selection grid is attached (10). The Faculty of Education have confirmed that they, and the shortlisting panel, did not receive any information in relation to the ethnicity or disabilities of any of the candidates. It is standard that this information is not provided to the shortlisting panel under the university's recruitment process"

(page 409)

171. The response essentially replicated the information provided by Ms Slova. The Grievance Committee would have been unaware that the response was not fully aligned with the request that had been made. If Dr Graham, Mr Jackson or Mr Dale felt that the grid or the information above failed to engage sufficiently with their requests they might have followed the matter up, particularly as the grievance hearing was then still over two weeks away. We were not taken to any further correspondence on the issue nor have we been able to identify anything further in that regard for ourselves. It has not been suggested that the request was followed up in the course of the grievance hearing. Although Mr Kirk refers to comments

at page 463 of the Hearing Bundle, there is no reference there to further information being requested about the other candidates or that requests for information were outstanding. Instead, the documented exchange at paragraphs 29 to 32 of the grievance hearing notes (pages 462 and 463) evidence that any questions were focused on what the Selection Committee knew about candidates' protected characteristics, being the point addressed in the response to the request for information.

172. In the course of the later appeal process Ms Frampton contacted Federica Ciardo, HR Systems Service Desk Analyst to ask how she could find out the race / nationality of the successful candidate (p.541). We were not told what may have prompted her further enquiry in that regard, so do not know whether she was acting on her own initiative or in response to further enquiries from Dr Graham, Mr Jackson or Mr Dale on the issue. Ms Ciardo replied the same day and informed Ms Frampton,

"I'm afraid ethnicity / nationality of applicant isn't something that we have access to as they are confidential data. The only report showing in WRS about that data is the following but it is not referred to a specific candidate."

The data provided by Ms Ciardo is difficult to read but seems to have set out the candidates' racial origins under three broad categories, namely 'BAME', 'White' and 'Other'.

173. During the hearing, we requested and were provided with specific information regarding the racial origin of the four shortlisted candidates. However, that does not alter the fact that at the relevant time this data was not readily accessible to Ms Frampton or her HR colleagues involved in Dr Graham's case. In his submissions, Mr Kirk suggests that Ms Ciardo's response was disingenuous. He overlooks that Ms Ciardo was responding to a general inquiry from Ms Frampton with no obvious understanding that it concerned Dr Graham let alone that he is black, was in dispute with the University and had done protected acts and made a protected disclosure. Ms Frampton might have followed up by asking Ms Ciardo who did have access to the data in question and in what circumstances it might be made available, but we do not infer from any failure on her part to do so that this was because Dr Graham had done protected acts or made a protected disclosure, and we certainly do not consider there is any basis for saying, as Mr Kirk does, that Ms Ciardo was being disingenuous. In any event there is no basis to impute an unlawful motivation to Ms Cobley, Ms Slova or the Grievance Committee from emails at a later date between Ms Frampton and Ms Ciardo. As regards the Grievance Committee, there is little, indeed if any, evidence that it had any input to the requests for information and documentation. Instead, they were dealt with administratively by Ms Cobley, with input from Ms Slova, and referred to the Faculty of Education, who as we say were effectively misdirected in terms of what was being requested. We do not uphold Dr Graham's various complaints in this regard.

174. In conclusion, Dr Graham's various complaints against the University and Ms Niven are not well-founded. His claims against them will be dismissed.

Employment Judge Tynan

Date: 8 October 2024

Sent to the parties on: 11 October 2024

For the Tribunal Office.

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