Neutral Citation Number: [2023] EAT 73

Case No: EA-2022-000234-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18 May 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

MR SIMON PIPE

Appellant

- and –

COVENTRY UNIVERSITY HIGHER EDUCATION CORPORATION

Respondent

- -
- -

Joshua Jackson (instructed by Cole Khan, Solicitors) for the **Appellant**
Anthony Johnston (instructed by Irwin Mitchell LLP) for the **Respondent**

Hearing date: 1-2 March 2023

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 18 May 2023 at 10:30am

SUMMARY

Disability discrimination – sections 15, 19, 20 and 21 Equality Act 2010
Age discrimination – section 19 Equality Act 2010

Under the respondent's Framework for progression, the claimant made three applications for promotion to a higher grade but was unsuccessful. He also argued that he was deterred from applying again in 2020. It was the claimant's case that the Framework was a provision, criterion or practice that placed him at a disadvantage due to his disability (he suffered from ADHD and a sleeping disorder), such as to give rise to indirect disability discrimination and an obligation to make reasonable adjustments, and that he suffered unfavourable treatment due to something arising in consequence of his disability in that he was unable to meet the Framework standards for progression in terms of attaining a PhD. The claimant also argued that the Framework gave rise to age discrimination. The ET rejected the claimant's claims. The claimant appealed.

Held: dismissing the appeal save in relation to the ET's failure to address the indirect discrimination claims relating to events in 2020.

The ET had erred in (i) finding that the respondent could not reasonably have known of the disadvantage suffered by the claimant by the time of his 2018 application; (ii) in its approach to the identification of the PCP; and (iii) in its assessment of disadvantage in respect of the claim of indirect age discrimination. These errors were, however, rendered academic by the ET's further conclusions, in the alternative, on disadvantage in respect of the disability discrimination claims; reasonable adjustments; causation; and objective justification. The appeal would accordingly be dismissed in respect of the ET's judgment insofar as that related to the claimant's applications for progression in 2017, 2018, and 2019.

The ET had failed to address the further claims of indirect disability and age discrimination made in relation to events in 2020. This had been part of the claimant's pleaded case and gave rise to an error of law. The appeal would be allowed in this limited respect and these claims remitted for determination.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This appeal raises various questions under the **Equality Act 2010** ("the EqA"), both as to the approach to be taken to claims of disability discrimination – by reason of a failure to make reasonable adjustments (sections 20 and 21 **EqA**), because of something arising in consequence of disability (section 15 **EqA**), and indirect disability discrimination (section 19 **EqA**) – and indirect age discrimination (again, section 19 **EqA**).

2. I refer to the parties as the claimant and respondent, as below. This is the full hearing of the claimant's appeal against the judgment of the Employment Tribunal sitting at Birmingham (Employment Judge Perry, sitting with lay members Mr Stanley and Mr Liburd, over eight days in December 2021, with a further two days in chambers for deliberations; "the ET"), sent to the parties on 1 March 2022. By that judgment, the ET dismissed the claimant's claims of disability discrimination by reason of a failure to make reasonable adjustments and because of something arising in consequence of disability, and further dismissed his claims of indirect discrimination because of age or disability. The claimant appeals against the ET's decision on each claim. The appeal is resisted by the respondent. Representation before the ET was as it has been on this appeal.

The Facts

3. The claimant initially started work for the respondent in late 2012/early 2013, as an hourly paid lecturer in journalism and media within the school of media and performing arts, which formed part of the faculty of arts and humanities. The respondent university comprises four faculties and various research centres; the faculty of arts and humanities is the smallest, with 4,500 of the respondent's 25-30,000 students. The claimant had been a newspaper/agency journalist until he joined the BBC in 1994, where he largely remained until late 2011, progressing to the position of senior broadcast journalist. Having obtained an MA in online journalism, from early 2013 the claimant started working in academia and, in November 2013, he took up a full-time position with

the respondent as a grade 6 assistant lecturer. In 2015, the claimant undertook a postgraduate certificate ("PGC") in academic practice in higher education, gaining a distinction. From 1 January 2017, he moved to working part-time, three days a week.

4. It was common ground before the ET that the claimant was disabled for the purposes of the **EqA**, in that he had been diagnosed with attention deficit hyperactivity disorder ("ADHD") and suffered sleep difficulties. The respondent had further accepted that it had knowledge of the claimant's sleep disorder disability from 2016 at the latest.

5. In 2015, the respondent introduced a corporate strategy which included a policy to increase the number of academic staff with doctorates by 30% and set a target in respect of the number of PhD completions by 2021.

6. Subsequently, with effect from January 2017, the respondent created a new academic framework for internal progression ('the Framework'). For grade 6 staff seeking promotion to grade 7, this introduced a new pathway for progression (they would previously have had to apply for roles via a competitive external interview process). The Framework involved a four-stage, paper-based process. The first stage involved a standard form application, endorsed with the applicant's line manager's comments; the second stage involved consideration by the applicant's head of school; if supported by the head of school, the application was referred to a faculty panel (stage three); the final, fourth stage involved consideration by the respondent's senior leadership team.

7. The ET found that the fundamental requirements of the Framework were embodied in two basic questions identified in the progression application form:

> "222.1 Was there a recommendation to proceed to the next stage i.e., had the applicant demonstrated that s/he had met the required standards? and
> 222.2 Was there a budget i.e., business need for a role?"

8. Achievement under the Framework was required to be demonstrated in two (later, three) of four areas: (1) teaching and learning; (2) research and scholarship; (3) enterprise; (4) leadership and management (within and outside the respondent). The criteria for progression from grade 6 to 7 identified that applicants must:

> "…
>
> - demonstrate activity which illustrates their ability to meet the requirements as described in the role profile for the relevant Grade 7 role.
> - successfully have completed their probationary period and be actively engaged in the Performance Appraisal process ….
> - have attained a PhD or, exceptionally, demonstrate equivalence in contribution to professional practice. If from a professional practice background, applicants will require a good Honours Degree (and/or Masters Degree) and appropriate professional qualifications and/or membership and/or equivalent professional qualifications which can be considered as equivalent to the PhD." (ET paragraph 31)

9. In addition to demonstrating the required achievement, because any appointment would necessarily have an effect on budgets, the Framework also required a business case to be made out for progression. As budgets were delegated to schools, likewise responsibility for providing that business case was delegated to the applicant's head of school.

10. Before the introduction of the Framework, between 2014-2017, the claimant had unsuccessfully applied for seven grade 7 lecturing posts at other universities; in the summer of 2015 he was interviewed for a grade 7 lecturing post with the respondent but was unsuccessful.

The Claimant's 2017 Application for Progression

11. On 13 February 2017, the claimant made an application for progression under the Framework. This was supported by testimonials, but was rejected at the head of school stage (the second of the stages outlined above). Before lodging his application, the claimant had sought advice from his line manager, Mr Dawkins, and they had had several conversations about how the claimant could maximise his chances. The ET accepted Mr Dawkins' evidence that he had emphasised:

> "46. … that a big part of the application was a solid business plan for where his role would fit within the structure, how it would add to the school … cautioning that his application may not be strong in that regard."

12. Within the arts and humanities faculty, figures were not available for those rejected at the head of school stage, but data showed that four were moderated at the faculty stage, all of which progressed to university moderation and were ultimately successful. One of the successful candidates

was also from the school of media and performing arts, Ms Emma Lambert, who had previously been an assistant lecturer in photography; Ms Lambert did not have a PhD.

13. The claimant asked that his head of school, Dr Garett Brown, reconsider her decision and provided additional information in support of his application. Dr Garett Brown emailed the claimant, outlining the following as areas in which his application had been deficient:

> "…
> - Evidence of having completed or begun a PhD or demonstration of equivalency
> - Evidence of trajectory towards peer reviewed publications, a national profile and/or income generation through association with research and/or enterprise projects.
> - Evidence of peer teaching observations & related module evaluations to substantiate discussions around own teaching strengths." (ET paragraph 44)

14. The claimant was notified of the outcome of his application on 10 March 2017 and received Dr Garett Brown's feedback at the end of that month.

Medical Evidence 2017

15. Also at around this time, the respondent sought an occupational health assessment regarding the claimant, but the adviser was unable to confirm whether he was disabled for the purposes of the **EqA**. Some adjustments were, however, recommended, albeit not promotion outside the Framework.

16. In any event, on 22 June 2017, the claimant was assessed by a Dr Zaiwalla, a consultant in clinical neurophysiology, who he told that he was under pressure to embark upon a PhD. It was Dr Zaiwalla's opinion that:

> "… In view of the severity of his sleep disorder [the claimant] will find it very difficult at present to successfully work towards achieving a higher degree." (ET paragraph 53)

17. On 26 June 2017, the claimant submitted a grievance, which included Dr Zaiwalla's opinion. The ET noted, however, that the claimant had already achieved a master's degree and PGC in higher education teaching, to which Dr Zaiwalla had made no reference; it concluded that the likely explanation for this omission was that Dr Zaiwalla viewed the claimant's impairment as temporary.

This, the ET found, was how the advice was understood by the respondent at the time. The ET also considered that Dr Zaiwalla's advice was based on a further false premise, that a doctorate was the mechanism that was open to the claimant for progression.

The 2017 Grievance

18. The claimant's 2017 grievance related to the refusal of his application for progression. It was heard on 20 September 2017, but rejected. The claimant appealed, and his appeal was heard by Dr Hides on 27 November 2017.

19. Dr Hides rejected the claimant's appeal, finding that the feedback given to him had identified that his application needed to provide more evidence of a trajectory towards peer-reviewed publications, a national profile and/or research income generation. This, Dr Hides explained, was in keeping with the respondent's corporate plan, research strategy, and criteria for progression, and he made the point that the respondent was seeking to increase the number of academic staff who had doctorates: whilst a PhD was not an absolute requirement, it was "*the norm*". Dr Hides was unable to see any evidence that the claimant had sought to discuss the possible options open to him to pursue a PhD either via the traditional route or the alternative publication route. Acknowledging that, in spring 2016, the claimant had said his condition (relating to his sleep disorder) meant he could not undertake research in his own time, Dr Hides was also unable to see that he had sought support in this regard. Referring to the advice from Dr Zaiwalla, Dr Hides noted that the claimant had said he had been "*taken aback*" when he was told that his condition made undertaking a PhD "*out of the question*". Given that reaction, and the fact that the claimant had previously chosen not to undertake a PhD because he could see no benefit, Dr Hides did not consider that the respondent could reasonably have been expected to know of this difficulty, but also referred to the different sources of help available to the claimant and the possibility of exploring other options. It was recommended that the claimant discuss his progression ambitions with his line manager, and he was advised that, if he wished to investigate the possibility of a PhD or other alternative, he should meet with Dr Hides and

his head of school. Dr Hides also recorded the need for the head of school to create a business case for support in progression.

20. The ET found, however, that the claimant did not trust Dr Hides and had continued to consider that a traditional PhD was the only route available to him when "*the actuality was otherwise*" (ET paragraph 106). The ET further found that the claimant failed to fully engage in the process the respondent sought to put in place and, instead of availing himself of the help offered, had embarked on his own course; moreover, at certain times the claimant had himself stated that he wanted to consider the PhD route and, indeed, even located his own PhD supervisor (although later accepting that was not the best choice).

2018 and the Claimant's Second Application for Progression under the Framework

21. From January 2018, the claimant worked additional hours, taking a further role within the respondent as a grade 7 hourly paid lecturer.

22. Going into 2018, the Framework was amended to require applicants to demonstrate achievement and efficiency in three (rather than two) out of four areas of activity.

23. On 12 March 2018, the claimant made a second application for progression, explaining that he had secured a PhD supervisor, had abstracts accepted for an international conference, and had become a grade 7 hourly paid lecturer. The application also stated, however, that, following tests in 2017, he had stopped working towards starting his PhD.

24. Mr Dawkins commented on the claimant's application as follows:

> "… Although this is quite a poorly-written application, his previous lecturing experience, continuing professional development and his research activities provide evidence of his ability to work effectively at Grade 7 level." (ET paragraph 111)

25. Dr Garrett Brown, head of school, also supported the application, observing:

> "… Since his last progression application [the claimant] has been working with his Research mentor to develop a pathway towards PhD study through a consolidation of his existing practice and research. His work in the teaching and learning sphere as an AL [Assistant Lecturer] has demonstrated [the claimant's] ability to operate at an L [Lecturer] level in the classroom. He has

> supported the new course roll out including the law modules and adoption of the mobile journalism ethos. As an L member of staff he would continue this work alongside assuming ownership of module leadership, as appropriate, for modules within all courses including the incoming BA International Communication. As an existing 0.6 AL member of staff [the claimant] is supporting BA and MA Journalism teaching. In addition to the increase in salary scale there would potentially be additional hours required at AL level to backfill the teaching and learning support activities which do not sit under the remit of a L level member of staff." (ET paragraph 112)

26. The application was considered at faculty level but rejected, with the following explanation:

> "… This application for progression demonstrates some significant progress over that of last year. There is a clear demonstration of some areas of excellence in teaching and learning and the capability to operate at the higher level in that respect. The application and the managers comments indicate that the research agenda is now better understood; however, the activities and outputs listed do not yet form the basis of a coherent research direction and can't as yet constitute research activity at the expected level. Finally the evidence under leadership and management are not constructed so as to make a convincing case. As an overall observation the application would benefit from some editing and revision — it is not coherent and persuasive as it needs to be and it includes comments that are not relevant to this process." (ET paragraph 113)

The faculty decision also stated that "*budget availability*" was not confirmed.

27. The claimant's application was the only one considered within his faculty in 2018. On 12 September 2018, however, the claimant was told that his job share partner, Ms Lisa Perry, had been made a lecturer, having applied for one of two part-time externally advertised vacancies. Ms Perry and a Ms Una Murphy were appointed to these posts without having doctorates, or being required to work on PhDs once in post, and neither had published research. The ET noted that Ms Perry's and Ms Murphy's appointments supported the respondent's position that it was prepared to take into account equivalent qualifications.

The Claimant's ADHD Diagnosis

28. On 2 July 2018, the claimant was assessed as exceeding the diagnostic criteria for ADHD, albeit further clinical assessment was required for a formal diagnosis.

29. On 1 October 2018, the claimant advised Mr Dawkins of his possible ADHD diagnosis; this was formally diagnosed on 10 October 2018 and the claimant confirmed this to the respondent a few

days later.

30. On 14 January 2019, the claimant informed the faculty HR adviser, Mrs Nicholson, of his ADHD diagnosis and that his consultant had advised he should be using the **EqA** to address his work situation. He asked that his 2018 progression application be reconsidered, as a reasonable adjustment, in light of his diagnosis, on the basis that the condition would have had "*a significant impact on my ability to meet the requirements set out in the progression system*" (ET paragraph 129). On 30 January 2019, Mrs Nicholson responded saying the progression application had been considered on merit and it was not possible for it to be reviewed but that, in the light of the upcoming progression process, the claimant might wish to get feedback from his line manager at an early stage, and she suggested that it might be possible for him to be given an extension to make his progression application.

The 2019 Application for Progression and Requests for Reasonable Adjustments

31. On 7 March 2019, there was an exchange of emails between the claimant and Dr Clarke (who he had asked to be his PhD supervisor), in which he explained he had an extension to apply for progression but acknowledged it was unlikely a business case could be made because of falling student numbers. The claimant offered to teach media law on Dr Clarke's course but Dr Clarke's reply made it clear that the future for his course was uncertain, again due to falling numbers. No mention was made of the claimant's PhD, which the ET found had effectively "*fizzled out*". On 25 March 2019, the claimant made a third application for progression.

32. Also in early 2019, the claimant was again referred to occupational health. A final report was provided on 15 August 2019, confirming the ADHD diagnosis and outlining the impact of this on the claimant's day-to-day life, as including:

> "… difficulties with concentration (leading to distractibility), organisation and planning (which could affect task completion including trying to plan and write up research timeously), misplacement of items, prioritisation (such that it was important that the University clearly demark his role and tasks and not assign difficult or complex tasks to him at short notice)." (ET paragraph 139)

33. The report further recorded that the claimant had suggested he be considered for promotion

outside of the normal process, to a non-research teaching role. It was stated that this might be considered to be a reasonable adjustment, the claimant's consultant, Mr Bescoby-Chambers, having advised that it was ADHD that made the normal routes difficult for him. The report continued:

> "… [The claimant] feels that his disabilities have prevented him from securing a substantive lecturing post. Given the difficulties he reports to have faced at work as a result of his underlying neurodevelopmental condition he has felt an impact on his mood. causing depressive symptoms as a consequence.
> His consultant notes that the pressure placed on him by the suggestion of completing a PhD would have a significant impact on someone with ADHD. Due to deficits in some of the skills that are often required to complete a PhD successfully, it would be extremely unlikely that [the claimant] could complete the task without a significant impact on his mental health. His consultant has advised that he does not think that this is achievable for him." (ET paragraph 140)

34. On 28 August 2019, Mrs Nicholson met with the claimant to discuss the occupational health report. She followed that up the next day with an email providing links and names that might help with the issues he had raised. As the ET recorded, this:

> "142. … included links to the University's coaching academy, its doctoral college, its academic development team (giving the name of someone he could contact), the names of the two faculty learning technologists who might be able to help and the details of A2W who she said were "great at offering the right support in work". She stated she would set up a meeting with Mr Dawkins to see what support the school could offer."

35. Two days later, Dr Garrett Brown sent the claimant the result of his 2019 progression application, albeit her decision on this application had been made on 1 April 2019. Having referred to the claimant's positive contribution to teaching and particular expertise, and identifying that he had demonstrated an ability to operate at grade 7 in terms of teaching, Dr Garrett Brown stated:

> "136. … At this Point however the application cannot be supported as [the claimant's] research profile is not yet in line with the academic role descriptor for grade 7 nor is there evidence of a clear pathway to PhD or equivalency underway. From a business case-perspective we are unfortunately not currently able to support a growth or extension of level in the staff base with Journalism due to falling application numbers which indicate a smaller student cohort for 19—20 intake. (Applications have fallen from 196 in 2017-18 cycle to 119 in 2013-19 cycle). The School leadership team are working with Faculty to devise growth plan for Journalism I with a view to opening up progression possibilities in the future."

36. In 2019 there were three applications for progression from grade 6 to 7 within the faculty of

arts and humanities; all were rejected at the head of school stage because there was no business case.

37. On 18 September 2019, the claimant's consultant wrote to his GP advising that he was:

> "… just not organised enough [to be able to complete a PhD] even with effective treatments" (ET paragraph 151)

38. During the autumn of 2019, there were discussions between the parties regarding various adjustments that might be made to assist him at work.

The 2020 Grievance; Requests for Reasonable Adjustments; Resignation

39. On 10 January 2020, the claimant lodged a formal grievance. In the context of setting out his request for reasonable adjustments, the claimant asked that the respondent:

> "… **consider** promoting [him] to grade 7 without going through the normal progression system, ideally to a teaching role with no research requirement, as a reasonable adjustment under the Equality Act 2010" (ET paragraph 167; ET's emphasis)

40. On 6 February 2020, the claimant went on sick leave, which lasted until 23 April 2020.

41. On 11 March 2020, the claimant's grievance hearing took place, chaired by Professor Foster. The ET noted that the record of this hearing included the following:

> "… [the claimant] referred to the requirement for a PhD; he knows in reality they bend it to be on a pathway towards a PhD. …" (ET paragraph 175)

42. On 20 May 2020, the claimant was provided with Professor Foster's grievance outcome via a video call, confirmed by letter, as follows:

> "… I found strong evidence of the Claimant's ability to teach and prepare material and assessment at the required level for a grade 7 position, however at that time there was no substantive position at grade 7 which was a 'teaching only' role. Having reviewed the Claimant's application, I was satisfied that it did not demonstrate the variety of skills at the higher grade required for progression to the grade 7 academic position (which is a position which incorporates not only teaching but other academic obligations). There was no option available for the Claimant to carry out a grade 7 teaching-only role.
> I could see that the University had made significant efforts to support the Claimant. They had done this both in supporting the writing of his application and also, on a wider basis, in discussing possible ways of broadening his skill base to be able to progress in the future." (ET paragraph 181)

43. On 16 June 2020, the claimant made a further request for a reasonable adjustment, to be

appointed to a grade 7 teaching-focused role. On 9 July 2020, the respondent rejected that request, stating that it did not consider promotion to grade 7 outside the academic progression process. That was stated to be the respondent's final position and the claimant was asked to desist from making further requests.

44. On 21 August 2020, the claimant resigned by notice effective 20 October 2020.

The ET's Decision and Reasoning

General Observations

45. The ET accepted the evidence of Mr Dawkins, the claimant's line manager, as follows:

> "There were two key routes to progression, PhD or Enterprise routes. Both were open and available to the Claimant and he could have done either if he'd wanted to do so with adjustments to the process. He would have found a PhD challenging – it is a challenging process for anyone. He would however have had access to support from me and the wider School team. My view was that the Enterprise route would have been better suited to the Claimant and whilst this would have been challenging in different ways he would have also been able to do this. At the University, we have many students who require adjustments who succeed (with adjustments) to achieve their ambitious academic objectives. We work with them to make sure the process is accessible to them. It would have been the same for the Claimant had he elected to stay and progress with us." (paragraph 34 Mr Dawkins' statement)

46. The ET concluded:

> "187. Having heard all the evidence and viewed matters in the round we find that embodies what we find the respondent was trying to do, to apply a consistent system for progression. That does not mean the system was perfect or one where the same requirements could be or were applied across different faculties; that was not appropriate due to the different nature of the subjects taught in them. What was being sought was a consistent approach. How that was interpreted we heard was subject to some latitude and ultimately was moderated at the University level."

47. Noting that the claimant had not engaged with the respondent's doctoral college (the body responsible for overseeing the university's standards), the ET observed that he had been seeking:

> "189. … the creation of a role for him at Grade 7 that did not include the normal research and administration responsibilities that a Grade 7 role would entail. [The claimant] envisaged that the role he wanted to be created would include aspects of the Grade 7 role such as responsibility for leading, creating and marking modules. As Dr Garrett-Brown made clear in her annotation on the 2018 progression application, teaching and learning support activities alone

> did not sit under the remit of a Grade 7 Lecturer.
> 190. Essentially what [the claimant] was seeking was the creation of a hybrid role outside the University's structure …."

48. The ET further found that:

> "191. … the role specification for full time Grade 6 & 7 posts at the University identified a substantive difference between Grades 6 & 7 in that whilst Grade 6 was essentially a teaching role, Grade 7 was a far wider role and the additional requirements Grade 7 encompassed skills required to undertake both the teaching and administrative aspects of that role."

The Reasonable Adjustments Claim

49. Turning to the claim that the respondent had breached its obligation to make reasonable adjustments, the ET first considered the question of **knowledge**. The respondent accepted that it had been aware of the claimant's sleeping disorder by 2016 but it denied that this amounted to actual or constructive knowledge of a substantial disadvantage arising from his ADHD condition, which had only been notified to the respondent in September/October 2018.

50. The ET noted that the first occupational health advice (in March 2017) had been unable to confirm that the claimant was disabled for the purposes of the **EqA** and it considered that Dr Zaiwalla's assessment, as recorded by letter of 10 July 2017, was based on a number of assumptions. Moreover, the claimant had not engaged with the respondent as to what alterations might be made to facilitate his progress and, absent such engagement and/or a full medical diagnosis, the ET found the respondent was not to be taken as having the requisite (actual or constructive) knowledge until September/October 2018.

51. As for the **provision, criterion or practice** ("PCP") relied on by the claimant, the ET noted that it was common ground that the Framework had been applied as a PCP; the issue was what the Framework entailed. On this question, the ET concluded, as follows:

> "210. We found the Framework was introduced to harmonise internal progression across the University as a reflection of the University's aim to maintain and indeed increase academic standards.
> 211. The Framework required a demonstration of academic standards and within that peer reviewed research or learning, whether it be theoretical or practical. That was because that demonstration of academic standards was

considered a prerequisite of demonstrating the ability to teach."

52. Accepting that the Framework "*formally required a PhD or exceptionally equivalence*", the ET noted that there were examples of academic staff succeeding in their progression application despite not having obtained a PhD at the time; it concluded:

> "212. … a flexible interpretation of the requirement for a PhD was applied by the University. What that meant was that in practice a PhD was not required for progression, nor for that matter was it required that a Grade 6 be formally signed up for a PhD but instead they be on what was described to us as a "pathway" to one. What we understand by the term "pathway" is that a proposal and/or a supervisor had been identified. That that was so is reinforced by the additional stage that [the claimant's] 2018 progression application reached in 2018 (when he had located a supervisor, Dr Clarke and was discussing proposals) compared to in 2017 & 2019."

53. The ET further found that:

> "213. … flexibility was also applied to the type of PhD and we find that there were various alternative routes to a traditional PhD route that the University was prepared to consider such as the enterprise route."

54. Satisfied that such flexibility would have been applied in the claimant's case, had he engaged in discussions as the respondent had wished, the ET rejected the claimant's case on the application of a PCP, reasoning:

> "217. … the Framework as applied by the University did not require an applicant to attain a PhD but required an applicant demonstrate a pathway to a PhD or an equivalent. Similarly, flexibility was applied in relation to the nature of the PhD or an equivalent. To that end there were various alternative routes to a traditional PhD route such as the enterprise route but in any event the Framework allowed for progression exceptionally by demonstrating equivalence in contribution to professional practice. Similarly, that flexibility would have been applied to demonstrating achievement across the required number of areas had [the claimant] engaged with the discussions the University wished to have with him.
> 218. Accordingly, the PCP contended for, was not in practice applied."

55. Notwithstanding that conclusion, the ET turned to the question whether the claimant had been put to a **substantial disadvantage**.

56. The ET determined that the fundamental requirements of the Framework were twofold: (1) was there a recommendation to proceed to the next stage - had the applicant demonstrated that s/he had met the required standards? and (2) was there a budget – that is, a business need - for the role

sought? (ET paragraph 222, as cited at paragraph 7 above). To the extent the Framework necessitated the claimant holding a PhD or demonstrating achievement in a number of areas, the ET accepted that he was placed at a substantial – in the sense of being non-trivial – disadvantage. Turning, however, to the particular applications for progression in issue, the ET found that in each year, there had been no business case. Specifically:

> "223. In advance of the 2017 application [the claimant] had not engaged adequately with what the Framework required because whilst he had spoken several times to Mr Dawkins … as both Mr Dawkins had cautioned in advance and the feedback [the claimant] … received following that application … there was no business case for a role.
> 224. In 2018 Dr Garrett Brown commented on the application form that there was no business case, and in 2019 no applications were progressed beyond the Head of School stage. Further we saw [the claimant's] exchange with Dr Clarke [in which the likely lack of a business case due to falling student numbers was acknowledged] … that embodies the position in the context of the 2019 progression application. That … was university wide."

57. The ET thus concluded:

> "225. … given that formed an essential requirement of the progression Framework the absence of a business case for a role for [the claimant] meant that neither he nor the group of which he formed part were put to a disadvantage; there was no business need for a role for him or any disabled or non-disabled person at the relevant times."

58. In any event, the ET then turned consider the **adjustments** contended for by the claimant, which were: (i) using alternative means to assess him for promotion; (ii) introducing a new teaching-focused professional practice role. The ET recorded the parties' respective positions as follows:

> "228. The way [the claimant] argues this claim is that both adjustments were necessarily required. As [the respondent] put it the first adjustment in isolation, would not have been effective alone to ameliorate the disadvantage resulting from the operation of the progression policy because it was also [the claimant's] case that he could not, in fact, have undertaken that role, hence the second adjustment contended for teaching focussed professional practice role."

59. The ET found, however, that the claimant's case in this regard conflated three elements:

> "229.1 the process by which the applicant demonstrated achievement/the necessary standards to undertake a grade 7 role,
> 229.2 the (created) role to facilitate Mr Pipe undertaking that role, and
> 229.3 the necessity for the creation of that role."

60. As for the first adjustment contended for, the ET did not accept that the evidence (in particular

that from the claimant's medical advisers, Dr Zaiwalla and Dr Bescoby-Chambers) had addressed what adjustments to the Framework were required. Specifically, the ET considered that the advice given by Dr Zaiwalla and Dr Bescoby-Chambers had been founded on what *the claimant* had understood the requirements of the Framework to be (focusing on a traditional form of PhD) and were thus based upon a flawed assumption; moreover, that evidence did not engage with the question as to whether (for example) the claimant could work additional hours in his own time to establish a pathway or equivalence (something the claimant said he could not do, albeit he had taken on additional hours from January 2018).

61. As for the nature of the role and necessity for its creation, again the ET found that the claimant's evidence had failed to address what any role that he was thus to undertake could (or could not) entail and why such a new role should be created as a reasonable adjustment. More than that, the ET accepted the respondent's case that the creation of such a new role would have broader impact across the university, there being no teaching-focused professional practice role within the university's existing academic structure. At the time of rejecting the claimant's 2019 application for progression, there had been a significant reduction in student numbers, such that the school could not justify employing a further grade 7 lecturer in journalism but, more generally, there would have been ramifications for other staff which could not be considered objectively reasonable.

62. The ET concluded that the evidence did not show that the contended adjustments were reasonable.

The Claim Under Section 15 ***EqA***

63. Addressing the section 15 claim, the ET noted it was common ground that the claimant had suffered **unfavourable treatment** in the rejections of his applications for progression. It was not accepted, however, that he had suffered unfavourable treatment in being placed under pressure to take a PhD, and the ET agreed with the respondent that there had been no unfavourable treatment in this regard: the Framework, in practice, required only that applicants for progression be on a "*pathway*"

to a PhD, and, in any event, the respondent did not place pressure on the claimant but sought to explore options with him as to how he could satisfy the Framework by other means.

64. As for the **"something"**, in respect of which the claimant contended he had suffered unfavourable treatment, this was characterised as follows:

> "The relevant symptoms of his ADHD and/or sleep disorder are: inattentiveness and impaired concentration; difficulties with task completion; poor organisational, prioritisation and planning skills; constant fatigue; impulsiveness and hyperactivity." (paragraph 11 list of issues)

65. The respondent accepted that the "*something*" arose from the claimant's disability but not that this caused the unfavourable treatment. The ET agreed. First, because it had concluded that:

> "259. … there was no business case for a role in any of the years 2017-2019. Even if [the claimant] had met the progression criteria, his applications would have necessarily failed because there was no role for him.
> 260. The failure of his progression applications were thus in no sense whatsoever caused by the something arising from his disability but because of the absence of an available role/business case for a role."

66. Secondly, having found that the claimant had not engaged with the respondent on alternative pathways to progression, which had thus not been properly explored, the ET held:

> "262. We are thus not satisfied the rejection of his applications were caused by the "something"; instead, they stemmed from the absence of a business case for a role for him and/or his failure to engage with the University in identifying a progression pathway for him."

67. In any event, the ET went on to consider the question of **justification**: whether the unfavourable treatment of the claimant was a proportionate means of achieving a legitimate aim. The ET accepted that the respondent had demonstrated legitimate aims, as follows:

> "265. …
> (a) adopting a consistent and transparent approach to academic progression;
> (b) maintaining consistently high standards in its Grade 7 Lecturers;
> (c) maintaining the Respondent's reputation as a provider of quality higher education;
> (d) maintaining a balance of staff within individual Schools and Faculties commensurate with the requirements of its business (having regard, inter alia, to student numbers and course needs)."

68. The ET found that (a) was necessary to ensure fairness and transparency; (b) and (c) were required to enable the respondent to survive and prosper in the marketplace; and (d), which meant the

respondent would only engage staff where there was a business need, allowed the respondent to thereby balance the provision of services against the proper utilisation of public funds.

69. The ET recorded that it was:

> "267. … common ground that where A's treatment of B is the direct result of applying a general rule or policy to B, whether B's treatment is justified will usually depend on whether the general rule or policy is justified."

70. Thus considering the Framework, the ET found that it was:

> "268. … appropriate, reasonably necessary and no more than reasonably necessary to achieve those aims. The … Framework was adopted to provide a transparent and consistent approach across the various Faculties (and the differing skillsets and requirements within them) but also to ensure standards were maintained which in turn linked in to maintaining the University's reputation and to place staff where there was a business need for them.
> 269. Given those differing skillsets and requirements the Framework needed to be just that, a framework and process for decision making, and what is more, to be applied flexibly. Too much discretion could give rise to partiality and favouritism. Too little, an inability to address the differing needs of staff across the various faculties and the wide range of disciplines taught within them.
> 270. The Framework was just that, it had various checks and balances within it. Applicants only applied if they wanted to progress and were only progressed if they demonstrated they met required standards and there was a business need. The process was moderated at several levels and outcomes fed back to decision makers and applicants so applications and decision making could evolve to reflect those outcomes in later years. Likewise, support for demonstration of the required standards was met and supported by the University's doctoral college and moderated again at various stages and ultimately across the University."

71. On that basis, the ET found the respondent had shown that the means of achieving the legitimate aims were proportionate and that any unfavourable treatment as a result was thus justified.

Indirect Disability Discrimination

72. As for the claimant's claim of indirect disability discrimination, for the same reasons as provided in relation to the reasonable adjustments claim, the ET found that the claimant had failed to establish that the **PCP** he had relied on was in fact applied. It similarly adopted the same approach to the question of **disadvantage** as it had for the reasonable adjustments claim and relied on its earlier reasoning in concluding, in the alternative, that the claimant's treatment had been **justified** (the Framework being a proportionate means of achieving the respondent's legitimate aims).

Indirect Age Discrimination

73. Finally, the ET turned to the claim of indirect age discrimination, which it also concluded must fail given that the **PCP** relied on by the claimant had not been established (see above).

74. If that was wrong, the ET considered the question of group and individual **disadvantage**, noting that the respondent accepted that persons in the 55-59 age group might be less likely to already have a PhD. Referring back to its earlier findings that, in practice, a traditional PhD was not required to satisfy the Framework (an individual merely needed to be on a "*pathway*" to one of the various forms of PhD, or to demonstrate equivalence), *and* that there were alternative routes available to a traditional PhD, the ET concluded that the claimant's age, of itself, would not have been a barrier to him obtaining (or conducting research towards) a PhD and thus meet the Framework requirements. The respondent's flexibility of approach distinguished this case, the ET found, from that of **Games v University of Kent** [2015] IRLR 202 (see below), observing:

> "293. … professional and industry experience could be used for equivalence, and issues such as the lesser historic emphasis on PhDs and the lower likelihood older applicants would be able meet a requirement for a PhD was addressed by the ability to be studying for or be on a Pathway to a PhD, …"

75. That the necessary group disadvantage had not been shown was, the ET considered, also reinforced by the claimant's own responses in evidence:

> "294. ... In addition to the health and disability impact of undertaking a PhD when asked about why age would restrict his ability to progress he not only appeared to be in two minds whether he wished to undertake a PhD but had decided against that partly because of concerns about failure on the basis of memory and brainpower not being that when he was younger, increased health vulnerabilities and partly as a result of a cost/benefit analysis to him in terms of career progression and the immense amount of challenging work a PhD would entail. Those issues to us appeared to be an issue of personal choice rather than the effect it would have a on the (age) group of which he was part."

76. Moreover, and in the further alternative, the ET concluded that the treatment of the claimant had been **justified** for the same reasons it had found in respect of the section 15 claim.

The Grounds of Appeal and the Parties' Submissions

77. The appeal was permitted to proceed on twelve grounds. Grounds 1-4 relate to the reasonable

adjustments claim; grounds 5-6 to the section 15 ("*something arising*") claim; grounds 7, 10, 11 and 12 to the claims of indirect discrimination in relation to both age and disability; ground 8 to the indirect disability discrimination claim; ground 9 to the indirect age discrimination claim.

Reasonable Adjustments

78. By **ground 1**, the claimant contends the ET erred in holding that the flexibility (as it had found) in how the Framework was applied in practice negated its existence as a PCP. That: (1) was an unduly narrow approach; and (2) elided the distinction between provisions and criteria, on the one hand, and practices on the other (effectively requiring the claimant to identify the provision or criterion (the Framework) *and* the manner in which it was applied (the practice)), which was contrary to the disjunctive phrasing of "provision, criterion *or* practice".

79. For the respondent, however, it is said that the claimant had failed to identify a PCP capable of supporting his case because the requirements which he claimed had put him at a substantial disadvantage were found not to have been applied in practice. Accepting that "PCP" should be construed widely, the ET had not adopted an unjustifiably narrow approach: its finding was based upon a determination of the *factual* question whether the PCP (in the form contended for by the claimant) was actually applied. The pleaded case had simply referred to "the Formula" but the ET needed to determine what that meant; doing so, it found as a fact that this incorporated flexibility.

80. By **ground 2**, it is said the ET misapplied the test of substantial disadvantage: (1) by failing to apply the triviality threshold (the claimant's impairments made it substantially more difficult for him to obtain a PhD, or undertake research activity, and thus put him at a disadvantage to those who did not suffer such impairments, which was not removed by any flexibility regarding the application of the Framework); (2) in concluding there was no disadvantage because there were additional reasons why the claimant's applications were rejected, when section 20(3) **EqA** does not contain a strict causation test (see paragraph 53 **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090 EAT); (3) by impermissibly relying (a) on the claimant's behaviour (in not accessing support or in

failing to follow procedures), which was associated with his disability and ought to have been disregarded (see paragraph 68-69 **Jennings v Barts** UKEAT/0056/12), and (b) on steps that the respondent had offered to take by way of potentially reasonable adjustments (see paragraph 29 **Finnigan v Chief Constable Northumbria Police** [2013] EWCA Civ 1191; paragraph 26 **R (Rowley) v Minister for the Cabinet Office** [2022] 1 WLR 1179 (Admin)).

81. For the respondent, it is countered that the ET had expressly recognised the low threshold for "*substantial disadvantage*" but permissibly found the claimant's failure to engage with the requirements of the Framework, or with what the respondent was seeking to put in place following discussions with him, meant the flexibility (which the ET found existed within the Framework) could not be explored. The ET did not thereby improperly rely on behaviours associated with the claimant's disability; it undertook a detailed analysis as to the circumstances in which he had failed to engage, which did not solely (or primarily) relate to difficulties associated with his disability but included other factors, such as his mistrust of Dr Hides. In any event, the ET did not err in finding there was no substantial disadvantage where, as a matter of fact, there was no business case for progression in any of the relevant years: if the claimant had not been disabled, the outcome of his applications for progression would have been exactly the same (see paragraph 49 **Sheikholeslami**).

82. By **Ground 3**, the claimant asserts that the ET misapplied the law in assessing the reasonableness of the adjustments he had contended for, namely: (i) using alternative means to assess the claimant for promotion; and/or (ii) introducing a new teaching-focused professional practice role. The claimant argues the ET: (1) erred in its understanding of his case, which was put on an and/or basis, not that *both* adjustments had to be put in place; (2) erroneously reasoned that both adjustments were required to ameliorate the disadvantage, thus losing sight of the low threshold that an adjustment need only have a "*prospect*" of achieving that result (see paragraph 17 **Leeds Teaching Hospital NHS Trust v Foster** UKEAT/0552/10); (3) failed to recognise that the creation of a new role can be a reasonable adjustment (see paragraph 45 **Chief Constable of South Yorkshire Police v Jelic** [2010] IRLR 744 EAT); (4) failed to apply an objective test, wrongly focusing on the claimant's

behaviours without considering whether those were related to his disability (and see paragraphs 68-69 **Jennings**; paragraph 29 **Rowley**); (5) irrationally disregarded the claimant's medical evidence, which consistently addressed the executive functioning impairments associated with his ADHD and sleeping disorder and the difficulties he would have in undertaking research and pursuing/obtaining a traditional PhD; (6) wrongly placed the burden of proof on the claimant to establish reasonableness (paragraphs 54-57 **Project Management Institute v Latif** [2007] IRLR 579 EAT); (7) failed to conduct a proper reasonableness test, taking account of all the relevant circumstances (paragraphs 6.23 and 6.29 **EHRC Employment Code**; paragraph 70 **Archibald v Fife Council** [2004] IRLR 651 HL; paragraph 29 **Rowley**); alternatively, provided inadequate reasons.

83. For the respondent it is noted that, as the ET recorded (paragraph 228 of the judgment), the claimant's case below was that he could not, in fact, have undertaken the role of a grade 7 lecturer, with all that that entailed, hence the need for the second adjustment, namely the introduction of a grade 7 teaching-focused professional practice role. Acknowledging that the list of issues did not expressly state that *both* adjustments were required, on the evidence, the conclusion reached by the ET was irresistible. As for the ET's findings in relation to the first adjustment contended for, those arose directly from how it found the Framework was applied in practice; while the ET made findings about the claimant's behaviour, that was in the context of it having found that the respondent was actively seeking to engage with him. In relation to the proposed creation of a teaching-focused professional practice role, the ET did not fail to recognise that the creation of a new role *could* be a reasonable adjustment but accepted the respondent's submission as to why this was not so in this case; it did not thereby place the burden of proof upon the claimant but permissibly found he had not advanced evidence to enable a contrary conclusion. Equally, the ET did not disregard the medical evidence but ultimately considered this did not assist. More generally, the ET undertook a proper reasonableness assessment, having regard to all the relevant circumstances but found the available evidence did not support the view that the creation of the new role was objectively reasonable.

84. **Ground 4** relates to the finding that the respondent had no knowledge of the claimant's

disability prior to October 2018 and is put as a perversity challenge, given: (1) the claimant had informed the respondent of his sleeping disorder and its effects; (2) he had mentioned his disability in his promotion applications in 2017 and 2018; (3) the respondent had received the medical evidence of Dr Zaiwalla in 2017; and (4) the claimant had outlined the impact of his disability in detail in his 2017 grievance. The ET further erred in relying on the fact the wrong label had been attached to the claimant's disability, rather than the evidence demonstrating the impact of his impairment (paragraph 88 **Jennings**); this was inapt where the symptoms of the claimant's sleep disorder and ADHD overlapped (as conceded at the earlier case management hearing). The ET also wrongly had regard to the claimant's failure to engage with the respondent, which was not an objective assessment.

85. For the respondent, however, it is said that, to extent there had been a concession at an earlier stage, that had to be seen in context: accepting that the sleeping disorder was subsumed within the ADHD was not the same as saying the position was the same the other way around. The March 2017 occupational health report was unable to say whether the claimant's sleep problems were likely to come within the **EqA** definition of disability. Prior to October 2018, the information provided by the claimant was that he had a long-term sleep disorder; the subsequent ADHD diagnosis was not simply giving the same impairment a different name (whilst the sleep disorder was a manifestation of the claimant's ADHD, that was very different from an assertion that the symptoms of that disorder were coterminous with the full collection of symptoms of his ADHD). In determining the issue of knowledge, the claimant's lack of engagement had repercussions as to what the respondent could reasonably have been expected to know, and when; it formed part of the circumstances to which it was appropriate for the ET to have regard in making its objective assessment.

86. **Ground 5** relates to the section 15 **EqA** claim, whereby the claimant contends that the ET erred in its approach to the question of causation: (1) in misapplying the "*more than trivial*" test (paragraph 31 **Dunn v Secretary of State for Justice and Anor** [2019] IRLR 298); (2) in concluding there was no disadvantage because there were additional reasons why the respondent rejected the claimant's applications, when the "*something arising*" from disability need not be the sole or principal

reason for the unfavourable treatment (paragraph 31 **Pnaiser v NHS England** [2016] IRLR 170); (3) by impermissibly relying on behaviours of the claimant (in not accessing support etc) that were associated with his disability; (4) in failing to consider and/or draw adverse inferences from the respondent's failure to call material witnesses (in particular, Dr Garrett Brown and relevant individuals from the People Team) or adduce documentary evidence of advice, notes of meetings etc (and see, e.g., paragraph 51(4) **Bennett v Mitac Europe Ltd** [2022] IRLR 25 EAT).

87. The respondent disagrees, arguing that the ET did not misapply the relevant test (per **Dunn** and **Pnaiser**); the reality was that the lack of business case meant that each of the claimant's applications for progression would have failed in any event, and it could not be said that "*the something*" relied on by the claimant had "*at least a significant (or more than trivial) influence on the unfavourable treatment*" (paragraph 31(b) **Pnaiser**). As for the failure to call particular witnesses or adduce certain documentation, the ET had other evidence before it and made permissible findings on that basis.

88. By **ground 6**, the claimant contends that the ET erred in its approach to the question of objective justification. The flexibility that the ET had found existed in the Framework meant that it allowed for a series of responses to individual circumstances, such that it could not be justified as a policy as opposed to requiring justification for its application in the individual case (see paragraphs 46-48 **Buchanan v Commr of Police for the Metropolis** [2017] ICR 184 EAT). In any event, the ET had failed to conduct a proper proportionality assessment (**Chief Constable of West Yorkshire Police v Homer** [2012] ICR 704 SC; **Aster Communities Ltd v Akerman-Livingstone** [2015] AC 1399 SC) and erred in not doing so in respect of each of the claimant's applications.

89. The respondent argues, however, that the observations in **Buchanan** must be seen in context: the policy in that case allowed for a series of individual responses relating to the individual's disability; in the present case the flexibility was necessary because of the Framework's coverage and was available to all. The question for the ET was, therefore, whether the Framework (with all the flexibility it incorporated) was a proportionate means of achieving a legitimate aim. In this regard, it

carried out the requisite balancing exercise and reached a conclusion open to it on the evidence.

90. **Ground 7** relates to the identification of the PCP for the purpose of the indirect disability and age discrimination claims. In this regard, the parties both rely on their submissions on ground 1.

91. By **ground 8**, the claimant challenges the ET's finding on the question of particular disadvantage in respect of his claim of indirect disability discrimination. On this issue, both parties rely on their submissions on ground 2.

92. **Ground 9** relates to the ET's finding on particular disadvantage in respect of the claim of indirect age discrimination. It is the claimant's case that, as the cases of **Chief Constable of West Yorkshire Police and anor v Homer** [2012] ICR 704 SC (paragraph 17) and **Games v University of Kent** [2015] IRLR 202 EAT (paragraphs 43-45) made clear, proximity to retirement would deter older persons from starting the long pathway to completing a PhD such that there was a particular disadvantage in the claimant's case. For the respondent, however, it is contended that this was a very different case to that of **Games**: there was no compulsory retirement age, and the ET had found there was no requirement to have a PhD or be studying towards one.

93. By **ground 10**, the claimant complains that the ET did not address his contention that he had suffered combined disadvantage, arising from age and disability. On this point, although accepting that the claimant raised this issue before the ET, the respondent observes that it had not been identified in the pleadings or the agreed list of issues, and thus did not constitute an error of law; in any event, as the ET had rejected the claimant's case on PCP and had found for the respondent on objective justification, it could not give rise to a stand-alone ground of challenge.

94. **Ground 11** relates to the ET's approach to objective justification in respect of the indirect disability and age discrimination claims. Both parties rely on their submissions under ground 6.

95. By **ground 12**, the claimant contends that the ET failed to address his claim in respect of his progression request in 2020, made as part of his grievance that year. Accepting this was raised in argument below, the respondent again points out that it was not within the agreed list of issues; in any event, given the ET's findings on PCP and objective justification, it would be bound to fail.

Discussion and Conclusions

96. Given the range of points raised by this appeal, I have sought to set out the relevant legal principles under separate headings, alongside my consideration of the parties' arguments and my conclusions on each issue.

Knowledge of Substantial Disadvantage

97. Although an issue addressed under ground 4, it is convenient to first consider the ET's approach to the question of the respondent's knowledge (actual or constructive) of the disadvantage the claimant suffered due to his disability.

98. At an earlier case management hearing, on 18 December 2020, the respondent's position on the question of disability had been confirmed, as follows:

> "1. … the respondent conceded that the claimant was disabled at the relevant time by ADHD. It further indicated that it was accepted that the claimant's sleeping difficulties were a symptom of his ADHD, albeit it was not accepted that the claimant had a sleeping disorder which was separate and distinct from ADHD.
> 2. … it was accepted that there was a long term and substantial adverse effect on the claimant's ability to sleep. The respondent acknowledged that for the purposes of deciding whether or not a person is disabled it does not matter what causes a particular impairment and accordingly … agreed that whether the claimant had a separate and distinct sleeping disorder or whether his sleeping difficulties were a symptom of his ADHD and caused by it was not something that was relevant …"

99. For the purpose of the reasonable adjustments claim, mere knowledge of the claimant's disability was, however, not sufficient; paragraph 8, part 3 of schedule 8 to the **EqA** provides that an employer will not be subject to a duty to make reasonable adjustments if it:

> "does not know, and could not reasonably be expected to know— … (b) … that an [employee of the respondent's who is a] disabled person has a disability and is likely to be placed at the substantial disadvantage referred to …"

100. A further question thus arose as to the respondent's knowledge of the "*substantial disadvantage*" suffered by the claimant. The respondent's position on this question was clarified at the outset of the full merits hearing, as follows:

> "3. … the University's knowledge of disability was not disputed from 2016

> but both disadvantage and its knowledge (or "constructive" knowledge) of disadvantage for the purpose of the reasonable adjustments complaints was disputed at least until it was advised of Mr Pipe's ADHD diagnosis in September/October 2018. …"

101. In oral submissions, I had understood Mr Jackson (for the claimant) to suggest it was relevant that the respondent had earlier made a concession as to the overlapping nature of the symptoms of the claimant's sleep disorder and ADHD. In providing a response to the draft judgment (circulated to counsel as part of the hand-down process), Mr Jackson has clarified that his submission was in fact limited to the respondent's knowledge of disability. Certainly it is clear that the respondent's concession was limited to the question of *disability*: regardless of the specific underlying diagnosis, it had made no concession as to its knowledge – actual or constructive – of the *disadvantage* suffered by the claimant.

102. More generally, the appeal on this ground is pursued as a perversity challenge, which must thus meet the high threshold of establishing "*an overwhelming case*" that the ET reached a decision not reasonably open to it on a proper appreciation of the evidence and the law (**Yeboah v Crofton** [2002] EWCA Civ 794). In the present case, although it was accepted the respondent had known of the claimant's sleeping disorder at an earlier stage, the ET concluded that it was only around the time it was informed of his ADHD diagnosis (September/October 2018) that the respondent could be said to have the requisite knowledge of the disadvantage the claimant suffered.

103. Considering the matters relied on by the claimant in this regard, it is apparent that the ET had regard to the information that he had provided in 2016 and 2017, relating to his sleeping disorder and its effects, including at the time when he decided to reduce to part-time working in January 2017 (see ET paragraph 194). It also permissibly took into account, however, the advice from occupational health in March 2017, to the effect that the advisor was "*unable to say*" whether the claimant would be a disabled person for **EqA** purposes (ET paragraph 204); and, although the ET there referred to the fact of the claimant's misdiagnosis at that stage, it was entitled to see this as relevant to the question of constructive knowledge. The ET also had regard to what the claimant had said in his 2017 grievance and appeal, and the medical evidence he had submitted, from Dr Zaiwalla, who had

advised that he would "*find it very difficult at present*" to work towards a PhD (emphasis added). The difficulty the ET identified was that Dr Zaiwalla's advice was, on its face, based upon a partial account of the relevant background: it appeared to take no account of the fact that the claimant had been able to obtain a Master's degree and PGC in higher education teaching, or that he was working additional hours as an hourly paid grade 7 lecturer. The ET permissibly considered the only explanation for those omissions was that, rather than attesting to a long-term effect, the advice was "*temporal*" (ET paragraph 55). As for the account taken of the claimant's failure to engage with the respondent, the ET was entitled to see that as relevant to the question whether, at that point, the respondent ought reasonably to have known of the disadvantage the claimant suffered. I do not allow this ground of appeal in relation to the respondent's knowledge (or constructive knowledge) in 2017.

104. I do, however, consider there is merit to the criticism raised under this ground in relation to the respondent's (constructive) knowledge of the claimant's position going into 2018. In his application for progression, dated 12 March 2018, the claimant had expressly stated that he had:

> "… a declared disability – a long-term sleep disorder that affects memory, focus and organisation, and general health …"

Further explaining:

> "Following intensive testing in 2017, my NHS consultant verbally said a PhD was 'out of the question' because of the severity of my condition … A grievance was eventually rejected because the consultant's letter said I would have difficulty 'at the moment'. This decision, apparently made without medical advice, disregarded evidence that my disability had lasted 40-plus years and would be difficult to treat – so would probably endure."

105. The ET also noted that by letter of 26 March 2018, the claimant's GP had advised that his sleep disorder:

> "… gives him marked impact in difficulty functioning during the day time due to extreme tiredness. It can massively affect his concentration and he can find it very difficult to organise himself at times."

106. Although it was the claimant's case that he had provided this letter to the respondent, it appears the ET made no finding on this. In any event, however, there was material before the respondent (in the form of the claimant's application, if not also his GP's letter) that - taken with the

information that had been provided in 2016 (referenced, for example, by Dr Hides' decision on the grievance appeal; see paragraph 19 above) and 2017 (in particular, the Dr Zaiwalla advice from; paragraph 16 above) – then put it on notice of a long-term impairment that affected the claimant's memory, focus and organisation. This is not a case where the claimant was *not* disabled at the earlier point in time; he just had not received an accurate diagnosis at that stage and the medical evidence initially presented to the respondent had been unclear as to the temporal effect, such that the respondent – given the information available to it at that time - might reasonably have considered the claimant's impairment did not give rise to the requisite disadvantage. Going into 2018, the information became clearer, particularly as to the continuing effect of the claimant's condition. There is, however, nothing in the ET's reasoning that demonstrates that it had regard to the cumulative picture that had thus been provided to the respondent by late March 2018; indeed, the reasoning seems to jump from 2017 to the time of the claimant's ADHD diagnosis in the autumn of 2018.

107. What the respondent might reasonably have been expected to know in the spring of 2018 was relevant to the determination the ET had to make relating to the second application for progression and I am unable to see that its finding on knowledge of disadvantage for this element of the claim was based upon a proper appreciation of the evidence. Had it properly considered the material that was then available to the respondent – or which would have been available to it upon the kind of further investigation that might reasonably have been expected, given what the claimant had said – it seems to me that the ET would then have reached the same conclusion it did in respect of the position in the autumn of 2018: regardless of the precise label given to the claimant's condition, the long-term substantial disadvantage he suffered was clear.

108. Given my conclusions on later grounds, this point becomes academic, but, had that not been so, I would have allowed this ground of appeal to the extent it relates to the position on or after 12 March 2018.

Provision Criterion or Practice ("PCP")

109. By grounds 1 and 7, the claimant challenges the ET's finding that he had failed to establish the PCP on which he was relying in this case; a finding that was fatal to both his claims of indirect discrimination (disability and age) and to his claim of disability discrimination due to a failure to make reasonable adjustments.

110. So far as the claims of indirect discrimination are concerned, section 19 **EqA** provides:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
> (*a*) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (*b*) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (*c*) it puts, or would put, B at that disadvantage, and
> (*d*) A cannot show it to be a proportionate means of achieving a legitimate aim.
> (3) The relevant protected characteristics are—
> age;
> disability;
> …"

111. As for the duty to make reasonable adjustments, by section 20(3) **EqA**, this is explained as a requirement that arises:

> "…where a provision, criterion or practice of [the employer]'s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, …."

112. In respect of both forms of claim, there is an initial burden on a claimant to establish that the relevant PCP caused substantial disadvantage; see **Project Management Institute v Latif** [2007] IRLR 579, at paragraphs 44-45, in which Elias P (as he then was) observed, at paragraph 45, that establishing the PCP and demonstrating the substantial disadvantage:

> "are simply questions of fact for the tribunal to decide after hearing all the evidence, with the onus of proof resting throughout on the claimant."

113. In **Allonby v Accrington & Rossendale College** [2001] ICR 1189, at paragraph 12, Sedley

LJ explained the initial burden on the complainant, as follows:

> "It is for the applicant to identify the requirement or condition which she seeks to impugn. These words are not terms of art: they are overlapping concepts and are not to be narrowly construed (**Clarke v Eley (IMI) Kynoch** [1982] IRLR 482, 485). If the applicant can realistically identify a requirement or condition capable of supporting her case, … it is nothing to the point that her employer can with equal cogency derive from the facts a different and unobjectionable requirement or condition. The employment tribunal's focus moves directly to the question of unequal impact."

114. The reference to "*requirement or condition*" in **Allonby** reflected the statutory language applicable at that time (in that case, section 1(1)(b) **Sex Discrimination Act 1975**). A similarly purposive approach has also been adopted in respect of the yet broader concept of a "*provision, criterion or practice*"; thus, in **Secretary of State and Industry v Rutherford** [2006] ICR 785, at paragraph 47, Lord Walker observed, in relation to the terminology of **Council Directive 97/80/EC**, where the language used was that of "*an apparently neutral provision, criterion or practice*",:

> "The definition has a broad scope. The "apparently neutral" measure may be formal and general or informal and particular, ranging from national legislation applicable to all employment in a member state to an administrative change in a single employer's shift system. …"

115. More recently, in **Ishola v Transport for London** (CA) [2020] ICR 1204, at paragraphs 35-36, Simler LJ confirmed the approach to be taken in identifying the PCP, and determining whether that has been applied in the circumstances in issue, as follows:

> "35. The words 'provision, criterion or practice' are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the statutory code of practice that the phrase PCP should be construed widely…
> 36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers … but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply … [or] a hypothetical comparator to whom the alleged PCP could

> or would apply."

116. The question raised by grounds 1 and 7 relates to the ET's approach to the identification of the PCP in this case. As recorded in the list of issues (in relation to both the reasonable adjustments and the indirect discrimination claims), it was common ground that the respondent had:

> "… applied a PCP to the claimant that applications from Grade 6 assistant lecturers to be promoted to Grade 7 lecturers in the Academic Framework Progression Process would be determined in accordance with the requirements of the Academic Progression Process."

117. As the ET observed, however, there was a dispute between the parties as to what the Framework entailed. It was the claimant's case that it placed him at a substantial disadvantage because persons with ADHD and/or sleep disorders have deficits in the skills that are required in order to obtain a PhD and/or plan, fund, conduct, analyse, and publish research; that case was put against what was said to be the relevant "*context*", as follows:

> "… the … Framework, expressly and/or in practice, required him to attain a PhD and demonstrate achievement in three of four area *[sic]*, including research." (agreed list of issues, paragraph 16 a.)

118. For the respondent, however, it was said that that was not, in fact, a requirement of the Framework. As its case was explained (albeit in relation to the section 15 claim):

> "… the Claimant was not, in practice, required to have attained a PhD, nor was it necessary for him to have focused on or written academic publications in order to satisfy the research pillar of the academic framework …" (agreed list of issues, paragraph 13A.)

And it further argued (specifically addressing the way the claimant described the PCP in the indirect disability discrimination claim):

> "… a range of support was available to applicants/potential applicants for progression to ensure that they would not be placed at any such particular disadvantage." (agreed list of issues, paragraph 16 c.)

119. It is unfortunate that in thus defining the issues between them, the parties spoke of what the Framework did, or did not, "*require*". The statutory definition no longer speaks of a "*requirement or condition*" and the language of "*requirement*" can lead to a narrowing of focus, contrary to the broader, purposive approach that should be adopted (see the EAT's judgment in **Carreras v United**

First Partners Research [2016] UKEAT 0266, upheld by the Court of Appeal at [2018] EWCA Civ 323). In most cases, this will be a point of distinction without difference: the application of a PCP will generally amount to a requirement (interpreting that term broadly, *per* **Carreras**), but in the present case the distinction was potentially relevant to the question of comparative advantage. Even if the Framework did not (whether formally or as a matter of practice) set a requirement that an applicant have a PhD (or be working towards one), the fact that it provided that others – without the claimant's disability – might have a greater choice of routes open to them for progression (because they would more easily be able to demonstrate the skills required to obtain a doctorate) could be sufficient to demonstrate the requisite (comparative) disadvantage.

120. Identifying the relevant PCP is always important: it is the starting point for the ET's determination of a claim of indirect discrimination or of disability discrimination by way of a failure to make reasonable adjustments. It is against the PCP that the question of disadvantage is to be assessed and this, in turn, will inform the determination of what (if any) adjustments an employer might have been obliged to make or as to whether the employer has been able to make good its case of objective justification. By focusing on what the claimant had described as "*context*", I consider the ET erred in failing to properly assess what it was about the application of the Framework that was the subject of the complaint in this case. Although the ET's approach may have been informed by the way in which the claimant was himself focused on what he saw to be a requirement to have a PhD, it then failed to engage with the broader issue as to whether a relevant disadvantage arose from the (undisputed) application of a provision within the Framework that would have advantaged those who could more readily demonstrate the necessary skills to obtain a PhD (and thus rely on this as a potential pathway to progression under the Framework, rather than having to try to "*exceptionally*" demonstrate "*equivalence in contribution to professional practice*"). That, in my judgement, was an issue raised by the more general objection to the application of the Framework (the PCP relied on by the claimant) in this case.

121. Absent the conclusions I have reached on later grounds of appeal (which render the point

academic, save potentially in relation to ground 12), adopting the broad approach required, I would, therefore, have upheld grounds 1 and 7, on the basis that the ET thus erred by finding that the claimant had failed to demonstrate the application of the PCP he had relied on.

Disadvantage

122. The challenge to the ET's findings on disadvantage arises under grounds 2 (disability discrimination due to a failure to make reasonable adjustments; sections 20 and 21 **EqA**), 8 (indirect disability discrimination; section 19 **EqA**) and 9 (indirect age discrimination; section 19 **EqA**).

123. For the purposes of section 20 **EqA**, when considering whether the employee has been placed at a "*substantial disadvantage*", that is to be understood as a disadvantage that is "*more than minor or trivial*", see section 212. A comparison exercise is thus required to test:

> "53.5 … whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison with others who do not have any disability" (**Sheikholeslami v University of Edinburgh** [2018] IRLR 1090 EAT)

124. This is not a question of strict causation and does not require exact comparators (**Sheikholeslami** at paragraphs 48-53). As made clear in **Griffiths v Secretary of State for Work and Pensions** [2015] EWCA Civ 1265, at paragraph 58:

> "The fact [disabled and able-bodied people] are treated equally and may both be subject to the same disadvantage […] does not eliminate the disadvantage if the PCP bites harder on the disabled."

125. Put another way, that disabled and able-bodied people may both be affected by a PCP does not preclude substantial disadvantage in circumstances where the likelihood or frequency of the impact is greater for the disabled person. As Simler P (as she then was) explained at paragraph 49 **Sheikholeslami**:

> "Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

126. In a claim of indirect discrimination, the PCP must place the group with which the claimant shares the protected characteristic in question at a "*particular disadvantage*" compared to groups

that, absent the protected characteristic, were not in materially different circumstances, albeit not every member of the group needs to be placed at a disadvantage insofar as the group is proportionately disadvantaged (see the discussion in **Essop v Home Office; Naeem v Secretary of State for Justice** [2017] UKSC 27 at paragraphs 25-27). "*Particular*" in this context is not intended to connote a disadvantage that is required to meet a certain level of seriousness but simply makes clear that it is a disadvantage for those with the relevant protected characteristic (**McNeil and ors v Cmmrs for HMRC** [2019] EWCA Civ 1112).

127. The ET accepted that, to the extent that the Framework had necessitated the claimant holding a PhD and/or demonstrating achievement in a number of areas, he had been placed at a substantial (in the sense of non-trivial) disadvantage. Given its findings as to how the Framework was applied *in practice*, however, the ET further concluded that: (1) in relation to his 2017 application, the claimant had failed to adequately engage with the Framework and, in any event, there had been no business case for a higher grade role for him; (2) as for his 2018 and 2019 applications, there was no business case and the claimant had thus suffered no disadvantage.

128. In the light of my earlier rejection of the claimant's challenge to the ET's finding as to the respondent's (constructive) knowledge of disadvantage in 2017, it is strictly unnecessary for me to consider the further grounds of appeal in respect of the first of the applications in issue. For completeness, however, I make clear that I do not agree with the claimant's characterisation of the ET's reasons for concluding that he suffered no disadvantage as a result of his impairment in relation to his 2017 progression application. While the ET referred to the claimant's lack of engagement with what the respondent "*was seeking to put in place following its discussions with him*" (ET paragraph 221), that could only rationally have related to the position *subsequent* to the 2017 application. To the extent that the ET referred to failings on the claimant's part *prior* to that application, that was to his lack of engagement with the requirements of the Framework, which – as he had been advised by Mr Dawkins – needed "*a solid business plan for where his role would fit within the structure, how it would add to the school*". Whilst it is not clear to me that there was

evidence before the ET linking the claimant's lack of engagement to his impairments, I am, in any event, satisfied that the ET did not impermissibly rely on behaviours associated with the claimant's disability; rather, having accepted Mr Dawkins' evidence, the ET found that the claimant's 2017 application did not make the business case that would be required under the Framework.

129. More generally, the ET found that, regardless of any disadvantage the claimant might have suffered in respect of the PhD pathway to progression, the lack of a business case to support each of his applications meant that the result would have been the same if he had suffered no such impairment: there was thus no relevant disadvantage as a result of the application of the Framework in any of the instances relied on by the claimant.

130. In reaching this conclusion, contrary to the claimant's arguments on appeal, the ET's reasoning was neither tainted by any consideration of behaviours that might have been said to have related to his disability (contrary to the guidance relied on by the claimant at paragraphs 68-69 **Jennings v Barts** UKEAT/00556/12), nor did it thereby test the question of disadvantage by reference to the mitigations to the PCP offered by the respondent as potential adjustments in the claimant's case (contrary to the approach made clear at paragraph 29 **Finnigan v Chief Constable Northumbria Police** [2013] EWCA Civ 1191 and paragraph 26 **R (Rowley) v Minister for the Cabinet Office** [2022] 1 WLR 1179 (Admin)). First, there is nothing that clearly demonstrates that the claimant's lack of engagement was linked to his impairments. More generally, however, the passing reference (at paragraph 221) to his failure to engage with the respondent, was made in the context of accepting that the claimant had demonstrated that he experienced non-trivial deficits in certain skills. The ET then went on to consider, separately, whether the claimant had in fact suffered substantial disadvantage in respect of any of the applications for progression in issue.

131. Focusing on the finding that the absence of a business need for a grade 7 role for the claimant meant that he suffered no disadvantage, the claimant objects that the ET thereby erred by imposing a strict test of causation that is not required by section 20 **EqA**; he contends that this demonstrates that the ET lost sight of the low comparative threshold, whereby the PCP merely has to have the

effect of disadvantaging the disabled person more than trivially in comparison with others who do not share that disability.

132. That criticism might have merit if the case before the ET simply required it to consider the question of potential disadvantage in the abstract (if, for example, the claimant was pursuing a claim merely for declaratory relief as to the effect of the Framework): as I have previously allowed, all other things being equal, a comparator, who was otherwise in the same position as the claimant but who did not suffer the same impairments, would have the advantage of being more readily able to pursue the PhD pathway to progression under the Framework; the claimant would thus be placed at a comparative disadvantage in that regard. The ET was not, however, addressing such a claim in the abstract but was having to determine whether the claimant suffered a more than trivial disadvantage in the specific applications in issue; as the claimant has summarised his case below in his skeleton argument for this hearing:

> "3. …[he] averred that the rejections of his applications/requests for promotion amounted to a failure to make reasonable adjustments …"

133. In considering whether the claimant had in fact suffered substantial disadvantage in the application of the PCP in respect of any of his requests for progression (that is, in 2017, 2018, or 2019), the ET noted that there had been two fundamental requirements of the Framework: (1) had the applicant demonstrated they met the required standards? *and* (2) was there a business need for a role into which the applicant could then progress? (ET paragraph 222, as cited at paragraph 7 above). On the evidence available, the ET's conclusion was that any disadvantage that the claimant might have suffered as a result of the application of a PCP relating to the requirement (as he put it) of a PhD was simply irrelevant as there was no business need for the grade 7 role he was seeking. Asking the question identified at paragraph 49 **Sheikholeslami** – what would have been the position if the claimant did not have the relevant disability? – the answer thus provided by the ET was that it would have made no difference, because there was no business case for a grade 7 role into which the claimant could progress.

134. In seeking to argue that there was a failure to apply the correct test ("*the triviality threshold*"),

or to appreciate that there was no strict requirement of causation (the focus being on comparative disadvantage), the difficulty for the claimant is that the ET found as a fact that his applications for progression failed because there was no business case. Even if it was allowed, therefore, that the claimant might have suffered a more than trivial comparative disadvantage in meeting the first requirement under the Framework (that he could demonstrate that he met the relevant standards), the ET's answer to the **Sheikholeslami** question of fact was that he had suffered no such disadvantage in respect of the second (the business case).

135. Although the statutory test under section 19 **EqA** is differently worded, there is no suggestion that the ET would have been required to reach a different conclusion as regards the question of disadvantage in respect of the claim of indirect disability discrimination. The ET had found as a fact that - even if any provision relating to holding, or working towards, a PhD had been removed – the claimant's applications were bound to fail as there was no business need for a grade 7 role into which he could progress. In those circumstances, it similarly concluded that the claimant had not been able to demonstrate that he (or anyone else sharing the protected characteristic of disability) had suffered a disadvantage in respect of any of the applications in issue.

136. There is no perversity challenge under either ground 2 or 8 and I am unable to see that there is any proper basis on which the EAT could look behind these conclusions of fact. For the reasons provided, I therefore dismiss the appeal on both those grounds.

137. Although it might appear that the same reasoning would equally apply to the ET's finding on the question of disadvantage for the purposes of the claim of indirect age discrimination (to which ground 9 relates), the judgment addresses that case rather differently, testing the question of disadvantage in a more general way (looking, in particular, at the question of group disadvantage) rather than in terms of the specific applications the claimant had made (and, for completeness, I note that the respondent has not sought to suggest that the ET's decision on this question should be upheld on alternative grounds). Considering whether persons in the age group 55-59 would have suffered disadvantage, the ET referred back to its earlier findings as to the flexibility allowed under the

Framework and concluded that age, of itself, would not have presented a barrier to meeting the standard of obtaining (or conducting research towards) a PhD.

138. It is the claimant's case that, in reaching its conclusion in this regard, the ET wrongly considered there were material distinctions between the facts of the present case and those of **Games v University of Kent** [2015] IRLR 202. It seems to me, however, that **Games** does not greatly assist the claimant. Whilst there is some factual similarity between the cases, it cannot be suggested that the ET in the present case fell into the errors the EAT found had been made by the ET in **Games** (a failure to have regard to Mr Games' evidence; an over-reliance on statistics; a failure to consider the question of disadvantage at the time the PCP was applied, which rendered the fact that Mr Games might have previously had the opportunity to obtain a PhD irrelevant given that he was unable to do so at the time in issue). Although the EAT held that these errors vitiated the ET's decision in **Games**, it did not substitute a finding that particular disadvantage had, in fact, been made out, but remitted the case to the ET so that question could be determined afresh.

139. The better point made by the claimant under ground 9 is that the ET effectively lost sight of the comparative exercise it was required to carry out. The issue was not whether *all* members of the older age group in question (55-59) would necessarily suffer disadvantage by the application of the Framework, but whether members of that group would thus be disadvantaged when compared to others who were not of that age (see per Lady Hale at paragraph 14 **Homer v Chief Constable of West Yorkshire Police** [2012] UKSC 15). Just as the impairments suffered by the claimant placed him at a comparative disadvantage if the application of the Framework was considered in abstract terms, so too might those in the older age range be disadvantaged, as compared to those who were younger, by the provision within the Framework allowing for progression for those who had (or had the ability to obtain) a PhD. I do not see that the flexibility (as the ET found) allowed under the Framework would necessarily remove this potential comparative disadvantage: if those who did not fall within the older age group would be more likely to have a greater number of routes to progression available, a comparative disadvantage would seem to arise. By focusing on how the

claimant, and others in the same age cohort, might obtain progression by alternative routes, the ET failed to consider the potential disadvantage arising from the greater range of options available to those in younger cohorts. I would therefore allow the appeal under ground 9 (albeit, given my conclusion on justification, this is rendered academic, save potentially in respect of ground 12).

Reasonable Adjustments

140. Should I be wrong in my rejection of ground 2 (and in my conclusion on ground 4, insofar as that is relevant to the 2017 application), I now return to the claim under sections 20 and 21 **EqA**, in respect of which, by ground 3, the claimant complains that the ET erred in its assessment of the reasonableness of the adjustments contended for in this case.

141. Section 20(3) **EqA** provides that, where a PCP puts a disabled person at a substantial disadvantage compared to those who are not disabled, there is a duty upon an employer:

> "… to take such steps as it is reasonable to have to take to avoid the disadvantage."

142. The duty thus imposed by section 20(3) necessarily requires that the disabled person be treated differently in recognition of their particular needs (see per Lady Hale at paragraph 47 **Archibald v Fife Council** [2004] UKHL 32); depending on the circumstances of the case, that could require the creation of a new role (see **Archibald v Fife**, per Lord Hope at paragraphs 69-71, and **Chief Constable of South Yorkshire Police v Jelic** [2010] IRLR 744, per Cox J at paragraph 45).

143. In determining the reasonableness of a proposed adjustment, the ET should consider to what extent it might ameliorate the disadvantage (see **Griffiths**, per Elias LJ at paragraph 66). In this regard, there is a relatively low threshold: the adjustment need only have a "*prospect*" of achieving that result, see **Leeds Teaching Hospital NHS Trust v Foster** UKEAT/0552/10. Although the **EqA** does not set out a mandatory list of factors that are to be taken into account (in contrast to the position under the **Disability Discrimination Act 1995**), the **EHCR Employment Code** lists matters that might be relevant to the ET's assessment, as follows:

> "whether taking any particular steps would be effective in preventing the substantial disadvantage;
> the practicability of the step;
> the financial and other costs of making the adjustment and the extent of any disruption caused;
> the extent of the employer's financial or other resources;
> the availability to the employer of financial or other assistance to help make an adjustment …; and
> the type and size of the employer."

144. It is the claimant's case that the ET failed to conduct a proper reasonableness assessment, weighing the relevant circumstances in the balance for each of the relevant years. More specifically, he argues that the ET mischaracterised his case; failed to recognise that the creation of a new role could be a reasonable adjustment; wrongly focused on the claimant's own behaviour; irrationally disregarded the medical evidence; and wrongly placed a burden on the claimant to establish reasonableness.

145. The adjustments contended for in the present case were two-fold: the first, was that an alternative means ought to have been used to assess the claimant for promotion; the second, that a new, teaching-focused, professional practice role be created, into which the claimant could progress. It is right to note that the list of issues did not state that these were interdependent, that both adjustments would have been required to avoid the disadvantage suffered by the claimant. On the other hand, that was clearly the ET's understanding of the claimant's case below (see ET paragraph 228, cited at paragraph 58 above). It was, moreover, a necessary implication from the ET's findings as to what a grade 7 lecturer role entailed. As it identified (see paragraphs 189 and 191 of the ET's judgment, cited at paragraphs 47 and 48 above), the grade 7 role encompassed additional research and administrative responsibilities, which the claimant considered would place him at a disadvantage given the impairments he suffered. Given that the claimant's applications for progression had to be viewed in the context of the role into which he sought to be promoted, I do not consider the ET erred in its characterisation of the adjustments contended for in this case as being interdependent.

146. As for the medical evidence relied on by the claimant in this regard, the ET was also entitled

to consider this in context. First, it permissibly had regard to the fact that the evidence in question focused on what was understood to be the necessary requirement for progression rather than the nature of the role into which the claimant might progress. Secondly, although both Dr Zaiwalla and Dr Bescoby-Chambers had advised that the claimant would experience difficulties in undertaking research activities (as associated with the obtaining of a traditional PhD), the ET permissibly took into account that both had relied on what the claimant had told them, which appeared not to include the fact that he had been able to obtain both a master's degree and a PGC in higher education teaching, and had taken on additional (hourly paid) teaching responsibilities at grade 7 level, or of the potential for other, non-traditional, routes to be used to demonstrate doctorate-level equivalence. The ET did not irrationally fail to give proper regard to the medical evidence; it permissibly concluded that the evidence available was of limited relevance to the assessment it had to undertake.

147. As for the claimant's criticism of the ET's references to his failure to engage with the support offered by the respondent, that was part of the objective assessment it was required to carry out. Determining the reasonableness of a suggested adjustment will always be a case-specific exercise. In the present case, the ET found that the respondent had been willing to discuss alternative pathways to progression with the claimant:

> "238 … the University sought to engage in a dialogue with Mr Pipe to identify a pathway that was both an acceptable mechanism to the University and for Mr Pipe to demonstrate the required levels of achievement across the various areas and which also took into account the adverse effects of Mr Pipe's disability upon his ability to meet the requirements of the Framework. The University wished to discuss that and then refer the matter to occupational health for their advice."

148. In then considering the first adjustment for which the claimant contended – that an alternative means ought to have been used to assess him for promotion – the ET was entitled to take into account how any suggestions made by the respondent had been received by the claimant (a circumstance relevant to its determination of the potential effectiveness of the step in question). The medical evidence before the ET did not state that the claimant's failure to engage with the respondent in this regard was a further consequence of his disability, and it was not inconsistent with the objective

nature of the assessment required that the ET tested the reasonableness of the adjustment in issue by reference to his response at the time.

149. More generally, it is apparent that the ET undertook precisely the reasonableness assessment that the claimant contends was required of it in this regard. Accepting that there was no teaching-focused professional practice role within the existing academic structure, the ET expressly considered the question whether the creation of such a role for the claimant would have been a reasonable adjustment in this case. Setting out the respondent's case in this regard, it is apparent that the ET accepted that:

> "242 … such a step would necessarily have had ramifications not only for C, but also for all of the other teaching staff employed both specifically upon the Journalism course (the contention in evidence effectively being that teaching hours allocated to those teaching staff ought to have been reallocated to C, with those teaching staff then being required to undertake other duties) and more widely across the Faculty, School and University."

150. The position in 2019 was specifically addressed in the ET's recitation of the respondent's submission at paragraph 241, which set out the very stark difficulties that would arise from the proposed adjustments at that stage:

> "…. at the time of rejecting C's 2019 application for progression, there had been a significant reduction in student numbers, such that the School could not justify employing a further G7 Lecturer in Journalism. Having regard to budget constraints, the inevitable consequence of increasing expenditure upon staffing upon one course (which did not actually require increased staffing resource) would be a need to reduce or limit expenditure elsewhere (where potentially the need for increased staffing resource was greater). In the premises, it is submitted that the adjustment would inevitably cause substantial disruption not only to the directly impacted members of Journalism staff, but also to the School and/or the Faculty more widely."

151. It would be wrong, however, to suggest that the ET only saw these as problems impacting on the 2019 application. Reading the ET's reasoning holistically (as I am required to do), it is apparent that it accepted Mr Dawkins' evidence as to the difficulties in identifying how any proposed new role "*would fit within the structure*" in 2017 (see ET paragraph 46, cited at paragraph 11 above), and that it had in mind Dr Garrett Brown's view as to the knock-on effect of the claimant's proposed grade 7 role in 2018: "*In addition to the increase in salary scale there would potentially be*

additional hours required at AL [Assistant Lecturer] level to backfill the teaching and learning support activities which do not sit under the remit of a L [Lecturer] level member of staff" (ET paragraph 11, cited at paragraph 25 above). The ET was thus entitled to take account of this wider impact when assessing the reasonableness of the creation of a new role as an adjustment in these circumstances.

152. Looking once more at the potential effectiveness of the step in question, the ET recorded that there was no medical evidence addressing the nature of a new, higher grade, role that might avoid the difficulties the claimant might experience in a more research-focused position. Thus undertaking the required balancing exercise, it is apparent that the ET concluded that the potential disruption identified by the respondent was not countered by evidence that would support the contention that a teaching focused professional practice role might amount to a reasonable adjustment in this case. Seeing that reasoning in the context of the ET's earlier findings of fact, that was a conclusion that it was entitled to reach on the evidence and was adequately explained. I would, therefore, dismiss ground 3 of the appeal.

Section 15 ***EqA*** *– Causation*

153. I turn at this stage to ground 5, which relates to the claimant's claim under section 15 **EqA**. Section 15 provides:

> "Discrimination arising from disability
> 1) A person (A) discriminates against a disabled person (B) if—
> (*a*) A treats B unfavourably because of something arising in consequence of B's disability, and
> (*b*) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

154. Section 15 does not require a comparative assessment, but looks at the specific treatment of the complainant, asking whether that is unfavourable. That was not in issue in the present case; it was common ground that the claimant had suffered unfavourable treatment in the rejection of his three applications for progression. Where unfavourable treatment is thus established, two separate questions of causation then arise: (1) what was the reason for that treatment? and (2) was the reason

something that arose in consequence of the complainant's disability? See **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305 EAT. As was observed in **Sheikholeslami**, the first question involves an examination of the putative discriminator's mind to determine what (consciously or unconsciously) was the reason for the unfavourable treatment; the second is a question of objective fact for the ET to determine in the light of the evidence (see also **City of York Council v Grosset** [2018] EWCA Civ 1105).

155. In answering the first question, it will not be fatal to the claim that the unfavourable treatment has more than one reason or cause:

> "The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it." (**Pnaiser v NHS England** [2016] IRLR 170 EAT, at paragraph 31(b))

156. In this regard, the approach the ET is required to take is that which is familiar in claims of direct discrimination; it will need to determine whether (consciously or unconsciously) the "something" operated on the mind of the relevant decision-taker/s, such as to amount to a material cause of the unfavourable treatment (and see the discussion in **Dunn v Secretary of State for Justice and anor** [2019] IRLR 298 CA). In so doing, the ET will be bound to apply the burden of proof as laid down at section 136 **EqA** such that, if a claimant has established sufficient evidence for the burden to shift to the respondent, cogent evidence will be required to discharge that burden (see the guidance laid down in **Igen Ltd v Wong** [2005] EWCA Civ 142, approved in **Hewage v Grampian Health Board** [2012] UKSC 37). In this regard, as was observed at paragraph 51 **Bennett v Mitac Europe Ltd** [2022] IRLR 25 EAT:

> "(1) The standard of proof necessary to discharge the burden is the balance of probabilities;
> (2) That is not altered by the reference to the requirement to establish that the treatment was 'in no sense whatsoever' because of the protected characteristic. That requirement relates to the extent to which the protected characteristic need have been a cause of the treatment; it need only have been a material cause – the point made in *Nagarajan* [*v London Regional Transport* [2000] 1 AC 501];
> (3) Similarly, the general requirement for 'cogent evidence' to discharge the burden does not apply a standard of proof beyond that of the balance of

> probabilities. Nonetheless, it is an important point. It is the respondent that generally can provide evidence about the reason for the claimant's treatment. The shifting burden of proof was designed to assist claimants in discrimination claims because such claims generally require an analysis of the reasoning process of an employee, or employees of the respondent. The respondent will be able to choose what evidence to call about the decision-making process and it is likely to be the key evidence in deciding whether discrimination has occurred.
> (4) While documentary evidence is likely to be important, because express evidence of discrimination is rarely available, much is likely to turn on the evidence of the decision maker(s). An important consequence of s 136 EqA 2010 is that if the respondent chooses not to call the relevant decision maker it puts itself at considerable risk of an adverse finding, should there be sufficient evidence to shift the burden of proof, because it will face substantial difficulty in discharging the burden."

157. As for the second question, although section 15 is given the title "*Discrimination arising from disability*", that shorthand can be misleading: the protection is against unfavourable treatment because of something arising *in consequence of* disability, which allows for the possibility that there may be several links between the "something" and the disability in issue (see the discussion in **Grosset**).

158. In the present case, it was the claimant's case that the unfavourable treatment was because of the impairments he suffered as a result of his disability (inattentiveness and impaired concentration; difficulties with task completion; poor organisational, prioritisation and planning skills; constant fatigue; impulsiveness and hyperactivity). Accepting that these were impairments (the "something") arising in consequence of the claimant's (admitted) disability, the respondent nevertheless contended that they did not cause the unfavourable treatment. The ET agreed with the respondent: first, because the claimant's applications for progression in 2017, 2018, and 2019 would necessarily have failed because there was no business case for a role for him at the higher grade 7; second, because he had failed to engage with the respondent in identifying a suitable pathway for progression in his case.

159. The claimant says that the ET thereby erred in its approach to both questions of causation that it was required to determine. It is his case that his impairments (the "something") not only impacted upon his ability to use the PhD route to progression provided by the Framework, but also explained

his failure to engage with the respondent in identifying how he might overcome that difficulty or find an alternative pathway: any failure on his part to engage with the respondent was, therefore, itself something arising in consequence of his disability. Although the ET had also found that the unfavourable treatment was caused by the absence of a business need for a role into which the claimant could progress, the claimant contends: (1) it ought properly to have drawn an adverse inference from the respondent's failure to call relevant witnesses (including Dr Garrett Brown) or disclose all relevant documentation, and (in any event) (2) it thereby failed to allow that the "*something arising in consequence*" of disability did not need to be the sole or principal reason for the treatment in question.

160. As I have already noted, it is (at best) unclear whether the claimant's case before the ET provided the necessary evidential basis for the assertion now made of an obvious link between his impairments and his failure to engage with the respondent; certainly that was not identified as a matter to be determined in the agreed list of issues. Even if such a link is assumed, however, I cannot see that this ultimately means that the ET's decision cannot stand. As already identified (see under the heading "*Disadvantage*" above), the ET found that the claimant's applications under the Framework had been rejected because there was no business need for a role into which he could progress; even if the claimant had been able to demonstrate that he had met the requisite standards for progression, he would still have been treated unfavourably because there was (as the ET accepted) no business case for him to take up a grade 7 role. The fact that the claimant had not been able to meet the standards required under the Framework might have been something taken into account by the relevant decision-takers but – on the ET's finding – it was ultimately not the motivation for the treatment of which he complained.

161. Notwithstanding this finding, the claimant complains that it fails to take account of the fact that his applications for progression were also rejected because he was not seen to meet the required standards (which, he contends, were focused on the obtaining of a PhD and the research pathway for promotion). Given the explanations provided to the claimant at the time, I have some sympathy

for this objection. In the feedback provided in respect of his 2017 application, both Dr Garrett Brown and Dr Hides (the latter in addressing the grievance appeal) focused on the claimant's shortcomings in terms of his research record and his failure to pursue a pathway to a PhD. Similarly, the feedback given in 2018 largely addressed the claimant's failure to meet the requisite standards under the Framework (although not solely those relating to research), whilst that provided in respect of the 2019 application also referenced the claimant's research shortcomings.

162. All that said, however, there was also evidence before the ET to support its conclusion, in respect of each application, that the unfavourable treatment was in fact due to the lack of a business case to support his progression. Mr Dawkins had explained the importance of the business case in relation to the 2017 application and the documentary evidence expressly referred to the absence of a budget or business need in 2018 and 2019. The fact that the claimant was provided with feedback that might improve any future application he might make did not mean that the ET was bound to find this also meant that this was an effective reason for, or cause of, the unfavourable treatment (*per* **Pnaiser**). Ultimately, the weight to be given to the different explanations provided was a matter for the ET.

163. Moreover, whilst the claimant criticises the ET for failing to draw adverse inferences from the omissions in the respondent's evidence, I am not persuaded that this can be said to amount to an error of law in this case. Although the respondent did not call Dr Garrett Brown, there was extensive documentary material setting out her contemporaneous explanations for the decisions in which she was involved and others, who were involved in the relevant decisions, were called to give evidence (including the claimant's line manager, who was closely involved with the applications throughout). Otherwise, the more general criticisms that the claimant makes of the presentation of the respondent's case go nowhere. The ET was entitled to find that the respondent had adduced cogent evidence to make good its case.

164. For all the reasons provided, I therefore dismiss ground 5 of the appeal.

Objective Justification

165. Notwithstanding my conclusions on grounds 5 (upholding the ET's conclusion on causation for the purposes of section 15 **EqA**) and 8 (upholding the ET's conclusion on disadvantage in respect of the claim of indirect disability discrimination), I have in any event gone on to consider the claimant's contention that the ET erred in its approach to the question of justification (grounds 6 (section 15 **EqA**) and 11 (indirect disability/age discrimination) of the appeal).

166. As provided by section 15(1)(b), unfavourable treatment because of something arising in consequence of disability will not amount to discrimination if the employer is able to show that the treatment was a "*proportionate means of achieving a legitimate aim*". Similarly, by section 19(1)(d), it will not amount to indirect discrimination if the employer can demonstrate that the PCP is a "*proportionate means of achieving a legitimate aim*".

167. In **Chief Constable of West Yorkshire Police v Homer** [2012] UKSC 15, at paragraphs 19-20, Lady Hale explained the approach that is to be adopted in considering whether an employer has demonstrated that an otherwise indirectly discriminatory measure is justified; in summary: (i) the employer must show that the objective of the measure corresponds to a real need; (ii) the means used must be appropriate with a view to achieving that end; (iii) the means must be reasonably necessary (and see per Mummery LJ in **R(Elias) v Secretary of State for Defence** [2006] 1 WLR 3213 CA). In **Aster Communities Ltd v Akerman-Livingstone** [2015] AC 1399 SC, at paragraph 28, Lady Hale similarly identified these as the relevant principles to be applied in relation to section 15 **EqA**, although under section 15(1)(b) it is the unfavourable treatment of the claimant that must be justified, see **Stott v Ralli Ltd** [2022] IRLR 148 EAT (albeit, the claimant does not suggest that this would give rise to a difference in approach in the present case).

168. Furthermore, as has been emphasised in the case-law, in determining whether the means adopted is "*proportionate*", the ET is required to ask a further question, (iv), and to consider whether the steps complained of strike a fair balance between the employer's need to accomplish the aim and the discriminatory effect of the measure or treatment in question (see paragraph 22 **Homer**;

paragraph 28 **Aster**); the more serious the adverse effect, or unfavourable treatment, the more cogent must be the justification for it (see per Elias J (as he then was) at paragraph 10 of **MacCulloch v ICI** [2008] IRLR 846 EAT, guidance that was subsequently approved in **Lockwood v DWP** [2013] EWCA Civ 1195). Moreover, the objective nature of the assessment required means that it is not enough that the reasonable employer might consider the PCP or treatment justified; the ET itself has to weigh the real needs of the undertaking against the discriminatory effects of the requirement (**Hardy & Hansons plc v Lax** [2005] ICR 1565 CA at paragraphs 31 and 32, cited in **MacCulloch** at paragraph 10(4) and **Homer** at paragraph 20).

169. Where the ET fails to demonstrate that it has approached the issue of justification in the structured way thus identified, and addressed each of the questions raised, the conclusion reached will be rendered unsafe, see paragraph 26 **Homer**. As the EAT (Judge Barry Clarke presiding) observed in **Department for Work and Pensions v Boyers** [2022] IRLR 748, at paragraph 30:

> "… the EAT can interfere where, upon appropriate scrutiny of the ET's reasoning, the balancing exercise required by s 15(1)(b) EqA does not appear to have been carried out. Where it has been carried out, the EAT cannot interfere unless the ET's analysis can properly be characterised as perverse."

170. In the present case, the first criticism made of the ET's approach to the question of justification is that it considered whether the general policy was justified rather than the particular treatment of the claimant. In this regard, the claimant relies on the guidance provided by the EAT (HHJ David Richardson presiding) at paragraphs 43-48 of **Buchanan v Commissioner of Police of the Metropolis** [2017] ICR 184 EAT.

171. In **Buchanan**, it was acknowledged that there will be cases in which the question whether the treatment of the claimant was justified will be dependent upon whether the relevant rule or policy is justified. That had been the position in the age discrimination case of **Seldon v Clarkson Wright & Jakes (Secretary of State for Business Innovation and Skills intervening)** [2012] ICR 716 SC, where Lady Hale had approved the approach laid down by the EAT in that case:

> "64. … 'Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important

> element in the justification. It is what gives predictability and consistency, which is itself an important virtue.' Thus the appeal tribunal would not rule out the possibility that there may be cases where the particular application of the rule has to be justified, but they suspected that these would be extremely rare. 65. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it . . ."

Accepting that this could also be the correct approach in a claim under section 15 **EqA**, the EAT held that that was not so on the facts of **Buchanan** itself, which was concerned with the application of an attendance management policy. The EAT considered that it:

> "48. … will be rare in disability cases concerned with attendance management for the approach in *Seldon* to be applicable. This is because generally speaking the policies and procedures applicable to attendance management do allow … for a series of responses to individual circumstances."

172. Returning to the facts of the present case, it is the claimant's submission that, given its finding that the Framework was applied flexibly, the ET ought properly to have treated this as having allowed for "*a series of responses to individual circumstances*"; it is said that it thus erred in considering justification in terms of the Framework itself, rather than in relation to its individual application to the claimant.

173. It is unclear to me that this was a point put in contention before the ET (it seems to have been common ground below that the relevant question was whether the general rule or policy was justified) but, in any event, I consider that this represents a mischaracterisation of the ET's finding as to flexibility in this instance. The ET rejected the claimant's contention that the Framework required an applicant to attain a PhD, finding that the respondent: (i) interpreted the Framework to mean that an applicant should either have a PhD or be on a pathway to obtaining a PhD (ET paragraph 212; paragraph 52 above); (ii) accepted various alternative routes to the obtaining of a doctorate, not simply the traditional approach that the claimant had suggested (ET paragraph 213; paragraph 53 above); and (iii) had, in any event, incorporated an alternative pathway to progression (albeit "*exceptionally*") by demonstrating equivalence in contribution to professional practice (ET paragraph 217; paragraph 54 above). It is hard to see the Framework as akin to an attendance management policy, but, in any event, the ET's findings as to the flexibility allowed under the

Framework would still not have permitted "*a series of responses to individual circumstances"*: an applicant for progression would have to meet the terms of the Framework, albeit that these did not amount to the imposition of a requirement to attain a PhD (as the claimant had suggested).

174. The claimant further contends that the ET erred in failing to conduct the proportionality assessment that was required of it in this case, either generally or in respect of each of the claimant's applications for progression. He complains that the ET conflated the legitimate aims with their appropriateness, reasonable necessity and proportionality; failed to consider alternatives; did not consider the disadvantage to the claimant; and failed to consider factors relevant to the questions it had to determine.

175. I remind myself of the aims accepted by the ET in this case: (a) adopting a consistent and transparent approach; (b) maintaining consistently high standards; (c) maintaining the respondent's reputation; (d) maintaining a balance of staff (ET paragraph 265; cited at paragraph 67 above). Considering these aims in respect of each of the applications made by the claimant, the ET found that the respondent had shown that each of the aims were legitimate. It is right that the ET reached this conclusion by considering the legitimacy of the Framework as a general rule or policy but, for the reasons I have already stated, that was an appropriate approach in this instance. The ET's reference to the acts of unfavourable treatment (paragraph 266 of its decision) demonstrates, however, that it appropriately considered the issue of legitimacy in respect of each of the years in which the claimant had made an application for progression.

176. Having thus found that the aims identified by the respondent were legitimate, the ET went on to ask whether the Framework was "*appropriate, reasonably necessary and no more than reasonably necessary to achieve those aims*" (ET paragraph 268). It is correct that the ET initially expressed this as an answer to "*the proportionality question*" but the reasoning that follows demonstrates that it carried out the structured assessment required of it.

177. The ET plainly found the Framework to be an appropriate means of seeking to achieve the aims identified, and it then went on to test whether it was reasonably necessary, permissibly taking

into account the flexibility allowed for in the Framework and the "*checks and balances*" that existed within the process. In so doing, the ET did not fail to question whether the Framework was disproportionate. Indeed, the ET can be seen to have considered carefully whether the provisions the respondent had put in place under the Framework went further than reasonably necessary and were thus disproportionate (see *per* Lady Hale at paragraph 23, **Homer**), concluding that the balance struck, between the required standards and business need, on the one hand, and the impact on staff with varying skillsets, on the other, fell in the "*Goldilocks Zone*" and was "*just right*" (ET paragraph 271).

178. In thus scrutinising the measures that the respondent had put in place, and carrying out the requisite balancing exercise, the ET was entitled to take into account its earlier findings on flexibility (particularly relevant to the potential disadvantage the claimant contended he had suffered because of something arising in consequence of his disability) and as to the alternative pathways to progression that distinguished this case from the facts of **Games** (even if the ET was wrong, as I have found, to conclude that this meant there would be no group disadvantage for the purposes of the indirect age discrimination claim, the factors it took into account in that respect (see ET paragraph 293, cited at paragraph 74 above) were relevant to assessing the extent of the discriminatory impact, so as to weigh that in the balance against the needs of the respondent). It was also entitled have regard to the support provided to applicants, which would mitigate the potential for disadvantage from the application of the Framework and would thus be relevant to the assessment of proportionality. Having considered all these matters, the ET's conclusion on justification was one that was open to it on the evidence in this case.

179. Given that this was a case that required justification to be considered in relation to a general policy, rather than a response to individual circumstances, I do not agree that the ET erred in failing to include within its reasoning at this stage references to the specific circumstances of the claimant. In any event, however, I do not consider that the ET lost sight of those circumstances. The claimant's individual position had been considered by the ET in detail: (i) when determining

whether a PCP had been applied to him; (ii) when considering the question of disadvantage; (iii) in addressing the issue as to whether the adjustments sought were reasonable; and (iv) in determining the question of causation for section 15 purposes. In then carrying out the necessary balancing exercise, for the purposes of determining proportionality, the ET was entitled to do so on the basis of the findings it had made as to the way the Framework had been applied, the degree of disadvantage suffered, the support provided, and the other considerations that had influenced the respondent in its approach to the claimant's case.

180. For all the reasons provided, I would therefore dismiss the challenge to the ET's findings on objective justification under grounds 6 and 11 of the appeal.

Combined Disadvantage

181. For completeness I return to the question of disadvantage and to the objection made at ground 10 of the appeal, that the ET failed to address the claimant's contention that he had suffered combined disadvantage, arising from both age and disability.

182. This was a matter identified in the claimant's closing submissions before the ET, in which it was stated that:

> "134. … it is artificial to separate the particular disadvantage associated with age and disability. As a matter of factual reality, the Claimant was a 55-58 year old with ADHD and/or sleeping disorder at all material times. The extent and particularity of the disadvantage caused by the PCPs was a result of these characteristics in combination. Such persons will be particularly limited in their ability to undertake PhDs and adopt the coping mechanisms required to do so because: (i) younger persons with earlier diagnoses of ADHD are generally better placed to establish coping mechanisms; and (ii) younger persons with ADHD have more time to undertake PHDs on, reducing the level of acute organisation when compared to completing a PhD in a narrow time frame."

183. The nature of discrimination is such that it is not always possible to sensibly compartmentalise the treatment or disadvantage complained of into discrete categories; as Cox J observed in **Ministry of Defence v DeBique** UKEAT/0048/09:

> "165. … Whilst some complainants will raise issues relating to only one or other of the prohibited grounds, attempts to view others as raising only one

> form of discrimination for consideration will result in an inadequate understanding and assessment of the complainant's true disadvantage. Discrimination is often a multi-faceted experience. …"

184. As the respondent has pointed out, although a matter raised in argument before the ET, this was not, however, an issue identified in the pleadings or in the agreed list of issues. As such, I do not consider it can be said that the ET erred in law in failing to address a matter that was not formally before it. In any event, however, I cannot see that this way of putting the case could make a material difference to my conclusions adverse to the claimant's appeal as set out above (and there was nothing in the claimant's submissions that would assist in this regard). I therefore dismiss ground 10 of the appeal.

The 2020 Complaint

185. By ground 12, the claimant again complains that the ET failed to address a point argued before it; this time, the objection relates to the claimant's claims of indirect disability and age discrimination in respect of his treatment in 2020.

186. In contrast to the question of combined discrimination, this was not merely a matter raised in argument but was identified as part of the claimant's pleaded case under section 19 **EqA** (both in relation to his complaint of indirect disability discrimination and that of indirect age discrimination). Thus, at paragraphs 9-11 of the amended grounds of complaint, the claimant complained that he had been deterred from applying for progression in 2020 and that this had amounted to indirect discrimination.

187. The respondent points out that this was not a matter identified within the agreed list of issues but it seems to me that, in this respect, that document is ambiguously worded in relation to the complaints made under section 19. As a claim that was specifically identified within the pleaded claim, which had never been withdrawn by the claimant, this was a matter that was before the ET and ought to have been addressed.

188. In the alternative, the respondent contends that, given the ET's findings on PCP and objective

justification, such a claim would be bound to fail. I have found, however, that the ET erred in its approach to the identification of the PCP in this case (see the conclusions on grounds 1 and 7 above). As for the question of objective justification, I have upheld the ET's conclusions, in part, on the basis that it specifically considered the legitimacy of the respondent's aims in relation to each of the years in which the claimant made an application for progression; the ET made no express finding in relation to 2020.

189. In the circumstances, I consider that this ground of appeal should be allowed. The ET erred in law in failing to address claims of indirect disability and age discrimination in relation to 2020, that were part of the pleaded case before it. It may be that the parties will wish to reflect further on the merits of these claims, given the existing findings of the ET that have been upheld on this appeal. On the material before me, however, I do not consider that I am in a position to say that such a claim would be bound to fail.

Disposal

190. I therefore allow the appeal on ground 12, in respect of the claimant's claims of indirect disability and age discrimination arising from his allegation that he was deterred from applying for progression to a grade 7 lectureship. To the extent that my conclusions on grounds 7 and 9 are relevant to the claimant's claims of indirect disability and age discrimination in relation to events in 2020, the appeal on those grounds is also allowed. Otherwise, for the reasons provided in this judgment, I dismiss the appeal.

191. The claims of indirect disability and age discrimination in relation to 2020 will need to be remitted for determination. My preliminary view would be that this should be to the same ET but I have not heard from the parties on this question and so have made no final decision in this regard. Should the parties wish to address me on this point, or to make any other representations as to the content of the order determining this appeal, they should do so in writing (limited to two sides of A4 paper maximum) at least 24 hours before the handing down of this judgment.

192. In responding to the draft judgment as part of the hand-down process, counsel for the claimant has requested that it be made clear that any remitted hearing in relation to the claims of indirect disability and age discrimination in 2020 would be limited to the questions of particular disadvantage and justification – the claimant having established a PCP in accordance with my conclusion on ground 7. On its face, that would appear to be correct. I express that view with some caution, however, as the complaint in relation to 2020 (i) was not properly addressed in the agreed list of issues; (ii) was not put on entirely the same basis as that in relation to the years 2017-2019 (not least because the claimant made no formal application for progression in 2020); and (iii) was overlooked by the ET. In the circumstances, I make no formal ruling on this point, but respectfully suggest that, if the claims in relation to 2020 continue to be pursued, the remaining issues for determination are the subject of a preliminary case management hearing before the ET.