

mf



# EMPLOYMENT TRIBUNALS

**Claimant:** Dr W Morgan

**Respondent:** University of East London

**Heard at:** East London Hearing Centre

**On:** 27 - 28 February, 1 - 2 March, 6 - 7 March & 29 March 2018 and  
(in chambers) on 24 - 26 April 2018

**Before:** Employment Judge C Hyde

**Members:** Ms L Conwell-Tillotson  
Mr D Ross

## **Representation**

**Claimant:** Ms A Chute, Counsel

**Respondent:** Ms R Tuck, Counsel

## **RESERVED JUDGMENT**

**The unanimous judgment of the Tribunal is that: -**

**The complaints of race discrimination were not well-founded and were dismissed.**

## **REASONS**

1 Reasons are provided for the above judgment as the judgment was reserved. The reasons are set out only to the extent that it is necessary to do so in order for the parties to understand why they have won or lost, and only to the extent that it is proportionate to do so. Further all findings of fact were reached on the balance of probabilities.

***Evidence considered***

2 The Claimant gave evidence on his own behalf and relied on a witness statement which was marked [C2]. Further on his behalf the Tribunal heard evidence from Dr Calvin Moorley; from Mr Errol Carbin; from Dr Antony Antoniou; and from Dr Gil Robinson by telephone conference call from Jamaica. The witness statements of these witnesses were marked [C3], [C4], [C5] and [C6] respectively.

3 At the commencement of the hearing a witness running order was produced which was marked [C1].

4 Finally, on behalf of the Claimant, Ms Chute's written closing submissions were marked [C7]. She attached to those written closing submissions a large bundle of authorities. The list of cases at the front of that bundle numbered some 24 authorities which are relevant to the law in this area. However, there was no dispute about the applicable law apart from the discussion of the effects of the case of *Clarke v Hampshire Electro-Plating Co Ltd* [1991] IRLR 490. It was not necessary however during submissions for the Tribunal to be taken to the text of any of these authorities.

5 The most detailed discussion about the law as it applied to the time limits in the circumstances of this case was about whether the detriments complained of were one off acts or evidence of a continuing policy. The cases of *Owusu* and *Cast v Croydon College* were discussed as well as the case of *Clarke* already referred to above.

6 On behalf of the Respondent the agreed bundle of documents was in two lever arch files and ran to just over 1,000 pages. It was marked [R1]. As is the way in such hearings, during the course of the hearing other documents were also added by agreement.

7 An agreed list of issues was also prepared, and this was marked [R2]. Also, at the beginning of the hearing the Tribunal was given a chronology and cast list which had been prepared by the Respondent: [R3] and [R4] respectively.

8 The Tribunal then heard evidence from: -

Dr Joanne Tocher [witness statement R5];  
Professor Duncan Turner [witness statement R6];  
Mr Feroze Amroliwala [witness statement R7];  
Professor Neville Punched [witness statement R8];  
Professor Jan Domin [witness statement R9];  
Professor David Rowley [witness statement R10];  
Mr Irfaan Arif [witness statement R11]; and  
Ms Alison McGrand [witness statement R12].

9 The written closing submissions prepared by Counsel for the Respondent were marked [R13] and at the end of the hearing the Respondent submitted an agreed cast list annotated with the "apparent" race of each of the people mentioned on it at the Tribunal's request. This was marked [R14].

10 The Respondent adduced, served and relied upon the witness statement of Professor Patricia Tuitt [R15] but she did not attend to give evidence.

11 In addition to the cast list which was annotated with apparent race, the Tribunal also had some documents giving information about race which had been prepared internally from information within the Respondent from pages 530-538. The document at pp 530 to 531 was prepared by the Claimant.

### ***Preliminaries***

12 The claim was presented on 17 June 2016, the early conciliation notification having been made to ACAS on 22 April 2016. ACAS issued a certificate on 22 May 2016. The Claimant complained that he had been subjected to race discrimination. He attached the particulars of his complaint in a document which ran to just over two pages (pp. 14-16). The Respondent duly presented a response form and set out the grounds on which they intended to resist the complaint in a document dated 19 July 2016 (pp.28-31).

13 A standard case management order was made by Employment Judge Foxwell on 8 August 2016 and sent to the parties on the same date.

14 The parties attended a closed preliminary hearing on 15 August 2016 before Employment Judge Warren. The summary following that hearing was set out at pages 43-47. The case had been listed for hearing by Employment Judge Foxwell on dates at the end of November and beginning of December 2016 and the issues were identified before Employment Judge Warren. However, the statement of the issues was superseded by the document produced to the parties during the hearing and marked [R2] as referred to above. The original hearing listing for three days proved to be inadequate and at a further closed preliminary hearing which took place on 5 December 2016 before Regional Employment Judge Taylor, it was decided that the case should be re-listed for six days in March 2017 (p. 68A). Some orders were also made for the Claimant to clarify his claim when the preliminary hearing took place before Employment Judge Warren. The responses which the Claimant had provided were the subject of discussion in front of Regional Employment Judge Taylor and further time was given to him to clarify the nature of the complaints being brought particularly in relation to acts of alleged discrimination in 2009 and 2010. In due course the Claimant provided that clarification (pp. 68C-D).

15 By a notice dated 26 July 2017, the parties were informed that the hearing would take place on the dates set out at the start of this judgment in February and March 2018.

### ***The List of Issues***

16 All events which occurred prior to 1 October 2010, namely under issue 1 – direct race discrimination paragraphs 1.2.1 and 1.2.2 of the List of Issues (“LOI”) - had to be considered under the Race Relations Act 1976 insofar as they were discrete acts of discrimination. The Equality Act 2010 came into force on 1 October 2010. It was agreed however that to all intents and purposes the applicable law under each Act was the same.

17 The issues, as set out in the agreed list, and keeping the numbering from that list for ease of reference, were as follows: -

1 **Direct race discrimination**

1.1 The Claimant describes his ethnicity as black Caribbean.

1.2 Has the Respondent subjected the Claimant to the following treatment, within section 1(1)(a) of the Race Relations Act 1976 for alleged acts that took place before 1 October 2010 and within section 39 of the Equality Act 2010 for alleged acts that took place after 1 October 2010, namely:

1.2.1 In or around 2009 the Claimant being required to step down at the direction of Professor Punchard from the role of School Equality and Diversity Leader.

1.2.2 In summer 2010 by Professor Punchard actively discouraging the Claimant from applying for the field leader's role and then acting to ensure he was not appointed.

1.2.3 In respect of the application for the Head of Bioscience post in May 2015:-

(i) Through Professor Punchard discouraging the Claimant from applying for the post of Head of Bioscience;

(ii) Through Professor Punchard suggesting the Claimant should wait for an Equality and Diversity post as the only way to gain promotion;

(iii) Through Professor Punchard not short-listing the Claimant for the post of Head of Bioscience using the online short-listing software (vacancy management).

1.2.4 With regards to the application for the post of Head of Bioscience in November 2015: -

(i) Professor Punchard influencing the scoring of the selection panel;

(ii) Professor Punchard changing the specifications for the post so as to disadvantage the Claimant;

(iii) Professor Punchard setting or influencing the setting of the questions to be asked at interview, so as to disadvantage the Claimant;

(iv) Professor Punchard ignoring or devaluing, or causing the selection panel to ignore or under value, the Claimant's role as Reader;

- (v) Professor Punchard or the selection panel under the influence of Professor Punchard, placing insufficient value upon the Claimant's work in student retention and attainment;
  - (vi) The Respondent making unwarranted changes to the person specification to "make it easier for the Claimant to apply"; and
  - (vii) The Respondent changing the composition of the interview panel, including the addition of a black Chair, the equality and diversity manager, and the lack of an independent subject expert, giving Professor Punchard more power during the appointment process.
- 1.3 Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated comparators? The Claimant names as comparators, Mark Clements regarding the 2010 application, Tony Raynham regarding the May 2015 application and David Guiliano regarding the November 2015 application. In the alternative, the Claimant relies upon a hypothetical comparator.
- 1.4 If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic (or on the grounds of the protected characteristic for alleged treatment occurring before 1 October 2010)?
- 1.5 If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?
- 2 Indirect discrimination on the grounds of race**
- 2.1 Did the Respondent apply either of the following provisions, criteria and/or practices ("the provisions"): -
- 2.1.1 In May 2015 in respect of the person specification criteria for the role of Head of Bioscience, the insertion of a new criterion, (by Professor Punchard), "line management in their current role", and
  - 2.1.2 In respect of the Head of Bioscience vacancy in November 2015, requiring a recent high impact factor publication and a high-index.
- 2.2 Did the application of the provision put other BAME applicants at a particular disadvantage when compared with persons who do not have this protected characteristic?
- 2.3 Did the application of the provision put the Claimant at that disadvantage, in that he was not selected for interview in May 2015 and was unsuccessful in his application in November 2015?

- 2.4 Has the Respondent shown that the treatment was a proportionate means of achieving a legitimate aim?

3 **Victimisation**

- 3.1 Has the Claimant carried out a protected act? The Claimant relies upon the following: -

3.1.1 Complaining in writing following a formal procedure in 2010, following an unsuccessful application for the post of Head of Bioscience, and

3.1.2 After his unsuccessful application for the post of Head of Bioscience in May 2015, writing to the Vice Chancellor in July 2015 to complain of discrimination.

- 3.2 If there was a protected act, did the Respondent carry out any of the treatment set out below because the Claimant had done a protected act?

3.2.1 With regard to the application in May 2015, inserting the line management requirement referred to above;

3.2.2 With regard to the November 2015 application, redrafting the job purpose and person specification, the setting of questions for the interview panel and Professor Punchard's interaction with and influence of the selection panel; and

3.2.3 Professor Punchard's interpretation of the criterion adopted so as to ensure that the Claimant was excluded in May 2015 before his application of that month. In conversation with the Claimant, Professor Punchard made it clear that his interpretation of the criterion would ensure that he would be excluded from consideration for the role.

4 **Time**

- 4.1 The Respondent argued that the Claimant's claims were out of time, although questions could arise as to whether some or all of the allegations amounted to conduct extending over a period of time such as to bring them in time or alternatively, whether it was just and equitable to extend time.

- 4.2 With regard to ACAS early conciliation, did the Claimant submit his complaints of discrimination in time? Was this the case in respect of each of the Claimant's specific allegations?

5 **Remedy (if liability proven)**

- 5.1 The Claimant sought compensation and a recommendation to the effect that he should be promoted.

5.2 The parties considered that if liability was proven a separate remedy hearing should be listed as the question of remedy would be very complicated.

6 **“Something more”**

6.1 The Claimant would say that the only two people in his department whose careers had not progressed were both BAME. He would say that this was the “something more” that indicated that the treatment of him was because of his race.

The Claimant named three comparators in relation to the three selection processes and in the alternative relied upon a hypothetical comparator.

***Findings of fact, consideration of the issues and conclusions***

6 The Claimant began his employment with the Respondent on 4 April 1993 as a Post-Doctoral Research Fellow in a research group run by Professor Peter Bach. By 1997 he had progressed to employment on a lecturer/researcher contract. In that role he took over, among other things, the supervision of several PhD students.

7 Dr Morgan was promoted to Senior Lecturer in 2001. As a result, from 2001 he took on a range of module and programme leadership roles. He also joined several committees such as the School Research Committee. He was made a Principal Lecturer from 2004. Finally, in the academic year 2015/16 he achieved the status of Reader in Toxicology and Clinical Biochemistry with the Respondent. It was agreed that this was a senior academic position.

8 Towards the end of 2007 Professor Neville Punchard (non BAME) commenced employment as Dean of the School of Health and Bioscience (“the School”) within which the Claimant was employed at all material times. He was therefore in charge of the Claimant’s department during most of the time that the Tribunal was concerned with. The central theme of the Claimant’s complaint was that Professor Punchard had impeded his professional progress in various ways.

9 The Claimant’s race case was pleaded on the basis that the relevant protected characteristic was that he was BAME – someone who was Black and minority ethnic origin. Where relevant below, it is stated whether relevant people were also BAME or not.

10 There was a wide range of issues as set out above. The Tribunal dealt with them broadly chronologically, addressing all the heads of claim as they pertained to common facts.

11 In assessing the evidence about events in 2009 and 2010 in particular, the Tribunal took into account the amount of time which had elapsed since the events complained about and the inevitable effect on the reliability of the relevant witnesses’ memories. Indeed, the Claimant expressed a similar difficulty when giving his evidence. Further, many of the relevant contemporaneous documents were unavailable.

*Issue 1 – being stood down as the Respondent’s Equality and Diversity Leader*

12 This was said to have been an act of direct race discrimination relating to events in or around 2009.

13 Dr Morgan had been Equality and Diversity Leader (“E & D Leader”) for the School and had sat on the University’s E & D Committee prior to 2008/2009. In his development appraisals at that time, he referred to setting up “a fledgling” E & D Committee in the School, which he was to chair (e.g. p.548C).

14 In the event a committee meeting took place in October 2009, having been organised by Ilana Morrissey (non BAME), an academic colleague of the Claimant’s. The Claimant did not attend that initial meeting. His absence was commented upon by some of those who attended given that he was seen and held himself out at that point as the Equality and Diversity ‘champion’ of the school. One of his colleagues who attended the meeting Karen Atkinson (non BAME), wrote to Wendy Drechsler to raise with her her disappointment at the Claimant’s lack of engagement. Karen Atkinson at about this time was manager of the RNIB Resource Centre and Senior Lecturer (Physiotherapy) in the School of Health and Bioscience (p.604).

15 Professor Drexler (non BAME) was Associate Dean in the School of Health, Sport and Bioscience. It appeared also from the letter written to Prof Drexler that Ms Morrissey had organised the meeting with some difficulty. Indeed, in the contemporaneous records the Claimant himself indicated that he had previously struggled to get this committee off the ground and that was part of the reason why he asked Ms Morrissey to take this task on.

16 As a result of the issues raised by Ms Atkinson, the matter came to Professor Punchard’s attention and he asked Professor Rowley (non BAME) who was Assistant Dean to take things forward.

17 On 4 November 2009, a second School E & D Committee meeting took place (minutes at p.587). The meeting was chaired by Ms Morrissey and a discussion about the role of the Chair took place. Although it was not noted in the extract of the minutes available to the Tribunal, the Claimant described in his witness statement at paragraph 61 that he attended the meeting after it was underway and left before its conclusion.

18 It appears from a contemporaneous letter sent by the Claimant to Professors Rowley and Punchard (pp.588-591) that discussion took place between the three of them in the week before 17 November 2009 about, among other matters, his role as the School’s Equality and Diversity Leader. The Claimant complained that he had been “effectively constructively dismissed from the role of Equality and Diversity Leader”.

19 The Tribunal considered that the contemporaneous documentation showed a degree of ambivalence and contradiction on the Claimant’s part in relation to the responsibility of running this committee. In the same letter in which he made the above complaint about constructive dismissal, he later asserted that it was: “never my intention to chair the Committee, for one thing my commitment to running the Masters



programmes would not have allowed me the time...” He confirmed that he had discussed the matter several months previously with Ms Morrissey and that he “happily handed over responsibility to her for organising the committee meetings”. Furthermore, it appeared to the Tribunal that he was content for Ms Morrissey to organise the meetings but that he still wanted to be seen as the lead in relation to equality and diversity issues by being Chair of the Committee. The Tribunal accepted the evidence of the Respondent’s witnesses to the effect that it was normal practice that the person who chaired the School Committee meetings had the responsibility of also reporting to the relevant university committee about the work of that committee. The Tribunal considered that this accorded with commonsense and there did not appear to be any good reason why Ms Morrissey having successfully called the meetings and indeed instituted them after the Claimant had encountered considerable difficulty in getting them on the road, should not have had the opportunity of being the Chair and then reporting to the University Committee.

20 The Tribunal was also satisfied that Professor Rowley and to a lesser extent Professor Punchard went to some considerable lengths to discuss this matter with the Claimant and to assuage his concerns about being undermined in his role. The Tribunal also noted that, generally speaking, the roles of these committees changed from time to time across the University and there was very little formality about who was entitled to be on a Committee or to chair it. There was certainly no constitutional basis for a role such as Equality and Diversity Leader within the School.

21 The Claimant’s managers sought to affirm his experience and commitment to equality and diversity issues, in response to the Claimant’s complaint. An example of this was when Professor Rowley wrote to the Claimant on 26 April 2010 in this context and suggested to him following a meeting apparently with Professor Punchard, that he might want to consider whether he would be prepared to act as a “BME champion for the School and within the School E & D Committee”. He also recorded in that email that for this to happen there were “some issues which would need to be addressed vis-à-vis the structure and operation of the committee”, and he suggested that there were a number of strategies which they could use to address these. He reassured the Claimant that it was a matter for him to do whatever he felt was right for himself and that regardless of the Claimant’s decision in relation to this suggestion:

“We will continue to support your membership of the UEL E & D Committee, should you so wish, in recognition of the valuable work you have done and continue to do for our BME students.”

22 In addition, the Tribunal had contemporaneous evidence before us of correspondence between Professor Rowley and the Claimant, such as an email dated 20 November 2009 (p.592) in which Professor Rowley again sought to reassure the Claimant about the importance of his contribution to the school and that there was no intention to threaten or undermine his position, and no grounds for the Claimant to feel in any way threatened or compromised by any readjustment of his roles. Professor Rowley was on leave when he sent this message to the Claimant.

23 In addition to the details set out in the email of 17 November 2009 from the Claimant to Professors Rowley and Punchard, the Tribunal considered the way in which the case was put by the Claimant in his witness statement at paragraph 66. It

was apparent from the latter statement that the Claimant was concerned that removal from the role of Chair of the Committee within the School involved a loss of status and access to the University's Leadership Personnel as he would no longer attend the relevant university committee.

24 As set out above, the Tribunal considered that this concern was very much understood at the time by Professors Rowley and Punchard after discussion with the Claimant and that as set out above they took steps to support the Claimant by the suggestion of his taking up other roles relevant to the furtherance of diversity.

25 The Tribunal did not consider that his objection to Ms Morrissey being the Committee Chair and as a result reporting to the university committee was valid. There was no reason why she should not also have aspired to achieve that position, and the Claimant had already had experience of that role.

26 In the context of a direct race discrimination complaint, the Tribunal had to consider whether there was any evidence of less favourable treatment of the Claimant in this respect. There was no evidence whatsoever to suggest that anyone else was given the favourable treatment that Professors Punchard and Rowley gave to the Claimant.

27 In relation to the claim as pleaded in paragraph 1.2.1 of the list of issues, the Tribunal considered that the Claimant had failed to establish on the balance of probabilities the primary fact alleged, namely that he was: "required to step down at the direction of Professor Punchard from the role of School Equality and Diversity Leader". There was no evidence whatsoever that Professor Punchard was involved in or gave any direction as to who should chair the Committee. It merely followed from the fact that Ms Morrissey revived this Committee and was subsequently elected by the attendees in about November 2009 to be the Chair and therefore she reported to the more senior University Committee.

28 He further alleged that he was removed from the senior management team at the behest of Professor Punchard.

29 The background to this allegation made by the Claimant which he pursued during the hearing was that his career had progressed smoothly and well prior to the arrival of Professor Punchard and that he had for example attended university committees and the senior management team meetings in his role as Equality and Diversity Leader but that after Professor Punchard's arrival he took actions which were designed to disqualify the Claimant from attendance at committees as he had before.

30 There were many occasions during the course of this case on which the Claimant asked the Tribunal to infer negative actions against him in circumstances where there was no evidence whatsoever to support such an inference.

31 The Tribunal will address the issue of jurisdiction at the end of this section but it is only right to note at this stage that the fact that the Claimant was complaining about matters which had occurred some 10 years before the date of the hearing meant that the Respondent was clearly prejudiced by the lack of access to relevant documents, and the Tribunal considered that it was highly likely that witnesses' recollections would

not be particularly good. Indeed, there were many occasions during the course of the hearing when the Claimant himself confessed to not being clear in his recollection of the detail of the allegations he was bringing.

32 This was particularly relevant in relation to the background issue of the Claimant's attendance on the senior management team meetings or at meetings of its predecessor, the ADG. There was a handful of minutes and invitation letters to those meetings in the bundle. The Claimant himself referred to having attended such meetings "*on and off...for about 5 years*", with inadequate contemporaneous documentation to establish why he had attended, and by what process. There was not a full picture on the available evidence of which committees each of the invitees was on, which might have explained why they had been invited to those meetings.

33 The Respondent's position was also that it was usual for an incoming Vice-Chancellor to reorganise matters such as the management of a department with consequential changes to the nomenclature and constitution of groups like the senior management team. This new name was given by the Vice Chancellor in February 2008 shortly after Professor Punchard took over as Dean. Professor Punchard's evidence was that this was in accordance with an instruction from the university level management team.

34 There was no evidence to contradict Professor Punchard's evidence on this and indeed the Tribunal considered that it was a credible explanation. The Claimant had no factual basis for suggesting that his exclusion from the new SMT in February 2008 was at Professor Punchard's instigation. The Tribunal considered that this was a good example of the Claimant having no adequate basis for believing that Professor Punchard had instigated action which he considered had a detrimental effect on him. Further, it was consistent with the regime brought in by the new Vice Chancellor that throughout 2009 such contemporaneous documentation as there was confirmed that the Claimant only attended the SMT if it involved equality and diversity issues. This was agreed by the Claimant [para 79 of C7].

35 The Tribunal also noted that there were many occasions on which matters were put to the Respondent's witnesses in a way which did not point towards differential treatment on grounds of race. One example was the proposition put to Professor Punchard that by setting up a core SMT and excluding the Claimant, Professor Punchard had marginalised the ambit of the principal lecturer role that the Claimant had been appointed into. The Tribunal considered that this was very far from the beginnings even of an allegation of less favourable treatment on grounds of race.

36 To the extent that the Tribunal was urged to reject Professor Punchard's evidence about the changes surrounding the invitees and the nomenclature of the SMT, the Tribunal took into account that Professor Punchard was being asked about these matters for the first time some several years after the event. We also took into account the scope of his responsibilities within the University. He was the witness most likely to have had direct knowledge of such matters.

37 Further, the Claimant did not point to any other member of staff within the Respondent or the School who received more favourable treatment than the Claimant did in this respect.

38 The Tribunal also took into account that there was contemporaneous documentary evidence which confirmed that other members of staff were concerned that the E & D Committee should take on board other issues of diversity and not limit itself to issues of race.

39 The Claimant contended that the decision to reinstate him on the SMT as E & D Leader was only done after external prompting. He also relied on an email he sent to Professors Punchard and Rowley on 22 December 2009. His contemporaneous statement about this was that:

*“One of the key roles of the E & D Leader is to provide advice to the Dean of School and SMT about the impact on particular E & D groups, of decisions made by the above. It was specifically for this reason the CMT, following prompting from the University’s E & D Committee, made it a requirement that all SMT must have the E & D Leader as a member”.*

40 This extract confirms the findings of the Tribunal already set out above that it was logical and consistent with efficient administration for the Chair of the School’s E & D Committee to be the person who reported higher up. Further, there was no evidence to support the Claimant’s assertion that the actions taken in relation to him were anything to do with race or were specific to him.

41 The Tribunal also made findings above that the senior management of his School made considerable efforts to soothe the Claimant’s fears and to encourage him, at about this time.

42 The Claimant’s Counsel submitted at paragraph 86 of her written submission that Professor Punchard accepted that he asked the Claimant to step down from his position as E & D Leader. The Tribunal’s notes of the evidence do not accord with the notes in her submission. The circumstances we found have been set out above. Ilana Morrissey was made the Chair of the School E & D Committee by the Committee itself and as a consequence, it was appropriate for her to report about the work of that Committee.

43 In relation to the Claimant’s complaint about insensitivity of the announcement at a meeting as a fait accompli, the Tribunal also considered that this was the normal course of events that the person appointed as a Chair would report to the SMT about the work and issues considered in those committee meetings. The Tribunal considered that the more exceptional event would have been for Ms Morrissey, as Chair of the Committee, not to have been given that responsibility.

44 Finally, in this context the Claimant suggested that it had been his plan to have a rotating Chair of the E & D Committee. This was a matter which was only raised by the Claimant during oral evidence. There was no corroboration of this assertion. More importantly, there was no basis from the evidence before the Tribunal for the Claimant to have expected to be able to determine who should be the Chair of the Committee, rather than, as turned out to be the case, that those attending the initial Committee meetings elected the Chair as they saw fit.

45 For the avoidance of doubt in relation to the contention by the Claimant that he was removed from the SMT at Professor Punchard's behest, the Tribunal rejected that as an implausible and uncorroborated assertion about action by Professor Punchard. The Tribunal accepted Ms Tuck's submission that the question of the Claimant's attendance on the SMT as E & D Leader only arose when the Committee which had been revived by Ilana Morrissey elected her as Chair and this led to the question arising at the Claimant's initiation of a separation of the role of Chair of the Committee from the 'Leader' role. Once again there was no evidence about how a similar situation had been handled in relation to anyone else.

46 As set out above and recorded in contemporaneous emails once this had been raised by the Claimant with Professor Rowley and Professor Punchard they sought to find a mutually acceptable outcome with the Claimant allowing him to retain the position of "E & D champion" and to continue to attend the University E & D meetings. These actions are not consistent with the Claimant's conspiracy theory of an elaborate plot to undermine and oust him.

47 In those circumstances therefore, the Tribunal considered that the Claimant had not established prima facie facts which shifted the burden of proof.

48 Thus allegation 1.2.1 was not well-founded and was dismissed.

49 In any event even if the claim had not been dismissed on its merits, the Tribunal would have dismissed it on the grounds that we had no jurisdiction to determine it having regard to the date on which the claim was presented relative to the date of the events complained of. The Tribunal accepted the Respondent's submissions about the prejudice to them of having to answer complaints in these proceedings about events in late 2009 given the amount of time which had elapsed before the Claimant first complained about them.

50 Further, the Claimant brought a formal grievance in late 2010 about his non-appointment to a position but he failed to complain in that grievance about the matters in this allegation. Further the Claimant only clarified that these matters were substantive complaints in this case once the litigation was underway in 2016.

51 Finally, there was a considerable interval between these matters and the later matters complained of by the Claimant both in the summer of 2010 and then subsequently in 2015.

52 In all the circumstances therefore, it was not just and equitable to extend time.

*Issue 2 – allegation 1.2.2 – Field Leader application July 2010*

53 This allegation of direct race discrimination related to an application for a post made in the summer of 2010. Although the Claimant made a complaint about this matter later in the year, because of the amount of time that had elapsed, the Respondent had not been able to unearth a complete set of documents relating to the recruitment exercise. Further, after the determination of the complaint lodged on 29 September 2010 (p.615), the Respondent's witnesses had not been asked to recall events again until the complaint in this case.

54 Dr Morgan applied for a post as Field Leader, and was shortlisted by, amongst others, Professor Punchard. He was interviewed on 28 July 2010 by a panel consisting of Selena Bolingbroke, Pro Vice Chancellor; Fiona Fairweather, Dean of Law and Social Sciences at the relevant time; Professor Punchard, Dean of HAB; Professor Rowley, Assistant Dean of HAB; and David Humber the external member of the panel who was Professor Punchard's immediate predecessor as Dean of the School. Professor Humber also happened to be one of the Claimant's referees in this application.

55 Dr Morgan was not successful after the interviews. The successful candidate was Mark Clements although he did not take up the post ultimately and the post remained vacant. Mr Clements was an external candidate.

56 The Claimant lodged an unsuccessful grievance about the recruitment exercise. The grievance was considered by a panel chaired by Andrew McDonald, Director of Library and Learning Services and thereafter on appeal by a panel of Governors in June 2011. The letter and report setting out the outcomes of the two processes were at pages 736-740 and 745-753 respectively. Mr McDonald notified the Claimant of the outcome of the initial grievance on 24 December 2010.

57 The Tribunal noted that the allegation in relation to this recruitment exercise for the post of Field Leader was not that the panel discriminated against the Claimant by selecting Mark Clements instead. It was that Prof Punchard failed to encourage the Claimant in his application.

58 The Claimant relied on Mark Clements as a comparator but there was no evidence whatsoever before the Tribunal about whether Mr Clements had been encouraged to, or more specifically, not actively discouraged from, applying for the position. There was not as far as the Tribunal could determine, evidence adduced about his race either.

59 The Claimant relied on evidence set out in his witness statement (paragraphs 79-83) to the following effect: -

- (a) That he was told by Joanne Tocher that Professor Punchard told her that he did not want the Claimant in the post;
- (b) That Professor Punchard and/or his personal assistant had not arranged a meeting with Dr Morgan to discuss the post; and
- (c) That he had overheard an argument between Professors Punchard and Rowley about Professor Punchard's preference for an external candidate.

60 Professor Punchard, Professor Rowley and Joanne Tocher all gave oral evidence and dealt with this allegation in their witness statements. The Tribunal also had regard to the accounts given in the grievance process about this issue.

61 Professor Punchard did not seek to deny his preference for an external candidate. Furthermore, his reasons for preferring an external candidate appeared to

the Tribunal to be rational and sensible. Indeed, other witnesses accepted that there were many strengths that an external candidate could bring to an academic environment. The Tribunal noted that Professor Punchard's preference was not concealed from the Claimant. It was also set out in the contemporaneous statements which were produced for the determination of the grievance in late 2010.

62 Moreover, Ms Tocher denied that she had indicated that Professor Punchard had said that any particular individual should not apply for the post. She also indicated that consistent with the Field Leader role that she herself held at that point, she had spoken to several people about the proposal of taking up the responsibility of Field Leader role jointly with her, not just with Dr Morgan. These were other members of staff to whom she had also on occasion delegated responsibilities of the Field Leader role. Dr Morgan believed that in the conversation, Ms Tocher had indicated that she believed he was fitted for the post, and that she could lead one field, and he the other (paras 77 to 78 of his witness statement).

63 Ms Tocher was not on the interview panel or the short-listing panel. It therefore would have been completely outside of her power to determine who was going to be likely to be successful in relation to that recruitment exercise. Further, Dr Morgan had not witnessed her conversations with others and therefore could not attest to whether she had given encouragement to other potential candidates.

64 There was considerable discussion in this context and also in relation to the assessment of the Claimant's management responsibilities as to whether he acted as Ms Tocher's deputy. There was no doubt that the terms 'staff management' and 'Deputy FL role' were used to describe some of his tasks in his 2010 – 2011 appraisal (p744D). Ms Tocher who was the reviewer apparently put a question mark beside the reference to continuing in the Deputy Field Leader (FL) role. The Claimant also set out this perception of his role in his grievance on 29 September 2010 (p.615). The Tribunal accepted, because there was no real evidence to contradict it, that there was no formal post of deputy to the Field Leader.

65 Among other matters in her statement for the purposes of the grievance written on 11 November 2010 (p.633) Ms Tocher stated that she did not have a deputy in her role as Field Leader and that there were three principal lecturers and two readers in the field, all of whom provided her with excellent support. She also indicated that there were other highly experienced members of staff who were currently senior lecturers who may have wished to use the opportunity of the proposed split of the Bioscience field as an opportunity for promotion to Principal Lecturer. Dr Morgan had pointed in his witness statement to the fact that he had carried out staff reviews as Ms Tocher's deputy. In her statement Ms Tocher indicated that she accepted that he had carried out the SDL of five members of staff in that year and indeed that he had done that task very well. However, she went on to state that he was not the only additional member of Bioscience to conduct reviews and that the staff involved were not necessarily part of the proposed new field. We accepted her evidence on the balance of probabilities, as she was in the best position to know this information, and there was no documentary evidence to contradict it.

66 It was also important to note, which was not disputed, that the Field Leader role was not a separate substantive role. Whilst it would have entailed additional

responsibilities for the Claimant, it would not have represented a promotion for the Claimant from his substantive post of Principal Lecturer at the time.

67 It also follows from Ms Tocher's evidence to the Tribunal and her statement in the internal grievance about there being a number of other potential candidates who might have benefitted from this promotion, that the Claimant would not have been the only person potentially adversely affected by a preference on Professor Punchard's part for an external candidate. They were not all Black or BAME.

68 Even allowing for the fact that before the selection process Professor Punchard was keen on an external candidate, it was not solely in Professor Punchard's gift to make the appointment and as set out above he was one member of a panel. Further the Tribunal noted that despite his preference for an external candidate he had short-listed the Claimant.

69 The Tribunal noted the seniority of some of the other members of the panel such as Ms Bolingbroke and also the presence on the panel of Professor Humber who was the former Dean of the department. Apart from being more experienced in that role than Professor Punchard, as set out above he had also been listed by the Claimant as the Claimant's referee. This led the Claimant to what appeared to the Tribunal to be a very difficult argument, namely that despite the fact that he had worked with Professor Humber in the department for a number of years and during these years he had progressed appropriately in his career, Professor Punchard was able to and did manipulate or influence Professor Humber into a position where he did not judge the Claimant fairly in this selection process. With very little evidence to support this contention beyond the fact that the Claimant was not selected, the Claimant's only knowledge of the two men having had contact with each other prior to the interviews was when they spent some time together at a handover meeting in the School. There was no evidence that the Professors knew each other apart from that.

70 In paragraph 31 of her closing submissions, Ms Tuck submitted that the conspiracy put that Professor Punchard and Professor Humber had formed a friendship during the handover period such that Professor Punchard could influence him negatively against the Claimant was not put in cross-examination to Professor Punchard. Further Ms Tuck reminded the Tribunal that during his cross-examination the Claimant had expressly excluded Professor Humber from any allegation of being part of a racist conspiracy. The Tribunal has already characterised this argument by the Claimant as 'very difficult'. In the Tribunal's view it was an indication of Dr Morgan's lack of objectivity about his failure to progress beyond Principal Lecturer at the time and the reasons for it.

71 In all the circumstances, the Tribunal considered that it was extremely unlikely, on the balance of probabilities that Professor Punchard would have sought to influence Professor Humber negatively about the Claimant, a man Professor Humber had worked with for some years, and who the Claimant believed, thought well of him, or that any such attempt would have affected Professor Humber's own views about the Claimant's candidacy.

72 A further point made by the Claimant in his grievance at the time and during this hearing although it was unclear how, if at all, this assisted his complaint of direct race



discrimination, was that the panel had been incorrectly constituted by the inclusion of Professor Humber. The Respondent did not dispute this. The Tribunal accepted Professor Punchard's evidence that this was an oversight at the time in that Professor Humber had been away from the Respondent by the time of the interviews only for three years and the rules about external candidates on interview panels was that they should have been away from the Respondent's employment for five years or more. The Tribunal however considered that the inclusion of an external member of the selection panel who had been stated to be a referee of the Claimant, albeit inadvertently contrary to the rules, was if anything likely to be of assistance to the Claimant. It was unlikely that the Claimant would have named him as a referee if he did not think that Professor Humber held him in high regard.

73 The Tribunal considered that this was yet another example of the Claimant criticising the Respondent in respect of a matter which, albeit it constituted a breach of process, could not objectively be viewed as disadvantageous to the Claimant.

74 The Tribunal further noted that there was no objection by the Claimant to the presence of Professor Humber on the selection panel at the time.

75 The other matter that the Claimant relied on in support of this complaint was that Professor Punchard or his PA failed to arrange a meeting with him. It was not in dispute that where there was a vacancy within the department in which an academic was employed, it was normal and indeed to be encouraged that they should have a discussion with their head of department about the post and about their prospects.

76 Mr Robinson, one of the Claimant's witnesses, had worked up to December 2016 as a Senior Lecturer in HR Resource Management in the Business School at the Respondent. He confirmed during his evidence that this was indeed to be expected. Moreover, he agreed that the line manager should give honest feedback to the member of staff who sought their advice about their prospects of success.

77 By an email sent on 23 June 2010 by the Claimant to both Professor Punchard and his PA Ms Colasanti but addressed in the text to Ms Colasanti, the Claimant asked her to find a 20 to 30-minute slot in Professor Punchard's diary as soon as possible so that he could discuss with him his plan to apply for the Field Leader post in Bioscience.

78 There was no response to the email from Ms Colasanti up to the time of the selection process.

79 The interview for the post the Claimant applied for was held on 28 July 2010.

80 The next communication that was relevant was dated 3 September 2010 from Ms Colasanti to the Claimant in which she apologised for not having responded to the message of 23 June. She said that she: "somehow completely missed this email in my inbox" and that she would not want the Claimant to think that Professor Punchard or herself had deliberately ignored his request. She then concluded the short email by inviting the Claimant always to feel free to follow up or come and ask her for a response should this ever happen again.

81 Dr Morgan's response, within 10 minutes, was to note that the email was sent also to Professor Punchard and to ask Ms Colasanti whether he was now saying that he too missed the email. Ms Colasanti replied by email on 7 September 2010 stating that as Professor Punchard's PA, she arranged his meetings and dealt with his diary so it was up to her to respond to his email. She apologised once again.

82 It was not in dispute that there were other recruitment exercises underway at about this time and indeed concurrent with this recruitment exercise was another one for a Field Leader post to which a colleague of the Claimant's Marcia Wilson was successfully recruited. There is no dispute that she is BAME. The Tribunal mentions this because it is apparent that as well as the normal responsibilities and duties of his role as Dean of the school there were additional matters which both Professor Punchard and his PA were having to deal with at about this time, which made their explanations about why the Claimant's email had been overlooked, more credible. Further the Tribunal accepted Professor Punchard's evidence that he did not consider it his role to act on this email because it was a matter which fell within the ambit of his PA's role to sort out. The Tribunal considered that this was likely to have been the case.

83 The Tribunal also considered that the failure by the Claimant to follow up once it became apparent to him that Ms Colasanti had not responded was regrettable. We heard that there was not a huge physical distance between their respective offices.

84 In the meantime, Professor Punchard had announced to the department by an email dated 9 August 2010 (p.602A) that Dr Clements had been appointed as the new Field Leader for the post the Claimant had also applied for. By now, because of the news of the announcement of the successful application of Marcia Wilson, the Claimant deduced that he had not been successful in his application. The Respondent was able to announce the success of Ms Wilson's application because they did not need to chase up external references in the same way as they had to for Dr Clements.

85 The Claimant contacted the Respondent about his non-selection for the role. The Tribunal had access to email correspondence in August 2010 about this issue. Thus, for example he sent an email to Liz Roy of Human Resources on 13 August 2010 (p.605) in which he reported that he had had feedback as to why he had not been selected but he characterised the decision of the appointments panel not to appoint him as "perverse". He had apparently been told that the person selected was "brilliant" and better qualified than he was for the role. He challenged the accuracy of this assessment. In the context of this letter he also referred to attempts having been made to prevent him from applying for the post by a senior member of staff within the University. The Tribunal took this to be a reference to the fact that his email to Professor Punchard and his PA had not responded to, and by his becoming aware prior to the selection process that Professor Punchard had a preference for an external candidate.

86 There was nothing in Dr Clements' resume to lead us to find that he was an unlikely candidate. On the contrary he had a very strong cv. No-one sought to argue that he should not have been shortlisted. The selection was based ultimately on his performance at interview.

87 The Tribunal considered also that the Claimant did not take on board at any stage either in relation to this application or indeed the subsequent one, that whilst he may have been in a good position to describe the events in his own interview, he was not in the same position in respect of the interviews of the other candidates at which he had not been present. He made a point which he returned to at various stages in the email of 13 August 2010 to Ms Roy (p605) as follows:

“You also questioned how vigorously I pushed my strengths in the interview, but what must be remembered is that as the internal candidate I had no room for spin they already knew me and this was confirmed by what happened at the start of the interview when the first thing said to me was ‘come in sit down you know everyone there is no need for introduction’.”

88 The Tribunal considered that the Claimant had drawn an adverse inference from what was clearly intended to be an introduction and a welcome to put him at his ease. We also took into account that at the same time as his selection process was going on there was an ongoing recruitment process and interviews for two other Principal Lecturer positions with the role of Field Leader (Professor Punchard’s statement at para 58). His evidence which there was no reason not to accept on the balance of probabilities was that in both of the other cases there was a strong internal candidate who had been undertaking the role for nearly a year in an acting capacity. They were both quite specialised positions and for one position there were only two candidates, including the internal, and for the other, there was only one, the internal candidate. In both cases Professor Punchard’s evidence was that the panel concluded that the strongest candidate was the internal one and that they were offered the position. Obtaining references for them was also easy as they were readily available internally. As a result, a decision and subsequent announcement of the successful candidate’s outcome could be made very quickly.

89 In summary therefore in terms of Professor Punchard’s PA not arranging a meeting with Dr Morgan, the Tribunal did not consider that there were sufficient grounds to conclude that the reason for her omission was to do with the Claimant’s race.

90 Further, Professor Punchard indicated that he did not speak to anyone else about this position. We had no evidence to contradict that statement, and Professor Punchard did not appear to have been asked during his evidence whether anyone else had asked for a meeting. In part of his written grievance the Claimant contended that Professor Punchard: “by contrast ... was willing to discuss the post with external candidates ...” As the Tribunal stated there was no evidence whatsoever presented to the Tribunal to support this assertion on the Claimant’s part. The Tribunal therefore rejected it on the balance of probabilities in favour of Professor Punchard’s case on this.

91 Moreover, the Claimant did not assert that anyone else had asked for and been granted a meeting. The Tribunal did not have any evidence therefore that anyone else asked Professor Punchard’s PA or Professor Punchard for a meeting.

92 Finally, in this context the Claimant said he had overheard an argument between Professors Punchard and Rowley about the filling of the vacancy. Both the Professors

disputed that there was such an argument. There was no corroboration of this argument by anyone else in the department. As set out above the Respondent and Professor Punchard in particular never denied that the Professor Punchard had expressed a preference for an external candidate.

93 In his statement in answer to the grievance that the Claimant made in September 2010 addressing among other matters the allegation that he had a negative attitude towards the Claimant, Professor Punchard stated that he recollected that at one time they wished to advertise the position with a heavy emphasis on the Field Leader role and with line management experience as an essential requirement. He continued that in that case it would have been extremely unlikely that anyone internally in the Field would have met the requirement and thus they would have been looking for an external applicant. However, he continued it was not possible to do this because the actual position of Field Leader is that of a Principal Lecturer and it was felt unlikely that they would be able to short-list at this level if they had such a requirement. He continued that in the end the Claimant applied and he short-listed him. It was then up to the Claimant to demonstrate his suitability to the panel.

94 Once again during the hearing, the Respondent readily accepted that Professor Punchard had tried to set out requirements of the role with the emphasis on line management experience but that because of advice from Human Resources this was not pursued. We have already referred to the fact that the Claimant indeed met the criteria and was short-listed.

95 Finally, the Claimant, as set out in the email referred to, to Ms Roy in August 2010 asserted that he was a strong candidate for this position. The Tribunal agreed that he was clearly appointable otherwise he would not have been short-listed and that he met the criteria. However, the Tribunal has reviewed the comments of the members of the panel whose views were sought for consideration of the grievance in late 2010. The general picture that emerged from their statements was that the Claimant had not performed particularly well at interview.

96 The Chair of the panel, Ms Bolingbroke, who was Pro-Vice Chancellor at the time, stated that the main areas of weakness in his application and interview performance were as follows:

*“The quality and content of his presentation was weak and uninspiring and the timing and delivery of his presentation was poor.*

*Despite being given more than one opportunity to answer a question concerning his experience and understanding of the value of partnership work, Dr Morgan was unable to identify and share with the panel either work that he had been involved with or why partnership work was important to the development of the Field or School.*

*The leadership and management experience was not well articulated. Too much of his answer to the panel’s question referred to delegation rather than a clear plan of what he would do himself as Field Leader and how he would motivate and manage staff to affect successful delegation.*

*Overall, the general assessment was that there was no sense of innovation or new ideas that Dr Morgan brings to bear on the development of the Field. He gave no sense that he would take up the role with a real imperative for change, or pace of development and improvement ...”*

97 Similarly, Dr Rowley in his statement (p.701) recounted that: *“There was a healthy debate amongst the panel and in the end strong agreement about who was felt to be the strongest candidate. Winston had not made the best job of selling himself in either his application or in parts of the interview and so, particularly for those members of the panel who did not know him, he did not stand out in comparison to several of the other applicants. Even knowing him as I do I would have to say that I felt the decision of the panel was entirely justified.”*

98 Finally, the Tribunal noted that Professor Humber who responded by way of an email dated 29 November 2010 (p.673) provided a very short response. Among other matters he stated that he believed the panel had carried out its activities in a professional way and according to UEL regulations. He stated that the decision was arrived at after a thorough discussion of all the candidates and was unanimous. He continued that he had no reason to believe that any individual on the panel had a disproportionate effect on their decision.

99 The Tribunal considered that that response was notable by what it did not address especially as Professor Humber was aware that he was the Claimant’s referee for that selection process.

100 He also incorrectly stated that he believed that the panel was correctly constituted. It was agreed at the Tribunal that the panel was not correctly constituted but Prof Humber appears to have believed at the time he wrote the email that the Panel was correctly constituted. The Tribunal does not consider that his view on that is of relevance. It was clear from the subject matter of the email that Professor Humber was aware of the reason for the Respondent reverting to him in November 2010 so long after the interview.

101 For the avoidance of doubt in relation to allegation 1.2.2, the Tribunal did not find any adequate evidence to support the contention that Professor Punchard had acted to ensure that the Claimant was not appointed to the post of Field Leader in the summer of 2010. The evidence about the impression given by the Claimant at interview answers that allegation.

102 Another circumstantial matter referred to by the Claimant was the delay in the provision of feedback to him about the outcome of the selection process in 2010. The Tribunal has already explained above why it was possible to confirm the successful applications of Ms Wilson and the other internal candidate so promptly. In any event, having regard to the time of year when this took place, the Tribunal accepted the Respondent’s case that Professor Rowley who had attended during his annual leave to be on the interview panel had sought to give feedback to Dr Morgan on 3 August and that feedback was then eventually given in October 2010. The Tribunal considered that the delay in notifying the Claimant about the outcome was therefore a matter of days. We did not consider that any significance could be attached to it in terms of the issues to be decided in this case.

103 The Tribunal also assessed this complaint by the Claimant in the context of the evidence that was available to us about the number of other people involved in making applications. Some twenty-seven people applied for the post of which five were short-listed and presumably interviewed for the post the Claimant was unsuccessful for. This did not take into account the interviews that were conducted in relation to the other post within the School as described by Professor Punchard above.

104 The Claimant's case about the 'something more' which should have led the Tribunal to infer race discrimination was that there were only two people in his department whose careers had not progressed and that both were BAME. One was himself and the other was a colleague who he identified on the first day of the hearing. The Tribunal however had no evidence whatsoever about the circumstances of his colleague which would have led the Tribunal to consider that this raised a sufficient inference that the burden of proof should shift to the Respondent. It was not even asserted that she had ever applied for any position.

105 The Tribunal also concluded in relation to the second issue – allegation 1.2.2 - that it was brought out of time. Even if it were right, which the Tribunal found it was not, that Professor Punchard had actively discouraged the Claimant from applying for the Field Leader's role on racial grounds and then acted to ensure that he was not appointed, the Tribunal considered that there was no basis for finding that this was a continuing act with the next set of allegations chronologically, which happened some five years later in May and November 2015.

106 In this context also, the Respondent was prejudiced in that they did not have a complete set of documents relating to the recruitment exercise and the witnesses were being asked about events which had occurred almost eight years ago having given accounts shortly after the events in reply to the grievance which was disposed of on appeal in June 2011.

107 Further, the Claimant advanced no good reason for not having pursued the matter at an Employment Tribunal within time or within a reasonable time of even the negative outcome of the appeal.

108 In Ms Chute's oral submissions, she contended that the Claimant's primary case in relation to the Tribunal's jurisdiction ("time points") was that he had been subjected to a continuing act of discrimination and that Professor Punchard started discriminating against him from the outset and that he "wanted nothing to do with him". The Tribunal considered that the way in which this was put even in closing exposed the difficulties that the Claimant's case involved. In his claim form and his witness statement it was apparent that the Claimant considered that Professor Punchard conducted himself as Dean in a different way to the previous Dean. However, there was very little by way of substantive evidence of Professor Punchard treating the Claimant less favourably on racial grounds, or evidence comparing the way in which Professor Punchard as opposed to the previous Dean dealt with various situations involving other people of a different race.

109 In seeking to establish that the Claimant had been the subject of continuing discrimination Ms Chute sought valiantly to stitch together events which had taken

place up to 2010 with the next set of incidents complained about which were in May 2015 onwards. She submitted that Professor Punchard was “always discriminating against the Claimant, sometimes more blatantly than others”. The Tribunal did not consider that this submission was sufficient to get the Claimant over the difficulty that he faced in terms of raising the possibility of there being a continuing act which covered the five-year gap.

110 The Tribunal reviewed the principles in the well-known cases of *Owusu, Cast v Croydon* and *Rovenska* and did not find that the essential elements identified in those cases were present to establish continuity in this case.

111 Ms Chute further relied on the case of *Hale v Brighton and Sussex University Hospitals NHS Trust* [UKEAT/0342/16]. This was a judgment of the Employment Appeal Tribunal delivered on 8 December 2017. The Tribunal considered that the facts in the *Hale* case were readily distinguishable from those in the current case. In that case the continuing act was said to cover a state of affairs, namely the institution of a disciplinary process leading to dismissal.

112 In the current case the Tribunal considered that the events certainly by mid-2010 and then as complained about from May 2015 onwards were a succession of unconnected or isolated specific acts as in the *Hendricks* case. The selection process was over and done with in the summer of 2010 and the appeal in respect of the grievance against that selection was also done and dusted by June 2011. Thereafter there was no further action complained of by the Respondent in relation to those actions until a further recruitment process in May 2015. The fact that there was a similar outcome in the sense that the Claimant was not successful does not, in the Tribunal’s view, amount to evidence of a continuing act. Taken to its logical conclusion the Claimant could in such circumstances make an application for a post, every five years, and then at the end of say a 15 or 20 year period if he were still unsuccessful, he could say that all those applications which were dealt with and concluded within a year or so at the most, including appeals against the outcome, were a continuing act and the claim was in time. The Tribunal did not accept this contention.

113 A further point which the Tribunal considered carried considerable weight in determining whether it was appropriate to extend time as between events up to 2010 and then the next complaint being alleged having occurred in May 2015, was that the five-year gap between substantive allegations was difficult to reconcile with the allegation of continuing discrimination.

114 The Tribunal also took into account in terms of considering whether issue 1.2.2 and indeed 1.2.1 were out of time and whether there were grounds for extending time, that the Claimant’s background of taking an interest in equality and diversity issues also led him to identify at the time of the events that there were racial discrimination issues as he perceived it. His failure to pursue the matter to the Tribunal therefore could not be said to be because he was not aware of any material circumstances which would lead him to believe that he had been the victim of race discrimination. Indeed, the statement that the Claimant prepared in support of his grievance which appears to be headed 14/12/10 at pp.719 and 720 referred under the section of the impact of the process on him, to the racial element.

*Issue 3 – application for Head of Bioscience post in May 2015*

115 The application for this post was said to have given rise to acts of direct race discrimination (issue 1.2.3); indirect race discrimination (issues 2.1.1, 2.2, 2.3 and 2.4); and victimisation under the Equality Act (issue 3.2.1).

116 The Claimant applied for the post of Head of Bioscience in May 2015 and he was told he had not been short-listed for it on 24 June 2015 (p791), about a year and a week prior to the filing of the claim form. No-one was appointed to the post. Three candidates were shortlisted – Drs Raynham, Bell and Arjona (p783) - by Professor Punchard, Wendy Drechsler and Professor Jan Domin (pp803 – 807).

117 The School had decided earlier in 2015 in consultation with HR to split the Field of Bioscience into two and advertise for an additional Head of Bioscience. The Head of Bioscience in post was Joanne Tocher, who had held the Field Leader responsibilities in 2010. Unlike the Field Leader role which the Claimant applied for in 2010, this role would have formal line management responsibility and would be classified as a management grade role within the Respondent's structures. Further, this was a substantive post as compared to the 2010 Field Leader role. There had been no intervening recruitment for that post.

118 It was not in dispute that the wording of the person specification for the role had been changed and placed an increased emphasis on line management experience as compared to the requirements of the Field Leader role which had previously been advertised. One of the essential criteria in the person specification which was used in the May 2015 recruitment exercise stated at page 761:

*“Demonstrable experience of line management and leadership of a team of Bioscience staff, as a substantial part of their role, ideally gained within the UK, or a compatible education system.”*

119 This time round, although the Claimant met with Professor Punchard on 29 May 2015 to discuss his application for the role (pp765 & 832), he complained in these proceedings that Professor Punchard had discouraged him from applying for the post as an act of direct race discrimination (allegation 1.2.3(i)).

120 Both Dr Morgan and his witness Dr Robinson confirmed that it was appropriate, if a person asked their line manager about applying for a role, for that manager to give candid feedback about the candidate's prospects in respect of the advertised post. This was also consistent with the Respondent's relevant policy document of the Respondent (p.64). The Tribunal accepted the explanation that the purpose of this was not to waste people's time in completing what are at this level very detailed applications for a post if they did not meet the criteria. Since September 2013, Mr Irfaan Arif was the Respondent's Equality and Diversity Manager, located in the Human Resources Department. In his witness statement his evidence on this issue was to the effect that in his view it was for a candidate to decide if they met the criteria. The Tribunal considered that the evidence of Dr Morgan and Dr Robinson and indeed of the Respondent's other witnesses was more credible on this issue. Whilst of course a candidate must take a view about whether they meet the criteria or not, it clearly makes sense if the line manager is aware that they clearly do not or are unlikely to be



seen as having met the criteria, to raise this with their member of staff prior to the lengthy exercise being undertaken of preparing a careful application.

121 In relation to this application it was not disputed by the Respondent that Professor Punchard told Dr Morgan that he did not consider that Dr Morgan met the essential criterion in relation to line management.

122 In assessing the evidence on this issue, the Tribunal helpfully had access to a draft letter which the Claimant had prepared reasonably contemporaneously, addressed to Wendy Cartwright of Human Resources (p.814a) but which he confirmed he had not actually sent. It appeared to have been prepared on 1 June 2015, judging by the metadata.

123 There was some disagreement about some of the content of that document but in relation to the first part, namely about whether the Claimant met the essential criteria the Tribunal did not consider that there was any major dispute. Further, in his oral evidence to the Tribunal, the Claimant confirmed that his position was that he only partially met the essential criteria in the May 2015 exercise. He gave this evidence when asked by the Tribunal about his view of what was stated by Professor Norah Colton, Deputy Vice Chancellor (Academic) in an email sent to him and copied to John Joughin (Vice Chancellor) on 24 July 2015 (p.835).

124 The further area of dispute was about Dr Morgan's case that when he asked Professor Punchard how he could achieve progression if he was not in a position to exercise line management responsibilities in his current post, Professor Punchard told him that the only way he could see him ever being promoted was if there was an Associate Dean's role in E & D (Equality and Diversity) (allegation 1.2.3(ii)). The implication of this complaint was that Professor Punchard imposed stereotypical limitations on his expectations of the Claimant.

125 The Tribunal considered that Dr Morgan's draft letter gave a broader context to the bare allegation that was set out in paragraph 169 of his witness statement. It made it clear, consistent with the account in Professor Punchard's witness statement (para 93), that there was a wider discussion about what opportunities there might be for the Claimant to progress. They both accepted that there was a discussion about the way in which another academic colleague had progressed but that it was then agreed that that was not likely to be of assistance to the Claimant. The Tribunal did not draw from that however that Professor Punchard's reference to this other colleague was somehow ill-intentioned. The suggestion came up as part of an open discussion about how there might be opportunities for advancement by the Claimant.

126 The Claimant then went on to say in his contemporaneous record (p814A) that there was a further suggestion about an Associate Dean's role at the Respondent becoming available. He also explained in his contemporaneous note that Professor Punchard had suggested this because as he stated such a role would not require line management experience.

127 The Tribunal considered that this note put a very different context on the reference to possible advancement by way of an Equality and Diversity post, and that it was clear that Professor Punchard was seeking as he says in his witness statement to

be positive and to try to consider with the Claimant whether there were indeed any other ways in which he could develop his career without being able to exercise line management responsibility in his current post. The Tribunal also accepted Professor Punchard's evidence on this because it was not disputed that there were very limited progression opportunities at that time for a member of the academic staff which did not involve line management responsibility.

128 Further, we noted that Professor Punchard told the Claimant that he would probably be retiring soon and that a new Dean may want different things for the School; that universities regularly change school management structures; and that either of these situations may generate new opportunities for him. The Tribunal has already noted in the context of the background complaint that in about 2009 the Claimant was not invited to attend SMT meetings at Professor Punchard's direction, that the new Vice Chancellor in 2009 had changed some of the management structures. So, on the balance of probabilities, the Tribunal accepted that evidence from Professor Punchard.

129 The Claimant did not suggest that there was some other course to progression which Professor Punchard should have directed him to. Thus, it appeared to the Tribunal that Professor Punchard was indeed setting out the correct position to the Claimant and being frank with him about his potential prospects if he applied for the post.

130 The Claimant relied on Dr Raynham as a comparator in relation to the May 2015 job application (para 1.3 LOI), although he was not specific about which aspect he was relevant to. He was one of three shortlisted candidates and was an internal candidate.

131 There was no attempt to put any evidence before the Tribunal that Dr Raynham should not have been short-listed. When the Tribunal looked at his scores he appeared to have been scored at a similar level across the criteria by the three shortlisters. The Tribunal has already referred to the fact that the short-listing was done independently.

132 The Tribunal noted that at paragraph 180 of his witness statement the Claimant elaborated that at the time of his application, Dr Raynham was a Lecturer at UEL and that as a result he did not have line management written into his contract. The Claimant says that in contrast that was held against him.

133 The Tribunal looked at the application form for the post submitted by Dr Raynham (pp.823-830). Helpfully the format of application form that the Respondent used at that point contained a number of boxes each of which was relevant to one of the criteria. It also stated whether the criterion being set out was an essential or desirable criterion. The criterion in dispute which was the subject of the discussion was criterion 3 and was an essential criterion. It was in the following terms:

*“demonstrable experience of line management and leadership of a team of Bioscience staff, as a substantial part of their role, ideally gained within the UK, or a compatible education system.”*

134 In this box Dr Raynham referred to his time as Head of the Medicinal Chemistry and Structural Biology Department at Cancer Research Technology where he was responsible for the strategy and management of the portfolio of projects performed within the Discovery Laboratories. He then described his responsibility as founder and leader of the department of approximately 35 scientists. As well as providing expert scientific leadership he listed that he was responsible for setting goals and planning resources; recruitment and career development of all members of the department; for installation of state of the art technologies and informatics to ensure optimal productivity, health and safety, and establishing and managing the budget.

135 He also described that as Associate Director, in another post namely Oncology Discovery Chemistry at Millennium Pharmaceuticals R & D Ltd, he built an efficient, motivated and successful Oncology Discovery Chemistry Department of over 40 chemists based upon the core talent of Cambridge Discovery Chemistry.

136 It was possible to deduce from the information on the application form that the candidate was talking about his experience over 10 years from 2004 to 2014 in the Medicinal Chemistry and Structural Biology Department; and before that three years' experience as Associate Director between 2000-2003. The Tribunal noted that he did not pray in aid in this context his experience for a year as Head of Department in Cambridge Discovery Chemistry.

137 On the basis of this evidence which was before the short-listing panel, the Tribunal considered that they had good grounds for short-listing Dr Raynham on the basis that he met the essential criteria.

138 The Tribunal also noted that the scores given by the three members of the panel in respect of this criterion were a 1 by Wendy Drechsler and 2 by each of Professor Domin and Professor Punchard. It appeared that the maximum score that could be given in respect of each criterion was a 3. A zero was awarded under this system where the shortlister believed that the candidate had not met the criterion.

139 In the comparable section of the Claimant's application form (p.770) he acknowledged that he found himself performing the role of: "*a de facto line manager on many occasions*". He did not therefore purport to have been a substantive line manager.

140 In relation to the sorts of decision someone with line management responsibility might have to deal with he for example acknowledged that he realised that there would be times if he were in that role, when he may have to take disciplinary action. There was no suggestion that he had so far been in a position where he had had to take those sorts of decisions or make decisions about disciplinary action.

141 The Claimant also implied that the prospect of an Equality and Diversity Associate Dean role was somehow a stereotype given that he was of Black Caribbean ethnic origin. The Tribunal noted that equality and diversity can embrace a wide range of matters and on his own case, the Claimant had taken a strong interest in this issue. The Tribunal also noted that the Chair of the School's Equality and Diversity Committee as set out above in 2010 was not from an ethnic minority.

142 In all the circumstances therefore, the Tribunal did not consider that the criticism of Professor Punchard's suggestion of advancement by way of an E & D Associate Dean role was either unfavourable or detrimental treatment of the Claimant, or that there was any adequate evidential basis for saying that the suggestion was made on racial grounds.

143 For the avoidance of doubt the Tribunal found that Professor Punchard gave frank feedback to the Claimant about his prospects of success given that he did not meet fully one of the essential criteria for the position and that his reasons for doing this were completely unrelated to the Claimant's race or ethnic origin. The allegation at 1.2.3(i) therefore of the list of issues was not well founded and was dismissed.

144 Further allegation 1.2.3(ii) was also not well founded in that whilst it was accepted that in general terms Professor Punchard had told the Claimant that there might be an opportunity for his progression by way of an Associate Dean position responsible for equality and diversity, this was said with a view to encouraging the Claimant given the very limited options for progression beyond the role of a Principal Lecturer within this Respondent. The Tribunal therefore did not consider that there was detrimental treatment of the Claimant by Professor Punchard which was in any way related to the Claimant's race. This allegation also was not well founded and was dismissed.

145 The final direct race discrimination allegation (allegation 1.2.3(iii)) in relation to the May 2015 recruitment was that Professor Punchard had not short-listed the Claimant for the post of Head of Bioscience using the online short-listing software (vacancy management). The undisputed evidence was that the vacancy management software allowed shortlisting to be done remotely and independently by the shortlisters. This allegation appeared to be based on the fact that no scores were recorded against Professor Punchard's name on the shortlisting returns (especially at pp805 -807), but there are scores recorded against the name of Dr Stella Cottrell. At the time Dr Cottrell was Pro-Vice-Chancellor, Learning, Teaching and Student Engagement within the Respondent.

146 The Tribunal accepted the Respondent's case about this apparent discrepancy. There was a contemporaneous email chain which confirmed that it was indeed Professor Punchard who carried out the short-listing with the other two panel members and not Stella Cottrell (pp 783 - 786) and the scores apparently attributed to Dr Cottrell were those entered into the system by Professor Punchard.

147 The external member of the recruitment panel was Professor Domin who was from the University of Bedfordshire. He was Acting Executive Dean of the Faculty of Creative Arts, Technologies and Science of the University of Bedfordshire at the time of the interview.

148 Given the way the Claimant had put his case, namely that effectively Professor Punchard had stymied his progress at every turn, the Tribunal considered it was appropriate to assess Professor Domin's assessment of the Claimant's application, and whether there were any good grounds for concluding that he had not reached his views on the merits of the Claimant's application independently.

149 Based on his evidence and that of Professor Punchard, the Tribunal was satisfied that the short-listing was carried out independently and that Professor Domin also reached the view of his own accord that the Claimant had not met the relevant short-listing essential criterion. The Tribunal considered that there was no reason to treat Professor Domin as other than an independent academic. The fact that he reached the same view as Professor Punchard and Wendy Drechsler did in this exercise confirmed the validity of Professor Punchard's judgment also. Finally, in this context, the fact that the Claimant himself accepted that he did not fully meet the line management criterion, tended to support the decisions of the shortlisting panel in May/June 2015. Given that the Claimant therefore was validly not short-listed because he did not meet an essential criterion, the Tribunal did not consider that there were any grounds for alleging that the failure to short-list him was on racial grounds.

150 The Tribunal briefly reviewed the short-listing summary forms (pp.805-807) of the eight candidates including the Claimant. Of these five did not survive the short-listing process. The Tribunal noted that all the candidates were described as "Doctor" so, on the face of it, had at least equivalent academic qualification to the Claimant, apart from Professor Khan who was ostensibly more highly qualified. We had no evidence about the ethnicity of the other unsuccessful candidates. Of the five rejected candidates, two others did not meet the essential criterion in relation to line management and they were Dr Buckley and Dr Demonacos. In short, the Tribunal did not consider that there was an adequate factual basis to support an allegation that the failure to short-list the Claimant was related to the protected characteristic of race.

151 The Tribunal also wished to record that there was no positive case put to Professor Domin that he was influenced by Professor Punchard in any way in making his judgment as to whether the Claimant met the essential criteria.

152 Allegation 1.2.3(iii) therefore was not well founded and was dismissed.

153 The Tribunal then moved on to consider the indirect race discrimination and victimisation complaints relating to the May 2015 application.

154 In her closing submissions Ms Tuck referred to the case of *Homer v Chief Constable of West Yorkshire Police* [2012] IRLR 601 and to paragraphs 19 and 20 in particular on the issue of justification. In particular she drew the Tribunal's attention to the sentence of the judgment in which it was stated that the PCP is a proportionate means of achieving a legitimate aim. She also emphasised the comment in paragraph 20 of the judgment that: "... it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement." It was, she submitted, an objective test for the Employment Tribunal. This was accepted.

155 In relation to victimisation she relied on the case of *Chief Constable of Greater Manchester Police v Bailey* [2017] EWCA Civ. 425 which confirmed that the "reason why" is the applicable test. In this context also therefore, the Claimant must show more than simply the fact of having suffered a detriment and of having done the protected act.

156 The allegations in paragraphs 2.1.1 and 3.2.1 of the list of issues respectively alleged indirect race discrimination and victimisation in relation to the wording of the essential criterion in the person specification which was used in the May 2015 recruitment exercise. This stated at page 761:

*“Demonstrable experience of line management and leadership of a team of Bioscience staff, as a substantial part of their role, ideally gained within the UK, or a compatible education system.”*

157 During the 2010 Field Leader recruitment exercise, the comparable essential criterion had been expressed as follows (p.601):

*“Demonstrable experience of management and/or leadership of a team of staff gained in an actual, supporting or acting capacity”.*

158 In relation to a different recruitment exercise for a Principal Lecturer with the additional role of leading the field of Professional Health Science in the same School, the Tribunal’s attention was drawn to the fact that one of the essential criteria in the person specification required (p.602F) *“Experience of team management and leadership”*.

159 Finally, in respect of the Field Leader role which was eventually filled by Marcia Wilson in 2010 (p.602L) the relevant essential criterion required: *“Experience of management and leadership of a team of sport scientists, coaches etc”*.

160 The Respondent did not dispute that the May 2015 criterion was in the terms set out above, or that the other posts had the criteria in the terms set out above. In the list of issues at paragraph 2.1.1 it was said the Professor Punchard had inserted a new criterion: *“line management in their current role”*. Although the wording was not accurately quoted in the list of issues, the Tribunal addressed the underlying complaint.

161 There was no dispute that this constituted a provision, criterion or practice (“PCP”). The next question was whether the application of the PCP put other BAME applicants at a particular disadvantage when compared with persons who did not have this protected characteristic.

162 It was not disputed that the job was advertised in such a way that anyone from any part of the world could apply for it. The Tribunal was presented with national statistics as to the ethnicity of staff within the higher education sector in the United Kingdom and Dr Morgan agreed during cross-examination that the Respondent is in fact much more diverse than the sector generally.

163 The Tribunal noted also in paragraph 153 of Ms Chute’s submission that she put the group of people who it was said would be put to a particular disadvantage in a different way from the way in which it had been pleaded in the list of issues and in the claim form. Thus, she extended it beyond BAME to BAME and black applicants. The Tribunal did not consider that it was appropriate to change the way the case was considered by reason of a change at the closing submission stage, and we considered that it would not be fair to the Respondent to decide the case on that different basis.

164 The Tribunal accepted the Respondent's submission that the Claimant had failed to show any particular disadvantage in relation to BAME applicants by the imposition of this requirement.

165 In the circumstances therefore, we were satisfied that the Claimant had failed to meet one of the essential prerequisites for establishing an indirect discrimination complaint.

166 For the sake of completeness, the Tribunal also addressed the other questions which were about whether the Claimant shared that disadvantage. The Tribunal found that the Claimant did indeed have that disadvantage because he did not have line management experience in his role. The Tribunal heard evidence that the trade unions within the Respondent had been very resistant to having lecturers at the Claimant's grade (Principal Lecturers) having management responsibilities as part of their job descriptions. This was in contrast, the Tribunal heard, to the position in other higher education institutions. This was also relevant to the question we considered above because black and minority ethnic lecturers in other institutions would have had the relevant line management experience and therefore would not be disadvantaged as the Claimant was.

167 Further, in deciding this issue the Tribunal had regard to the references to management being undertaken by a Principal Lecturer both in the evidence of the Claimant and in the notes of one of the meetings which the Claimant attended. It was said by the Respondent that the note of what was said about Principal Lecturers having line management responsibilities was inaccurate. The only evidence that the Tribunal had of Dr Morgan carrying out line management responsibilities was the reference to his having completed five SDRs for members of his team. The Tribunal did not consider that there was sufficient evidence of the Claimant actually exercising substantive line management responsibilities which could have for instance put him in the position of correcting misconduct and discussing matters such as sickness absence and other substantive aspects of line management. The scope of what the Claimant described appeared to the Tribunal to be more accurately characterised as having some supervisory duties and also taking a leadership role in an academic context.

168 Also for the sake of completeness, the Tribunal looked at the justification argument. The explanation provided by the Respondent as to why they wanted to recruit someone with specific line management experience was set out in Professor Punchard's witness statement (para 84). His evidence was partially corroborated by the evidence of Mr Robinson who gave evidence on behalf of the Claimant and who at the time had been involved in Human Resources teaching. He confirmed that he knew of the review that Professor Punchard described and of staff being unhappy. He had no basis on which to take issue with the description in Professor Punchard's evidence of the facts and matters relied on by the Respondent as the reason for the legitimate aim.

169 It also appeared to the Tribunal that it was a proportionate way of achieving that aim by seeking to recruit someone who had experience in line management in order to address the issues which were causing concern and that making it an essential criterion in the person specification was an appropriate way of recruiting such a person.

170 The Tribunal also had regard in thinking about this issue to the evidence which was not disputed by Professor Punchard that in other academic institutions someone at the level of Principal Lecturer would have had line management experience anyway.

171 In all the circumstances therefore primarily for the reason that the Claimant had not established that there was particular disadvantage to BAME candidates by the imposition of the essential criterion in relation to line management experience, the claim was not well-founded and was dismissed. Moreover, even if that were wrong the Tribunal concluded that the Respondent's argument as to justification would have succeeded.

172 The Claimant also claimed that the wording of the person specification for the May 2015 job was victimisation (allegations 3.2.1 & 3.2.3). The protected act relied upon in relation to this detriment is the grievance which the Claimant raised in 2010 (para 3.1.1 of the LOI). It was not in dispute that the grievance constituted a protected act.

173 The Tribunal did not consider that it was likely that the line management requirement was put in the person specification because of Dr Morgan's grievance five years previously. The Tribunal notes in this context that there was no evidence of any other disadvantageous action being taken against the Claimant between 2010 and 2015. It was therefore on the balance of probabilities unlikely especially given the cogency of Professor Punchard's explanation as to why he sought this experience.

174 In all the circumstances, the claim of victimisation in para 3.2.1 of the LOI did not succeed on the basis that there was insufficient evidence of causation.

175 The Tribunal noted in this context that one of the Claimant's complaints particularly in the hearing and in closing submissions was that the Respondent had not taken action to develop his management experience. The Tribunal accepted Professor Punchard's evidence that there were limited opportunities given the restrictions on the roles of Principal Lecturer which was the Claimant's substantive post, and given that this evidence was not contradicted by the Claimant apart from his argument that he was in fact exercising management responsibilities.

176 The Tribunal also had evidence about the Claimant along with other members of staff being sent on a course in 2010 which was meant to develop their leadership skills (pp.609-611). The Learning and Development Manager wrote to Professor Punchard on 31 August 2010 (p.611) in the following terms:

*"The leadership development centres have now been running for two years and have largely been met with a very positive response to leadership and career development by participants and their managers.*

*I have substantial data on reaction to the development centre by the participants as well as some data on role/career changes for some individuals."*

177 On 19 August 2010, the same Manager, Ms Warwick, had written to all those who had recently attended the course which included the Claimant to remind them that



the post development centre attendance meetings with their managers and Ms Warwick were now outstanding and asking the participants to arrange the relevant meeting through their admin support. Dr Morgan forwarded the email to Professor Rowley and wrote to Ms Warwick on 20 August 2010 to indicate that he had sent the email to Professor Rowley and that he should contact Ms Warwick to arrange dates.

178 The Tribunal noted that in Ms Warwick's email to the Claimant and others she had said that the administrative support would need to contact her directly to fix a date. The correspondence then came to the attention of Professor Punchard when Ms Warwick wrote to him by a further email on 21 August 2010 and she commented:

*"FYI ... he should be arranging this and not the other way round.*

*How do you want to proceed as you wanted to have this meeting with him."*

179 Professor Punchard responded to Ms Warwick by saying that she should stick to the principle that Dr Morgan should organise the meeting. He stated: *"It is important that we do not treat him any differently to anyone else"*.

180 The Tribunal heard evidence at the hearing about this which we accepted as credible on the balance of probabilities. The Claimant did not contradict the evidence that it was part that it was part of the purpose of the course that the participants should be encouraged to show initiative and that one of the ways in which this was to be demonstrated was by taking charge of arranging for the meeting to take place. The Tribunal also noted that Professor Punchard indicated in his reply to Ms Warwick that the Claimant was not being treated any differently to anyone else. That also undermined any suggestion that he was being treated disadvantageously. In relation to the general point about the Claimant not being encouraged or not being given the opportunities to gain line management experience the Tribunal considered that this was an example of an occasion where within the constraints of the Respondent's organisation, he had apparently failed to pursue an opportunity to develop in this respect and passed the matter up the line for someone else to deal with.

181 The final complaint about the May 2015 recruitment exercise was a complaint of victimisation (para 3.2.3. of LOI). The Tribunal considered that although it was worded differently this was essentially repetition of the direct discrimination allegation in the various respects set out under allegation 1.2.3. The Tribunal considered that the findings of fact above in that context applied to this complaint also.

182 However, the Tribunal for very much the same reasons as the direct race discrimination allegation was rejected, also found that there was no proper reason to conclude that the reason why Professor Punchard interpreted the criteria adopted by not short-listing the Claimant in May 2015 was because of the Claimant having made the earlier protected act of the grievance in 2010. The Tribunal has already referred to this in relation to dismissing the allegation 3.2.1.

183 In all the circumstances therefore, the allegation in para 3.2.3 of the LOI was not well founded and was dismissed.

*Issue 3 - November 2015 application*

184 After the Claimant was informed that he was not successful sometime in June 2015 he wrote to among other people, Mr John Joughin the Vice Chancellor at the time (p.839). Indeed, this correspondence was the second protected act relied upon by the Claimant in support of his victimisation complaint about the November 2015 recruitment exercise. The Claimant had written to Professor Joughin previously after he was informed he was unsuccessful in June 2015 but it was in his formal grievance (p.839-842) sent on 25 August 2015 that the Claimant alleged discrimination against him. The Respondent did not dispute that the formal complaint of 25 August 2015 constituted a protected act.

185 The Respondent gave responsibility for dealing with this issue to Mr Feroze Amroliwala who was at the time Deputy Vice Chancellor and Chief Operating Officer of the University. He joined the University in 2011 as Pro-Vice Chancellor (Services and Infrastructure). At that time the role involved managing and overseeing the running of Facilities Services, HR Services, Library and Learning Services, IT Services and the Mentoring and Equalities Unit. Mr Amroliwala had a diverse and varied work background. The Tribunal considered that given his responsibilities within the Respondent, it was appropriate to have allocated responsibility for dealing with this complaint to him. Allocating this task to him also indicated that it was being taken seriously by the Respondent as it was dealt with by a very senior member of the management.

186 The next complaint chronologically was the allegation of victimisation at para 3.2.2 of the list of issues in relation to the November 2015 recruitment exercise. As there had not been a successful candidate from the recruitment exercise in the summer the job was re-advertised and the Claimant complained that the redrafting of the job person specification and the setting of the questions for the interview panel and Professor Punchard's interaction with and influence on the selection panel constituted victimisation.

187 In the claim form, Dr Morgan indicated that he was complaining about the actions of Professor Punchard which, he alleged: "*ensured that another internal candidate previously employed at a grade several levels below me, with far less experience and white was appointed in February 2016*".

188 It was fair to say that, despite that formulation, from the time the list of issues was agreed at the end of 2016, the way in which the case was put about the recruitment process in November 2015 was very much focused on the original decision and not on the subsequent appointment of Mr Guiliano in February 2016. He was referred to as a comparator – para 1.3 of list of issues. There were no substantive issues identified about the appointment of Mr Guiliano in February 2016, as part of the direct discrimination complaint at paragraph 1.2.4.

189 The Tribunal considered that given the way the issues had been formulated and given the time which had elapsed since they had been formulated it would be unduly prejudicial to the Respondent to require them to answer a case which was not effectively pursued between December 2016 and towards the end of the hearing.

190 The Tribunal considered the course of events about which the allegations were made and which very much placed Professor Punchard at the centre. In particular we assessed the evidence about why the job specification was changed for the November 2015 recruitment exercise. The Tribunal took into account the evidence already referred to above that Professor Punchard was in any event approaching the end of his academic career with the Respondent.

191 Further, as was corroborated by contemporaneous documentation, very shortly after his lack of success in the May 2015 recruitment exercise the Claimant was in direct contact at his own instigation with the Vice Chancellor and Deputy Vice Chancellors such as Ms Colton. The Tribunal considered that the contemporaneous documentation demonstrated that the Vice Chancellor took ownership of the investigation into Dr Morgan's complaint and of the way in which the matter would be dealt with by asking Mr Amroliwala, who was also a more senior member of the management than Professor Punchard, to deal with matters. It was also apparent that they liaised directly with Human Resources, and did not go through Professor Punchard. In short it appeared to the Tribunal that after the complaint about the May 2015 recruitment exercise managers other than Professor Punchard determined how the next recruitment exercise was dealt with.

192 The Tribunal also considered that it was apparent from the contemporaneous correspondence that the Respondent tried to address the Claimant's expressed concerns by attempting to do what they could properly to facilitate his career development. They believed that they were acting in his best interests by doing so, and removing any potential scope for race discrimination against him.

193 Specifically, there was no evidence whatsoever that Professor Punchard was instrumental in the alteration of the person specification as alleged in para 1.2.4(ii) of the LOI. The formulation of the management related criterion that appeared in the November 2015 advertisement was: "*criterion 7 "ability to line-manage academic and support staff"*". This was one of four essential criteria.

194 An email which illustrates the Tribunal's finding about more senior managers than Professor Punchard being involved in decisions which would normally have been dealt with by the Dean, was the email correspondence between the Claimant and Nora Colton copied to John Joughin of 24 July 2015 (p.835) and the response from Ms Colton.

195 In her response, which was on the same date, she stated among other matters that she had:

*"now worked in conjunction with the Dean and HR on reviewing the post and also the application. This post will be re-advertised and recruited to. I hope you will take the time to consider applying again once you have had a chance to review the criteria and role."*

196 There was a letter in similar terms from John Joughin to the Claimant on 8 July 2015 (p.836). After this correspondence as described above, Mr Amroliwala became involved and conducted some discussions with the Claimant about how matters could be resolved.

197 In relation to the Claimant's suggestion that it was Professor Punchard who altered the language the Tribunal considers that it is unlikely that he would have influenced Professor Joughin the Vice Chancellor and the other people involved to make a decision which was unjustifiable in relation to the requirements of the job. No allegation was made against Professor Joughin.

198 It was agreed that the person specification was changed in the way set out above. There was no evidence advanced by the Claimant which suggested that the reason for the change was detrimental treatment of him because of his race. This was said to be a direct discrimination allegation (para 1.2.4(ii) of the list of issues). It was also said to be a victimisation complaint (para 3.2.2).

199 The Tribunal rejected both these contentions. There was no adequate evidential basis for finding that he had been treated detrimentally by the change to the person specification.

200 On the contrary, the Tribunal noted that at paragraph 200 of his witness statement the Claimant described that Professor Joughin told him that he considered that the Claimant ought to have been interviewed on the previous occasion (May 2015) and that the Respondent now seemed to be saying that the change to the person specification would make it easier for him to be short-listed and appointed. At paragraph 201 he clarified that when he first raised his grievance he had not asked the Respondent to change the May 2015 person specification and that all he was asking was that he be fairly judged against it.

201 It was implicit in the Claimant's case in relation to this that he also accepted that the change of the description in the person specification was making it easier for him to meet that requirement, albeit it was not at his request. The Tribunal therefore struggled to see how it can be said to have been a change which would disadvantage him. He could argue that if the threshold was lowered that he could have ended up with more competition but it did not appear to the Tribunal that this was consistent with an allegation of race discrimination that the Claimant was saying that he could see that the Respondent had actually tried to alter the job specification to make it easier for him to pass a threshold.

202 On the basis that there was no evidence that the Tribunal could properly rely on to establish that Professor Punchard was responsible for changing the specification for the post and also on the basis that it was clear that such changes to the specification that had been made in relation to line management were clearly intended to make it easier for the Claimant to be positively judged against that criterion, the Tribunal rejected the allegation of direct race discrimination at 1.2.4(ii).

203 The similar complaint in relation to victimisation at 3.2.2 was also rejected on the same basis.

204 Finally, in relation to the complaint about the change to the person specification in the November 2015 recruitment, Ms Tuck submitted with some force in the Tribunal's view, that the Claimant was in effect complaining that the Respondent had removed a criterion which he had maintained was indirectly discriminatory and an act

of victimisation when it was part of the May 2015 recruitment. The Tribunal considered that this was yet another reason for rejecting the Claimant's complaint about the adjustment to the description as something that was detrimental, let alone unlawful.

205 The next issue complained about by the Claimant in relation to the November 2015 recruitment was in relation to the panel composition. This was said to be an act of direct race discrimination in allegation 1.2.4(vii). The way that the case was put as an act of direct race discrimination suggested that the composition of the interview panel was changed. There was no evidence that there was another interview panel for the November 2015 recruitment which was then changed.

206 The Respondent accepted that the Chair of the panel Ms Patricia Tuitt was to be the external member of the panel. It appeared to the Tribunal that this was an error in terms of the composition of the panel because under the relevant policy documents the purpose of an external panel member was to have a panel member who had experience and knowledge of the area to which the employee or the candidate was being recruited. Ms Tuitt was a legal academic.

207 The Claimant had no information about how she came to be recruited. The only information about this came from the Respondent and Professor Punchard and from Professor Tuitt's witness statement. Although she did not give oral evidence, in her witness statement she confirmed what Professor Punchard stated which was that she was contacted by Professor Joughin to chair the recruitment panel and that she was thereafter involved in both the short-listing and interviews for the post. She described that she had previously sat as an external panel member on a number of recruitment panels at the Respondent in which the Vice Chancellor, Professor Joughin or the Deputy Vice Chancellor Nora Colton had acted as Chair. She indicated that she suspected that this was why she was asked to chair the recruitment panel for Head of Bioscience's post. She indicated that she was not aware that Dr Morgan had made a complaint about the previous recruitment process. Nor was she aware that the person specification had been amended from the previous recruitment round. She was simply aware that the post had been previously advertised for and that no appointment had been made.

208 The Tribunal can only determine matters on the balance of probabilities. The Claimant's case is not based on any evidence but he has speculated about what Professor Punchard may or may not have done.

209 Given the absence of any evidence which contradicted that of Professor Tuitt, the Tribunal considered that it was appropriate on the balance of probabilities to accept her evidence about how she came to be on the interview panel.

210 The Tribunal also considered that it was likely given that the Claimant had complained about being the subject of race discrimination earlier that year that the Respondent would take steps to try to avoid circumstances which might lead to a recurrence of that perception and indeed to avoid actual discrimination in the recruitment process. Thus, they included on the interview panel Mr Arif the Equality and Diversity Manager. No complaint was made about his presence on the panel. In this context, the Tribunal considered that it was probably relevant that as well as being a very senior academic and university manager in her own right, Professor Tuitt was also Black.

211 As Mr Amroliwala expressed it in his oral evidence, he and Ms Colton felt that the Respondent needed to strengthen the constitution of the panel to demonstrate to Dr Morgan and to the Respondent that they were taking steps to ensure fairness and equality. He confirmed that it was Professor Joughin who contacted and selected Professor Tuitt as chair of the panel. He also confirmed that Mr Arif's presence on the panel was not normal.

212 The Tribunal considered that the Respondent was acting to try to avoid difficulties. The mere presence of course of a black person as Chair of the panel does not mean that discrimination is avoided but equally the appointment of an appropriately qualified member of the panel who can be expected to exercise appropriate judgment in the selection of a candidate is, the Tribunal considered, a positive step and not one which is normally consistent with discrimination.

213 The Tribunal also noted that the Claimant criticised the Respondent for having Professor Punchard on the selection panel. At the time that the post was being recruited to, Professor Punchard remained the Dean of the School and under the recruitment procedures it was a requirement, given the seniority of the post being selected for, that the Dean should be on the panel. The Tribunal therefore considered that there was some inconsistency with the Claimant's position on this.

214 The Tribunal also noted there was no objection by the Claimant to the constitution of the panel beforehand. Once again not least because there was no evidence to contradict it, the Tribunal accepted Professor Punchard's evidence that he had lined up external panel members in the relevant subject area but was told that Professor Joughin had already sourced an external panel member. The Tribunal considered that this was another example of the process actually being run above Professor Punchard's grade even though he was still involved in some parts of the recruitment process. His role did not appear to have been determinative or decisive.

215 The other unusual element of the November 2015 recruitment was the presence of Professor Turner. The facts found here overlap with consideration of the allegations that

215.1 the Claimant was victimised by the setting of questions for the interview panel and Professor Punchard's interaction with and influence on the selection panel: para 3.22 of the LOI.

215.2 The Claimant was directly discriminated against by Professor Punchard setting or influencing the setting of the questions to be asked at interview, so as to disadvantage the Claimant: para 1.2.4(iii) of the LOI.

215.3 The Claimant was indirectly discriminated against on grounds of race 'by the application of the PCP of requiring a recent high impact factor publication and a high-index': para 2.1.2.

216 Professor Turner's role at about this time required him to attend all recruitment exercises for posts at this level and above pursuant to an instruction from Professor Colton as Deputy Vice Chancellor (Academic). This was confirmed by an email (p.845)

sent on 18 September 2015 to “all”. Essentially, she suggested that all the relevant departments should start adding to selection panels, their REF co-ordinator or R & KE Leader or a Professor in the subject area that they were hiring to, to ensure that they gave a sufficiently high profile to the research record of members of staff who were being recruited. She stated that the objective was to get not only good teachers but also researchers on all recruitment exercises. There was no dispute that Professor Turner held the relevant research standards brief for this School. The Tribunal considered therefore that there was nothing sinister about Professor Turner’s presence on the panel and indeed it was expressly said by or on behalf of the Claimant that he did not criticise Professor Turner’s presence on the panel.

217 Finally, it was said in relation to the direct discrimination allegation that all the elements set out in 1.2.4(vii) gave Professor Punchard more power during the appointment process. The Tribunal refers to its findings below about the interview process.

218 The Tribunal made findings about just how the person specification came to be changed. The Tribunal heard evidence from Alison McGrand who was Head of HR Services at the Respondent at the relevant time. She described how she took ownership for the reviewing and amending of the person specification and job description for the November 2015 role. She stated expressly (para 26 of her witness statement):

*“The reason for making the amendments was also partly so that Winston would be more likely to meet the essential criteria for the role and therefore be more likely to be short-listed for the role.”*

She also stated that the primary reason was to widen the pool of potential applicants. The Tribunal noted that the previous recruitment exercise had only led to three candidates being short-listed and that none of them had been successful.

219 Certainly, the contemporaneous correspondence and discussions with the Claimant confirm that the Respondent’s senior managers encouraged the Claimant to re-apply for the position, after his complaint about the May 2015 process. All these circumstances made it highly unlikely that the Respondent took action against the Claimant in relation to the amendment of the person specification either with a view to disadvantage him or as an act of direct race discrimination or victimisation: paras 1.2.4(ii), 1.2.4(vi) and 3.2.2 of the LOI. As stated above the Tribunal was satisfied that it was not disadvantageous to the Claimant. This was an inevitable finding, not least because of the terms of para 1.2.4(vi) of the LOI in which he alleged as an act of direct race discrimination that the Respondent had made unwarranted changes to the person specification to “make it easier for the Claimant to apply”.

220 Those complaints in paras 1.2.4(ii), 1.2.4(vi) and 3.2.2 of the LOI were not well founded and were dismissed.

221 The Tribunal next looked at the selection process and how it operated, against the further allegations made by the Claimant. Allegation 1.2.4(iii) alleged that Professor Punchard set or influenced the setting of the questions to be asked at the interview so as to disadvantage the Claimant. This was said to be an act of direct race discrimination.

222 The contemporaneous evidence and the evidence of Professor Punchard and Professor Turner confirmed that Professor Punchard was not solely responsible for the setting of the questions and indeed he delegated to Professor Turner the setting of the questions which were directed to the research element.

223 At the commencement of the hearing, it was represented to the Tribunal that the questions which were asked at the interview were set out in a document in the bundle (pps 975-976). Towards the end of the hearing, the Claimant produced what was later agreed to be contemporaneous evidence about the questions asked. The content differed in some respects. However, the Tribunal considered that the failure by the Claimant to have conducted the search earlier was extremely regrettable. These documents did not appear until the very end of the hearing. The Tribunal reminded the parties of the importance of conducting proper discovery. It however also indicated that the Claimant had commenced the hearing making allegations about the interview questions without having sufficiently checked that the questions were that were asked.

224 Up to the point when the further document arrived, the Claimant had launched cross-examination on the basis of a comparison of the questions in the November 2015 exercise with those which were prepared for the June 2015 exercise: (p.792) compared with (pp.975-976).

225 The additional documents added by the Claimant at a late stage were eventually added shortly after 1:47pm on the last day after the evidence had been concluded. They were pages 1087 to 1115. No witnesses were recalled to deal with them. The Tribunal decided to admit the documents on “a pragmatic basis” and taking a proportionate approach to the time involved in discussing whether they were admissible or not. It was also relevant that the Claimant was not calling any witnesses about the additional documents or seeking to recall any witness to deal with them.

226 At the beginning of the hearing on 29 March 2018, the Claimant made an application to admit additional documents. One category of documents was in relation to the November 2015 recruitment exercise and it was to add documents which indicated that the presentation question was different from that which had been recorded at page 975 and about which the Claimant had not raised any issue of substance. In the event the Respondent did not object to that document being put in and it was not being said that the presentation question which Dr Morgan was asked to address was any different from the presentation question which any of the other candidates was asked to address.

227 Given that the Claimant was not disputing that the same presentation issue was addressed by both himself and the other candidates, it did not appear to the Tribunal to be appropriate to spend time investigating in any detail how this issue had arisen. Further, as set out above, the Claimant was not raising any issue of substance in relation to the selection process about the presentation topic. His criticisms were about other questions and in particular the questions which formed part of the questions put by Professor Turner.

228 For the avoidance of doubt the presentation subject was “As a Head of Subject, how will you develop Bioscience from a leadership and research standpoint”. The candidates were invited to use Microsoft PowerPoint.



229 The Tribunal also thought that it was indicative of the difficulty that the Claimant faced in challenging selection decisions of the Respondent made on three occasions and on two of which he had interviews, yet there was virtually no evidence put forward by the Claimant about the substance of his interviews or the points he put across in his interview arguing that they justified his selection. Thus, for example one of the specific points as part of the Claimant's allegation of direct race discrimination at para 1.2.4(iv) of the LOI was that Professor Punchard ignored or devalued or caused the selection panel to ignore or undervalue his role as Reader.

230 The Tribunal noted that this was a criticism which the Claimant could not possibly substantiate because he had no idea of what discussions took place in his absence about his role of Reader. Further, the panel were all drawn from the academic environment and all at a senior level and so the Tribunal must assume that they were aware of the significance of the Claimant being a Reader. However, the primary point about this is that the Claimant did not put forward in evidence anything that he said as part of his interview or any part of his presentation which highlighted this. He believed that Professor Punchard should have argued his case.

231 The Tribunal accepted the evidence of Professor Punchard, Professor Turner and Mr Arif in their witness statements and confirmed in their oral evidence that the panel made decisions based on the performance of the candidates at interview and that Professor Punchard did not seek to influence their professional judgments during the course of the selection process.

232 The Tribunal also noted that prior to the selection of Mr Arif on to the panel the Claimant had been in correspondence with him about his concerns about the selection process in May 2015. The Tribunal does not criticise the Claimant for this or suggest there was anything improper about it. However, the Tribunal considered that the subsequent criticism by the Claimant of the presence of Mr Arif on the November 2015 selection panel was surprising given that he had reason to believe that Mr Arif was fully aware of his concerns about fairness prevailing during any selection process that he was involved in, and also it fell within Mr Arif's brief to ensure that equality and diversity was achieved.

233 Evidence which confirmed that Professor Punchard did not seek to exert any influence, even though the Tribunal doubts very much whether it would have been effective, was the oral evidence of Mr Arif to the effect that Professor Punchard made his contribution about the candidates last as they went around the room.

234 Further, the evidence in the witness statement of Professor Tuitt was consistent with that in the witness statements and oral evidence of Professor Punchard and Professor Turner. As set out in paragraph 17 of her witness statement, she took responsibility for ensuring that a fair process was followed during the hearing. Having regard to her professional qualifications and her position within the management structure at Birkbeck University, the Tribunal considered that there was no proper basis for us to doubt that evidence.

235 The Tribunal also noted that most of the questions set in November 2015 closely mirrored the questions set in May 2015 except for the questions about research. The

Tribunal has already referred to how Professor Turner came to be involved and the higher profile being given by the University to research in the terms of its recruitment decisions. Professor Turner had not been involved in the May exercise because the position of the University had not yet been circulated at that point. Further, if one examined the questions which were attributed to Professor Turner (p.975), it was apparent that they were all related to eliciting questions about the research record and focus of the candidates. They were self-evidently relevant for the selection for the post.

236 To the extent therefore the Claimant brought a specific complaint about interview questions 5 and 6 which were noted as: "What is your H-index/citation-index?" and: "What is your best impact factor publication from the last five years and why is it important?", the Tribunal considered that this was totally misconceived.

237 He complained about this as an act of indirect race discrimination: para 2.1.2 of LOI. The Tribunal refers to its earlier findings about the particular disadvantage which caused difficulty for the Claimant in relation to the first indirect discrimination complaint. However, even if the Tribunal were wrong on that the Tribunal considered that here also the Respondent would have succeeded in its justification argument.

238 The Tribunal also noted that these were very open questions. They were designed to be used in the selection process to a senior academic post. Inviting the candidates to elaborate on their publication and research history appeared to the Tribunal to be not only justified but completely appropriate.

239 In relation to this indirect discrimination allegation (para 2.1.2 on the list of issues) the Claimant relied on evidence that was before the Tribunal about the position of senior academics and what he submitted was the low representation of black and BAME academics in senior positions. He also argued that if an academic had been employed in a Russell Group University they would have been more likely to have had experience of and be involved in research which would give them a higher score in terms of the H index or impact factor.

240 The Respondent did not necessarily accept the proposition about being disadvantaged by not being in a Russell Group University. Professor Turner pointed to his own research record and indicated that his research may not have been published in the standard academic journals but had a very high impact in terms of its usefulness within the NHS. Professor Turner was employed by the Respondent and thus was not at a Russell Group University.

241 The Tribunal considered in all the circumstances that the assertions being made by the Claimant that the reference to high impact factor publication and H index/citation number was likely to put BAME candidates for the job at a particular disadvantage was not established. The Tribunal was also bound to take into account the fact that the successful candidate was Professor Khan at the end of the interview process. No evidence was presented about the relevant statistics/information for the Claimant or any of the candidates in the recruitment exercise.

242 The Tribunal was thus faced with a situation where there was limited specific evidence about only two of the candidates for this position who were short-listed,

namely the Claimant himself and Professor Khan who was successful after the interviews. Professor Khan apparently had no difficulty meeting or dealing with these questions and these questions did not appear to be ones which would have put him at a disadvantage. And he fell within the racial group that the Claimant was suggesting would be disadvantaged i.e. BAME. On the other hand, the Claimant contended that this question put him at a disadvantage. The Tribunal considered that the evidence really was insufficient to meet the test of a requirement which would have a particular disadvantage for the identified group.

243 But as the Tribunal has said even if that were wrong because of the general information that was available to the Tribunal about the positions occupied by BAME academics in the UK (even though this position was available for recruitment around the world), the Tribunal reiterated that we did not consider that the Respondent would have had any difficulty in satisfying us that the questions were justified given the post that was being recruited to and given the higher profile being required in the University for research.

244 Professor Turner further explained during his evidence that in his opinion where a candidate had been qualified for a long time, a question involving reference to high impact or high citation was not necessarily to be assumed to be disadvantageous. It was equally likely, he considered, that a candidate would have a high citation index because it can often take time for an academic's published research to be quoted by others. The Claimant had sought to argue that as his research was dated from a longer period ago, he was likely to have been disadvantaged by the question about a high citation index. Even if the Claimant were right, that argument had no apparent racial element to it.

245 The Tribunal also rejected the Claimant's allegation that Professor Turner and/or Professor Punchard must have looked up the index scores for both the Claimant and the eventually successful candidate David Guiliano before setting the question. Both denied having done so. It was put to Professor Turner that he must have done so, otherwise he would not know if a candidate was being truthful about this at interview. Professor Turner's response was that that he would assume that they were telling the truth when giving their answers at the interview.

246 Professor Punchard who gave evidence towards the end of the hearing and had heard this matter being canvassed gave evidence that over the weekend before his evidence he had tried for the first time ever to look up the Claimant's H index score using Google Scholar and other academic search engines and had been unable to find it. There was no evidence from the Claimant as to what his score was nor indeed what were the scores of Professor Khan or Dr Guiliano.

247 We considered that the Claimant was not in a position to contradict the evidence which the Tribunal heard from Professor Turner to the effect that Professor Turner was responsible for devising the particular question about which the Claimant criticised the Respondent. It was also credible that Professor Turner would have set the questions because they related to one of his areas of expertise, and an area he had a specific responsibility for in the School, namely research standards. There was no background of difficulty between the Claimant and Professor Turner. Professor Turner gave very credible and cogent evidence about his involvement in the selection process.

248 There was no proper basis therefore for the Tribunal to reject Professor Turner's evidence. Importantly however there was no or no adequate basis on the facts for the Claimant to allege some sort of conspiracy between Professor Turner and Professor Punchard in the formulation of the questions. The questions on their face were relevant to the post being recruited to. The Claimant's theory was based on a number of convoluted assumptions without any basis in fact.

249 Thus, the Tribunal found that the indirect discrimination race discrimination allegation (para 2.1.2 of the LOI), was not well founded and we dismissed it. In relation to the direct race discrimination allegations which related to the setting of the questions (1.2.4(iii)) and the victimisation allegation which also entailed a criticism about the setting of the questions for the interview (second part of para 3.2.2), the Tribunal found that these allegations were not well founded and they were dismissed for the reasons set out above.

250 Also the Tribunal set out its findings above about the direct race discrimination complaint (para 1.2.4(iv) of the LOI) about Professor Punchard ignoring etc the Claimant's role as Reader in the selection process. For the reasons set out above the Tribunal concluded that this complaint was not well founded and it was therefore dismissed this.

251 The next allegation was (1.2.4(v)) that Professor Punchard or the selection panel under the influence of Professor Punchard placed insufficient value on the Claimant's work in relation to student retention and attainment. The Tribunal had regard to paragraph 25 of the witness statement of Professor Tuitt. In answer to this allegation, she denied that this was the case. She stated that in her feedback to Dr Morgan she had specifically mentioned to him that the panel considered that he exceeded the requirements in this area. This was confirmed in the email which Professor Tuitt sent to Dr Morgan on 7 December 2015 (p.999). She stated:

*"... the panel felt that you exceeded the requirements of the JD and PS insofar as these related to the strategic aim of improving retention and progression of students, especially BME students."*

When this was put to the Claimant, his response was that he should have scored more highly compared to Mr Guiliano the candidate who was offered the position after Professor Khan was unable to take it up. The Tribunal notes once again that the Claimant has no idea whatsoever and never asserted that he knew what answer Mr Guiliano gave to this question.

252 The Tribunal also noted that the limited contemporaneous documentary evidence that was still available about the points that were scored by the three candidates indicated a picture of Professor Khan scoring either on the basis that he had met the 10 of the criteria for the position or that he had exceeded them (the other 8). The picture was more mixed in relation to the Claimant and Dr Guiliano. The Claimant did not meet the requirements of 1 criterion, he partially met 5, met the criteria in 7 areas; and there were 5 areas in which he exceeded the requirements. In relation to Dr Guiliano the overall assessment was that there were no respects in which he did not meet the criteria, there were three respects in which he partially met the criteria, there were 12 respects in which he met the criteria and there were 3 respects

in which he exceeded the criteria. The Tribunal considered that those scores tended to support the evidence of the Respondent's witnesses including that of Mr Arif that whilst there may have been some individual differences between Dr Morgan and Dr Guiliano, overall it was felt that Dr Guiliano was stronger than the Claimant and came in second behind Professor Khan. The Tribunal considered that the contemporaneous documents about the selection process is consistent with the witnesses' evidence. The scoring for the candidates certainly did not beg the question as to why it was that Dr Guiliano was treated as the second strongest candidate.

253 The Tribunal also noted that in Professor Tuitt's email referred to above to the Claimant recording the feedback that she had given to him, having made the positive comment to the Claimant about the area in which he had performed well, she went on to say that the panel considered that another applicant for the post was stronger overall. Professor Tuitt continued:

*"In particular, the applicant demonstrated experience and further capacity to build international links and establish a new field of research in the school – both relevant to the school's overall standing and, in turn, its ability to address recruitment and the general student experience."*

254 It was apparent to the Tribunal that in that letter Professor Tuitt was explaining to the Claimant that whilst he had strengths and he was considered to be appointable the other two candidates had been assessed more favourably. Further, the explanation that she provided for the more favourable assessments of the other two candidates were credible relative to the information available to the Tribunal about their experience and background. The Claimant was once again not in a position to dispute the evidence of the assessment of the performance of the candidates in the interview and how they had "sold themselves" because he had no knowledge of what had taken place in those interviews.

255 The Tribunal also considered it was important to note that Mr Arif did not dissent from the unanimous decisions of the panel.

256 In all the circumstances therefore, the Tribunal considered that the allegation in para 1.2.4(v) of the LOI was not well founded and was dismissed.

257 Finally, for the avoidance of doubt the direct race discrimination allegation (para 1.2.4(vii) of the LOI) has been addressed above in relation to the specific criticisms made about the composition of the Panel in November 2015. However, that paragraph also contains the allegation that by the act of changing the composition of the panel and omitting an independent expert among other things, the Respondent gave Professor Punchard more power during the appointment process.

258 We did not consider that there was any validity to this criticism. The Tribunal has already referred to the very senior nature of the other members of the panel and the absence of any evidential basis for the speculation about Professor Punchard exercising power over them during the appointment process.

259 The Tribunal also noted that the Claimant had not brought as a substantive complaint that the Respondent appointed Dr Guiliano in February 2016 after Professor Khan withdrew from the position due to difficulties about securing appropriate housing

within a reasonable distance of the University. This position was reached as the Tribunal could see from contemporaneous correspondence between Professor Khan and the University by late January 2016.

260 Finally, in relation to Dr Guiliano as the November 2015 comparator the Tribunal has already addressed this in terms of the absence of any evidence in material respects as to how Dr Guiliano was dealt with apart from the fact that he scored more highly than the Claimant overall and was placed second out of the three candidates. The Tribunal has already addressed that these judgments appeared to have been reasonable and based on evidence before the panel. In all those circumstances therefore, allegation 1.2.4(vii) was not well founded and was dismissed.

261 The Tribunal heard evidence from Dr Antoniou, who had been a senior lecturer in biomedical sciences/immunology at the Respondent between November 2014 and January 2016. He had no role in any of the processes the Claimant complained about. He was called to give evidence on behalf of the Claimant, essentially, it appeared, to 'trash' the contents of Dr Guiliano's application form and presumably thereby undermine the Respondent's selection of him after the first choice was no longer available in early 2016. Given the Tribunal's findings above, it is neither necessary nor proportionate to go into detail about Dr Antoniou's evidence.

262 Dr Guiliano had been employed as his post-doctoral research assistant between 2008 and 2011, and Dr Antoniou had supervised him in that capacity. Then Dr Guiliano left to take up a position at UEL in 2011, and Dr Antoniou acted as his referee at that time. They then both worked for the Respondent after Dr Antoniou arrived in late 2014. They ostensibly had a good professional relationship up to the termination of Dr Antoniou's employment in late January 2016 for gross misconduct by way of sexual harassment of a female student and wilful disregard of his duties as an academic. Dr Guiliano submitted a statement in support of Dr Antoniou in those proceedings (AA1). However, by February 2017, relations had soured between the two men, as was apparent from a solicitor's letter before action in respect of a potential action for defamation, written to Dr Guiliano from solicitors acting on behalf of Dr Antoniou (AA9 – AA12). Dr Antoniou was threatening to sue him because he believed that Dr Guiliano had defamed him by among other things, repeating the reasons for Dr Antoniou being dismissed by UEL. It also seemed that the two men had fallen out about intellectual property rights.

263 Unfortunately, the documents (AA1 – 12) were only available after Dr Antoniou had given his evidence so he was not questioned about them. However, for the purposes of this case, the Tribunal considered that there was clear evidence of hostility towards Dr Guiliano which made Dr Antoniou's evidence to the Tribunal unreliable.

Employment Judge Hyde

25 October 2018