



## EMPLOYMENT TRIBUNALS

**Claimant:** Dr N Arunasalam  
**Respondent:** University of Plymouth  
**Heard at:** Southampton (by CVP)      **On:** 5, 6, 7, 8 July 2021  
**Before:** Employment Judge Dawson, Ms Hewitt-Gray, Ms Skillin

### Appearances

**For the claimant:** Mr Kerlake

**For the respondents:** Ms Avery

## JUDGMENT

The claims are dismissed.

## REASONS

### Introduction and issues

1. At the times to which this claim relates, the claimant worked as a lecturer for the respondent.
2. By a claim form presented on 10 April 2020, the claimant claimed that she was the subject of discrimination on the grounds of race over a period between July 2018 and December 2019. Her, well drafted, particulars of claim allege six separate acts of direct discrimination and 4 acts of harassment which, largely, overlapped with the allegations of direct discrimination.
3. At a hearing on 27 January 2021, the issues in the case were clarified and recorded by Employment Judge Bax. The issues appear at pages 58 to 61 of the bundle and, at the outset of this hearing, both parties confirmed that the issues remained the same as recorded by Employment Judge Bax.

### The Hearing

4. The claimant gave evidence on her own behalf and the respondent called evidence from Louise Winfield. It also asked us to take into account the witness statement of Tracey Harding who had been unable to attend. We have given no weight to the witness statement of Ms Harding in circumstances where she has not been available for cross-examination. A timetable was agreed at the outset of the hearing for the presentation of evidence and the parties were able to stick

to that timetable without the need for further time to be given to them. Both parties prepared written closing submissions which we received and read.

5. The parties were both ably represented and we are grateful to the representatives for the careful and diligent way in which they presented their cases.
6. We received a bundle running to 237 pages and a supplemental bundle of 161 pages. Unless otherwise stated, references to page numbers below are to the main hearing bundle.

**Findings of Fact**

7. We will set out some general findings of fact and then make our findings of fact by reference to the list of issues at page 59.

**General Findings of Fact**

8. The claimant identifies herself as Asian. She states that she originates from Malaysia. That is not disputed.
9. The claimant is a qualified registered nurse with over 25 years of experience in both practice and in academia. She specialises in adult nursing and is well respected. It was clear to us that she approached her duties with rigour and integrity.
10. The claimant was appointed by the respondent as a lecturer in adult nursing in the School of Nursing and Midwifery in July 2017. She was appointed to grade 8 of the University salary structure which is the maximum grade for a lecturer.
11. Louise Winfield has been the head of the School of Nursing and Midwifery since July 2017.
12. In her witness statement and particulars of claim, the claimant complains about a discussion she had with Louise Winfield around the time of her appointment about the status of lecturers and senior lecturers within the respondent. She believes that she was misled by Louise Winfield but, expressly, does not assert that was on the grounds of race. Her particulars of claim state that the issue is relevant to establishing a pattern of unscrupulous behaviour at the respondent, and in particular by Louise Winfield. She did not make any complaint at the time.
13. Given that this is not an allegation of discrimination on the grounds of race, we have not found it necessary to resolve who is right or wrong in this respect.
14. There is a dispute between the claimant and the respondent about whether the claimant was the only non-white member of the school. Louise Winfield gave evidence that there were other "ethnically diverse people" but admitted that they were a small minority within the School. We have not been given any empirical data by which we can decide this point and accept that the claimant was either the only non-white member of the school or one of an extremely small number who would class themselves as non-white.
15. In April 2018 the claimant was asked to become the MSc dissertation coordinator and agreed.

16. We turn then to the list of issues in respect of which we must make findings of fact.

**Direct Discrimination**

**2.2.1 On 21 August 2018, Ms Winfield asked the Claimant to withdraw herself from consideration for the ENNE role so that it could be given to an English person.**

17. In or around August 2018, the respondent was in need of an ENNE coordinator. By email sent to a number of recipients, including the claimant, staff who were interested in becoming that coordinator were asked to send expressions of interest by Friday 17 August. The email did not state how people would be selected, beyond consideration of the expression of interest.
18. The claimant applied on 10 August 2018. Her application is on page 95. Two others also applied, one being Jane March-McDonald and one being Claire Peers. The expression of interest from Claire Peers is, in our view, significantly stronger than that of the other two applicants. It went into much more detail about her understanding of the role, feedback she had had in the past, how her experience was relevant to the role as well as how her skills would be relevant. The claimant did not really challenge that Claire Peers' expression of interest was much more detailed than hers, her point was that she had understood that the process was that she would be invited to an interview at which she could expand upon her experience etc.
19. The claimant's case is that at a probation review meeting on 21 August 2018 she was asked to withdraw her application for the ENNE role to allow the respondent to appoint someone who was English. It is necessary, however, to set out the way in which the claimant has described what happened.
20. The claimant made no complaint at the time and did not do so until 2020. In the meeting held to investigate her grievance which took place on 2 April 2020, the claimant stated "Probation meeting on 21<sup>st</sup> of August, during which LW asked me to withdraw my application. I was shocked and said pardon, then she repeated it, then I asked her why. She said it was for a junior member who was English/White. I didn't know what to say, so I said okay and then left." (p231)
21. In her particulars of claim the claimant stated "on 21<sup>st</sup> of August 2018... Ms Winfield, whilst looking down and avoiding eye contact with claimant, asked the claimant to withdraw her application for the ENNE role so that it could be given to "a junior member of staff who was English". The claimant subsequently withdrew her application..." (p21)
22. In her witness statement the claimant states "she informed me that only one other person had applied and that she wanted to give it to the junior member of staff who was English. I asked her to repeat herself as I thought I had misheard her. She repeated the same for second time."
23. In her evidence the claimant stated that she was not sure whether Louise Winfield had said "English" or "white". She also said that she did not withdraw her expression of interest.
24. The claimant's version of events has changed, somewhat, over time.

25. By the time the claimant wrote her witness statement, her evidence had become that she was told twice by Louise Winfield, in the probationary meeting, that Louise Winfield wanted to give the role to a junior member of staff who was English; however, her initial account, on 2<sup>nd</sup> April 2020, was that it was only when Ms Winfield was repeating the request for the claimant to withdraw that reference was made to race (i.e. race was only referred to once). On 2<sup>nd</sup> April 2020 the claimant did not recall whether reference was to “English” or “white” but in her witness statement she says the reference was to “English”.
26. The claimant’s witness statement is also different to the earlier account in that she sets out in some detail that she was told only one other person had applied for the role. She does not say that elsewhere. There would be no logical reason for Louise Winfield to tell claimant that, since two other people had applied for the role.
27. In her particulars of claim the claimant says that she withdrew her application, in her evidence she said that she did not.
28. We have heard from Louise Winfield who adamantly denies that she made any reference to withdrawal from the role or the race of Claire Peers.
29. Claire Peers was appointed to the role. The claimant became aware that she had been appointed in October 2018 from the “Good News Bulletin” We note that the claimant did not raise the issue until well over a year later and in a context where she had come to believe that she was being discriminated against because of her race. We think it likely that, in that time, the claimant’s recollection has changed and whilst we do not doubt that her evidence is given honestly, we are not satisfied on the balance of probabilities that it is correct.
30. We prefer the evidence of Louise Winfield in this respect.

*2.2.2 From 4 July 2018 Ms Robinson, in the course of her employment, was hostile to the Claimant, in that she would not answer questions and would not engage with the Claimant. The Claimant relied on Ms MacDonald-March as a comparator*

31. Following her appointment as the MSc dissertation coordinator, on 13 June 2018, the claimant received an email from Alison Thoburn, a fellow academic who was supervising a student, Suzi Robinson, who was completing a Masters degree. Suzi Robinson was also a member of staff. Alison Thoburn was leaving the University at the end of that month, which was also around six weeks before the submission of the dissertation. That would leave Suzi Robinson without a supervisor. There was too little time to allocate that role to someone else and, therefore, the claimant stepped into the role.
32. We accept the claimant’s evidence that she was told by Alison Thoburn that Suzi Robinson would fail because she had taken no advice from her. That is corroborated by the email at page 88 on 16 July 2018 when the claimant wrote to Rhona Winnington stating “what is the matter with Suzi... Alison told her that the project was too big for M level but she did not listen and everything that Alison told her to do or not to do, she did the opposite!... I offered her EC [extenuating circumstances] as I felt she has put in a lot of work it would give her some additional time to get everything right... – She refused!”. Rhona Winnington was the previous module lead.

33. We accept that the claimant tried hard to give feedback to Suzi Robinson and that she suggested that she applied for extenuating circumstances. We accept that Suzi Robinson refused. There is evidence of quite detailed feedback on 12 August 2018 at page 102 which Suzi Robinson clearly found difficult to accept (page 101).
34. The claimant's evidence was that there was no issue of behaviour between 4 July and 12 August 2018, but Suzi Robinson's behaviour changed following the feedback given on 12<sup>th</sup> August.
35. Suzi Robinson submitted her dissertation in late August 2018 and the claimant marked it along with Jane March-McDonald who was the second marker. Suzi Robinson failed and the result was released on 9 October 2018.
36. The claimant says that after that, Suzi Robinson became hostile towards her. Her witness statement describes various events in paragraphs 30 to 34. She describes Ms Robinson "blanking" her, looking directly at her with great intensity and anger, again staring at her with intensity with a screwed up face and folded arms and, on another occasion when the claimant was sitting down, standing directly in front of her with her back to her so that her bottom was level with her face.
37. The respondent has not called any evidence to dispute the claimant's version of events. Although, at this hearing, it asserts that the version of events given in the witness statement is not included in the particulars of claim, that criticism is somewhat unfair. Paragraph 20 of the particulars of claim does state that Ms Robinson had been hostile since 4 July 2019 which continued throughout the relevant time. We understand that the reference to 2019 should be to 2018.
38. In the absence of evidence to the contrary, we accept that it is likely that the claimant's version of events is accurate. We make clear, however, that we have not heard from Suzi Robinson and anticipate she may have a different version of events. We do not know why she has not been called to give evidence and decide the case on the basis of the evidence that we have heard.
39. The claimant also says that Ms Robinson did not behave in the same way to Jane March-McDonald. Again we are willing to accept that evidence.
40. The claimant invites us to conclude, therefore, that the treatment was on the grounds of race. She says that Jane March-McDonald is an appropriate comparator because she was the second marker, who also failed the dissertation.
41. We do not find that Jane March-McDonald is an appropriate comparator. The material circumstances were different between the two. The claimant had taken over as Suzi Robinson's supervisor. Even before Suzi Robinson knew that she had failed she was disputing the feedback which she was being given by the claimant (page 101). Not only was the claimant Suzi Robinson's supervisor she was also the module lead and the first marker.
42. The behaviour of Suzi Robinson which the claimant complains about can be broken down into two types. Between 12 August 2018 and 9 October 2018, Suzi

Robinson was refusing to take advice. After 9 October 2018, when Ms Robinson knew that she had failed, the behaviour was much more aggressive.

43. We find, on the balance of probabilities, that the behaviour of Suzi Robinson was linked to the progress of her MSc, rather than the race of the claimant. Suzi Robinson was not unpleasant towards the claimant up until she received the first negative feedback on 12 August 2018. Up until then she had been simply refusing to take advice. Her behaviour then became more hostile after she knew that she failed her dissertation. There is a correlation between Suzi Robinson's behaviour and the academic issues which she was facing and we find, on the balance of probabilities that was the reason for her behaviour,
44. The behaviour of Suzi Robinson ended, on the claimant's own case, on 18 November 2018. Thus, this claim would be significantly out of time if it was not part of an act extending over a period.

*2.2.3 Ms Winfield disregarded the concerns the Claimant raised in July and August 2018 and March 2019 about Ms Robinson.*

45. There is no dispute that the claimant contacted Ms Winfield about her concerns in respect Suzi Robinson's dissertation and her refusal to take advice in both July and August 2018. However the claimant also accepts that she was reassured that she had done all she could for Suzi Robinson and if she, Ms Robinson, would not listen, that was her decision.
46. The claimant's case is that Ms Winfield should have spoken directly to Suzi Robinson about her refusal to take advice and, if she had done, things would never have escalated later.
47. We do not consider that Ms Winfield behaved in any way improperly. She was not the dissertation supervisor, the claimant was. The claimant was giving proper feedback and was being supported in doing so by her manager. She did not ask Louise Winfield to speak to Suzi Robinson directly and, at that stage, there was no reason for Louise Winfield to do so. The matter was being dealt with satisfactorily by the claimant as the Module Lead and dissertation supervisor.
48. We are entirely satisfied that anybody in the claimant's position, whether English or not would have been treated in the same way by Louise Winfield.
49. The allegation in relation to March 2019 is different. After Suzi Robinson was failed in October 2018 she appealed against the decision. The appeal was allowed on the basis that she was disadvantaged by the late change in supervisor - there was no criticism of the claimant. A new supervisor was allocated to Suzi Robinson and she resubmitted the dissertation. It was marked in March 2019.
50. The first marker was Rhona Winnington and the second marker was Alison James.
51. There was, initially, a difference of opinion between Rhona Winnington and Alison James as to the mark to be given in respect of the dissertation. The claimant became aware of that. However, the markers discussed their scores and reached an agreement as to the appropriate mark which they were both happy with, as is apparent from the email from Alison James at page 160.

52. On 7 March 2019 Rhona Winnington emailed the claimant stating that the marking was now completed, agreed and uploaded. There was a recommendation of amending parts of the work prior to uploading.
53. On the same day the claimant emailed Tracey Harding stating that she had moderated the work and found serious errors in it. She stated "I am just emailing you to inform that the two independent markers marked the first submission of Suzi Robinson and passed her... I found serious errors in their work... I have now sent Nadine Abelson-Mitchell to blind mark it due to my concerns. I am emailing just to let you know" (page 150)
54. The claimant's evidence is that during March 2019, it was Tracey Harding who was directing her in respect of the dissertation and she was doing nothing of her own initiative. That account is inconsistent with the email that we have quoted. The email clearly shows that the claimant was taking the initiative in seeking to challenge the marks of the first two markers.
55. By a later email on the same day the claimant contacted Tracey Harding stating "there is no such thing as making a recommendation to amend part – it's not like a PhD I have serious concerns by what is written by the marker below." Tracey Harding clarified whether the email was about Suzi Robinson who she had referred to Nadine for a third opinion, and the claimant replied yes.
56. On 11 March 2019, the claimant wrote to Tracey Harding stating that there were errors in Nadine Abelson-Mitchell's comments. It is apparent that Nadine Abelson-Mitchell had concluded that the thesis did meet the learning outcomes for the module and the marks awarded by the first and second marker should be accepted. Tracey Harding replied to ask what errors were being referred to - was it that Nadine Abelson-Mitchell had used the term thesis instead of dissertation. The claimant replied "yes, we agreed on Friday on the phone if Nadine reviewed the work and supported it as a pass then this would be taken forward but she only reviewed the methodology chapter as she states. That is what I asked advice about in my previous email. If you feel it should pass despite the errors in the work, okay". The claimant referred to other errors of Nadine (page 152).
57. Tracey Harding then replied to state that she was not saying the work should pass as she had not seen it. She noted that two experienced colleagues had reviewed the work and suggested it pass. She asked the claimant to take her concerns back to Nadine and let her know the outcome.
58. Tracey Harding then wrote to both the claimant and Nadine Abelson-Mitchell saying that she assumed that Nadine, having agreed with the first markers that the dissertation was a pass, now considered it a refer. She asked her to let her know if she was wrong (p154).
59. The reply from Nadine is not in the bundle but later on 11 March the claimant wrote to Jane Campbell-Baigre stating that she could not confirm the final mark for Suzi Robinson. Also on 11 March 2019, having realised that their marks were being challenged both Rhona Winnington and Alison James defended their marks (page 158 and page 160). By this point there was confusion as to whether Nadine was moderating the marks which had been given by the first two markers or giving a third mark.

60. On 12 March 2019, the claimant emailed Tracey Harding stating that there were errors in what Rhona Winnington had said and Tracey Harding replied suggesting an email to Alison James explaining that Nadine was a moderator and not a third marker.
61. On the following day the exam board was to meet to confirm the marks which would be awarded to students. The exam board included a senior academic member, an external examiner and the program leads. If no mark had been entered for Suzi Robinson by the end of 12 March 2019, she would not get her degree until either the next exam board or, in some circumstances, the Chair could review the incident and take action to ratify the marks given by Rhona Winnington and Alison James. However we were told, and accept, that even then there would still be significant delay.
62. Louise Winfield became aware of the situation and reviewed the email correspondence and spoke to Tracey Harding. She took the view that since two markers had looked at Suzi Robinson's dissertation and considered it a pass, it should be submitted.
63. It was against that background that on 12 March 2019 Louise Winfield wrote to the claimant, Tracey Harding, Rhona Winnington, Alison James and Jane Campbell-Baigre. The email is addressed to the claimant in the sense that the subject line states "MH504 Hello Mala". The email is business-like but not unpleasant in tone. Louise Winfield summarised what she understood the claimant's concerns to be and answered them. She stated "I am confident that process has been followed here and would like to thank, you, both markers and Nadine for your consideration of this dissertation. I am therefore proposing the mark of 57% goes to the board tomorrow as planned." (Page 165).
64. The claimant replied stating "Thank you for taking this decision out of my hands as in future if there is a complaint I will not be held responsible for any consequences of this outcome." (Page 166).
65. In terms of this issue, it is inaccurate to say that Louise Winfield disregarded the concerns of the claimant. Her email summarised those concerns and answered them. The claimant's real complaint is that Louise Winfield did not agree with her. That is a different point. Whilst we understand that having one's concerns overruled in the fashion that Louise Winfield did might be embarrassing and upsetting, that does not mean that the claimant's concerns were disregarded.
66. Louise Winfield accepts that, with hindsight, it would have been better for her to email the claimant separately. We tend to agree with that, however, as the Head of the School it was necessary for Louise Winfield to get to grips with the situation which existed. The claimant was seeking to go behind the marks which had been given by two experienced markers and her own moderator (at least initially). A decision had to be made before the board met the following morning. We do not find that Louise Winfield acted in bad faith.
67. Moreover even if it could be said that the claimant's concerns were disregarded, we can see no basis for finding that a white member of staff would have been treated differently. Louise Winfield was simply reacting to the situation in front of her, we accept her evidence that she would have done the same with any member of staff, regardless of race



2.2.4 On 12 March 2019, Ms Winfield sent a humiliating e-mail to a number of the Claimant's colleagues, but addressed it solely to the Claimant.

68. We have already set out our findings of fact in relation to this email. We do not think that the email was humiliating but we do accept that it would have been embarrassing and upsetting.
69. For the reasons we have given, we find that any member of staff, whatever their race, would have been treated in the same way.

2.2.5 In December 2019, the Claimant was subjected to additional scrutiny in relation to how students were managed and supported and how the Claimant declined an extension to Tim Needham, which was later allowed by someone else.

70. In April 2019 the claimant was asked to take on the lead role for the Supportive Palliative and End of Life Care partnership module. On 15 May 2019 she was told by the previous lead that for students doing "the odd M level module not as part of a programme of study –... we may be slightly more generous than we would for those people who have undertaken a programme of study and writing their proposal for dissertation. Quite a few of the students only want to do PG cert level and will never proceed to a dissertation." (Page 172). The claimant was concerned by that and considered it to be a lowering of the academic standards
71. Between 16 October 2019 and 13 November 2019, the claimant was on annual leave in Malaysia. She agreed with the teachers on the module that while she was away students would be given a date for tutorials with the claimant which would be 15 November 2019. In advance of the tutorial students had to complete an essay plan and two sides of A4 of their critical discussion section for their Formative assessment.
72. The students were not given the dates of their tutorials by the other staff causing some of them to email and on 29 October 2019 Elizabeth Lawley sent a genuine apology to the claimant, copied to various others.
73. At the tutorials, one of the claimant's students, Tim Needham, informed her that he had submitted his draft but she did not have it. He sent it while he was on the phone to her and she gave feedback.
74. In the claimant's view the students were struggling to write at a Masters level and so she gave them an additional opportunity to submit two sides of an A4 of their critical discussion. She then intended to provide further feedback. We find that in this respect, the claimant was being helpful, in that she was only required to provide one tutorial to the students.
75. The claimant again did not receive any submission from Mr Needham but on 27<sup>th</sup> of November 2019 he wrote an email stating "I don't know if you received this, but given our previous issues with email I thought I would re send..."
76. The claimant replied stating "That issue was already sorted by IT. The deadline for the drafts was 26/11/19 and you missed this deadline. Unfortunately, due to my other work commitments, I will not be able to give you feedback on your late second draft submission as this was an additional support that I had kindly provided. Please follow the feedback that I provided during your lengthy tutorial on 15/11/19" (page 187).

77. Mr Needham sent a robust reply stating that if there were IT issues that should not impact his tutorial support as it was a Plymouth University system fault.
78. The claimant then went on study leave between 2<sup>nd</sup> and 6 December 2019. On 4 December 2019, Jane Campbell-Baigre wrote to the students stating that a decision had been made to extend the deadline for submissions to 22<sup>nd</sup> January 2020 stating “this will allow those of you who need the tutorial support to receive feedback before submitting your final submission.” The letter also stated that the claimant would continue to provide tutorial support (p189). The claimant had not been consulted about that.
79. It is apparent from an email from Jane Peters to Tracey Harding dated 4 December 2019 that students on the course were unhappy. She writes, “I have offered to speak to any students that wish to express their concerns so that we can think about how we take that forward. Sharon R, thinks that a couple of students may submit formal complaints...”. (p191)
80. It is not clear to us exactly what those complaints were or how they had come about, but contemporaneous documentation shows that such complaints did exist. The claimant’s witness statement states that around the same time Jane Peters had a chat with her asking why complaints had been received if students have been provided with support. The claimant says Jane Peters got angry and ranted about damage control and the claimant was very distressed.
81. At the same time the claimant contacted the respondent’s IT department to check why she had not received Tim Needham’s email. The response was that there was no evidence of an email being sent to the claimant on either the 25<sup>th</sup> or 26 November. The student had sent a screenshot of the image being sent on the 25<sup>th</sup> but the image had been modified after it was created. It was suggested that the email would have been sent from an NHS address so there might have been potential issues on that side and it would be necessary to see more evidence.
82. On 9 December 2019 the claimant sent an email reply to Mr Needham setting out the support she perceived that she had given. The email is factual in content but somewhat cool in tone. She stated “I have contacted the University of Plymouth IT team. Please could you resend (not take a snapshot of the email) your emails of 25<sup>th</sup> and 26 November. If you are unable to do this the IT team suggested that you download the email and attachment in your response.” A further reply was sent by Mr Needham attaching screens shots and saying that he would forward the original email from the 25<sup>th</sup> November to demonstrate that it was sent, although it does not appear that he did.
83. The claimant also sent the report from IT to Louise Winfield and Tracey Harding. On 10 December 2019 Tracey Harding stated “we would want to support both you and Tim here, so I think it will be best if acknowledge receipt of his email at your earliest convenience and then ask for phone contact to talk about his work to offer feedback and meet/Skype. Does this sound fair to you Mala? You and I are meeting tomorrow so we can talk through further then.” (p198).
84. The claimant replied stating “Having time to reflect on this distressing situation and the apparent questioning of my professional integrity, I need to inform you that I am unable to offer further tutorial support for this student.” She then sought a referral to occupational health. (Page 199)

85. On 10 December 2019, Tracey Harding also set out an account to Louise Winfield as to what had happened. She recorded that the claimant would not support the student and stated that Jane Peters had volunteered to do so.
86. Louise Winfield then copied Human Resources into the correspondence for advice since she felt that refusing to offer tutorial advice to the student was inappropriate.
87. Karen Ellis of human resources replied stating "I do agree the behaviour of the academic is unreasonable." She recommended a referral to occupational health. (Page 200).
88. On 11 December 2019 Tracey Harding had a meeting with the claimant. She sent a detailed note of the contents of the meeting the following day (page 203). She asked the claimant to relate what she had done and, according to the claimant, stated "wouldn't it have been easier to just give feedback?". There was a discussion about referral to occupational health and the claimant said that she wanted to refer herself to occupational health but, according to the claimant, Ms Harding pressed that she wanted to make the referral. The claimant told her to leave it as she was very upset. We accept that account.
89. The claimant says that the email sent by Tracey Harding fails to acknowledge that Tim intentionally lied and misled. It is true that it does not make any such acknowledgement.
90. In his closing submissions, the claimant's representative suggested that the extra scrutiny which the claimant had been placed under (in terms of this issue) was the judgment which had been made that the claimant was being unreasonable.
91. The claimant takes considerable exception to the way this issue was dealt with. She states that colleagues Ms Griffith, Ms Lawley, Ms Hine and Ms Peters were not scrutinised in the same way as she was despite them being responsible for issues which were created (closing submissions paragraph 53). However, although the claimant had agreed that her colleagues would send out the dates for the tutorials on 15<sup>th</sup> November and they failed to do that, it was not in that respect of the claimant was placed under any extra scrutiny.
92. To the extent that there was any additional scrutiny it was:
  - a. the discussion with Jane Peters about why students were saying they felt unsupported
  - b. the discussion with the claimant about why she was refusing to supervise Mr Needham.
93. We find that those were reasonable questions for the claimant's managers and colleagues to ask of her.
94. In any event, the question for us is whether a person of a different race to the claimant would have been treated more favourably than she was.
95. In this context the comparators suggested by the claimant are not true comparators, their role was very different to that of the claimant, they simply forgot to tell the students when the tutorials would be. The claimant has not

pointed to any evidence which suggests that an English or white person in her position would have been treated differently.

2.2.6 The Respondent failed to investigate the Claimant's complaint, made on 11 December 2019 to Ms Harding, that after providing evidence from IT that showed she had not received an e-mail from Tim Needham and that she was becoming the focus of the investigation which was potentially a disciplinary manner. The Claimant was being regarded as unreasonable for refusing the extension.

96. The evidence does not establish that on 11<sup>th</sup> December the claimant made a complaint of the type alleged here. At its highest the claimant's witness statement states "I showed her emails and explained about the IT concerns and how Tim had intentionally lied and misled." There is no evidence that the claimant asked the respondent to investigate and we do not find that the respondent behaved unreasonably in not instigating an investigation of its own initiative.
97. There was no conclusive evidence that Mr Needham had lied to or misled anyone. At its highest, it might be said that he had failed to provide original copies of the email when asked by the claimant. We see no basis for asserting that, in those circumstances, the respondent was under any obligation to launch an investigation.
98. It is true to say that the claimant was being regarded as unreasonable in the context of her refusing to provide ongoing support for Mr Needham. It seems to us that many academics in the position of the claimant would have taken the view that whilst there had been a disagreement as to whether his work was submitted on time or not, the relationship could and should move forward notwithstanding that.
99. Again we are unable to find any evidence to suggest that a person of a different race would have been treated any differently.

### **Harassment**

100. In respect of the issues of harassment at paragraph 3.1 on page 60, we only need to make additional findings in respect of issue 3.1.3.

3.1.3 In November 2018 Ms Winfield was reluctant to investigate and/or investigate the concerns the Claimant had about Ms Robinson's hostility

101. In November 2018 the claimant did raise with Louise Winfield that Suzi Robinson was being hostile towards her. A meeting took place on 19 November 2018 between Louise Winfield, the claimant and Andrew Grace who attended with the claimant.
102. There are no minutes of the meeting. The claimant says that in the meeting she told Louise Winfield of the incidents set out in paragraphs 30-34 her witness statement. Louise Winfield denies that and says that the claimant did not provide further information and she was told by Mr Grace (the University's Equality Officer) that she could not ask for examples because the claimant's perception was enough.
103. Louise Winfield told us, and we accept, that after the meeting she spoke with Suzi Robinson about her behaviour. She says that Suzi Robinson was very angry

about the failure of the dissertation and denied that she had acted on the basis of the claimant's race. The claimant agreed that after that date there was no more difficulty with Suzi Robinson.

104. We largely accept Louise Winfield's account of this meeting. The claimant did not challenge her evidence that Mr Grace said the claimant's perception was enough. It seems to us that would most likely be said in the context of him resisting providing further details to Ms Winfield. However, Ms Winfield did act on the limited information she had. We do not accept that she was reluctant to investigate the concerns the claimant had about Suzi Robinson's hostility. Indeed it appears that her intervention brought matters to an end.

### **Taking a Step Back**

105. It is necessary not only to look at individual allegations that the claimant has made but also to take a step back to consider the overall picture. Sometimes a situation where somebody is being discriminated against can be overlooked if one only focuses on particular allegations rather than the bigger picture.
106. Having done that, we conclude that throughout the period in respect of which the complaints are made, there was a clash of attitude or ethos between the claimant and the respondent. The claimant is clearly somebody who takes academic rigour seriously. She believes in the maintenance of academic standards. She believes in adherence to process. The respondent, through the claimant's colleagues, was more flexible. It was willing to extend deadlines where that would be helpful to the relationship between it and its students. It regarded itself as providing a service to students as well as conferring qualifications upon them. In saying that, we make no finding that the respondent watered down its standards, it had a different approach to the claimant.
107. The claimant's outlook was such that she found it difficult to accept the views of others who disagreed with her when marking papers. She was not willing to say, effectively, "I would not have awarded that mark but I accept that others have done". That inevitably led to conflict with her colleagues and the need for the managers at the University to step in.
108. The claimant was not willing to give Mr Needham the benefit of the doubt unless he proved he was right. That also led to conflict.
109. We find that the issues which the claimant has raised did not arise out of her race but out of her personality and the difference between her ethos and the respondent's ethos. We make no judgement as to which ethos is right. But we are satisfied that it was that clash which, generally, has caused the difficulties in this case. It was not the claimant's race.

### **The Law**

110. The following are relevant sections from the Equality Act 2010.

#### **13 Direct discrimination**

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

## 26 Harassment

- 1) A person (A) harasses another (B) if—
  - a. A engages in unwanted conduct related to a relevant protected characteristic, and
  - b. the conduct has the purpose or effect of—
    - a. violating B's dignity, or
    - b. creating an intimidating, hostile, degrading, humiliating or offensive environment for B
  
- 4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
  - a. the perception of B;
  - b. the other circumstances of the case;
  - c. whether it is reasonable for the conduct to have that effect.
  
111. Section 136 Equality Act 2010 deals with the reversal of the burden of proof and states
  - (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
  - (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
  
112. In considering questions of causation, in Nagarajan [1999] IRLR 572, the House of Lords held that that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case was, 'why the complainant received less favourable treatment ... Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'
  
113. In Shamoon v Chief Constable RUC [2003] IRLR 337, the House of Lords held "No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason-why issue. The two issues are intertwined" (paragraph 8).
  
114. In Madarassy v Nomura International plc [2007] IRLR 246, the Court of Appeal held, at paragraphs 56-57,

“The court in *Igen v Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

57 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

115. In *Hewage v Grampian Health Board* [2012] UKSC 37, the Supreme Court held “Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352 (para 39) it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.”

### **Conclusions**

116. We state our conclusions by reference to the list issues, but leaving the question of time until the end. However, where we deal with the factual issues we will, at the same time, set out our conclusions as to whether the treatment we have found proved was less favourable treatment because of race or harassment related to race. We do so bearing in mind the provisions on the burden of proof.

#### **Direct Race Discrimination**

117. In respect of issue 2.2.1 we do not find that Ms Winfield asked the claimant to withdraw from consideration for the ENNE role.
118. In Respect of issue 2.2.2 we find that from 12 August 2018 to 9 October 2018 Suzi Robinson was refusing to take advice in respect of her dissertation and not receiving feedback with good grace. From 9 October 2018 until 18 November 2018 Suzi Robinson was more openly hostile towards the claimant, including ignoring her and behaving in an unpleasant fashion. However, the claimant has not proved facts from which we could conclude that treatment was because of

race. Indeed, on the balance of probabilities do not think that it was because of race, we think it was because of the claimant's position as the supervisor and first marker of the dissertation.

119. In respect of issue 2.2.3 we do not find that Louise Winfield disregarded the concerns raised by the claimant. Moreover we find that anybody raising the same concerns as the claimant would have been treated in the same way as the claimant was, regardless of race.
120. In respect of issue 2.2.4, we accept that the email of 12 March 2019 would have been embarrassing and unpleasant for the claimant. We do not think that anybody else in the same position as the claimant would have been treated any differently. The treatment was not because of the claimant's race but because of the circumstances in which she found herself, having attempted to go behind the marks of the first and second markers of Suzi Robinson's resubmitted dissertation.
121. In respect of issue 2.2.5 the claimant's case as to additional scrutiny was difficult to follow. Although she was asked questions both about support to students generally and to Mr Needham in particular, we do not find that those questions were "additional" to the questions which would have been asked of anybody else in the claimant's position. The respondent was seeking to resolve a difficult situation where students had complained. We are satisfied that anybody in the claimant's position would have been treated in that way, regardless of race.
122. In respect of issue 2.2.6 the claimant did not make a complaint which required investigation on 11 December 2019. The claimant was being regarded as unreasonable for refusing an extension to Tim Needham. We are satisfied that anybody in the position of the claimant would have been treated in the same way, including being regarded as unreasonable.

### **Harassment**

123. In respect of issue 3.1.1, repeating our earlier findings, we do not find that the allegation is factually made out.
124. In respect of issue 3.1.2 whilst the allegation is made out to some extent, and would have been unwanted conduct, we are satisfied that it was not related to race.
125. In respect of issue 3.1.3 we do not find the allegation is factually made out.
126. In respect of issue 3.1.4 whilst the allegation is made out to some extent and would have been unwanted conduct, it was not related to race.
127. In respect of issue 3.1.5 we do not find the allegation is made out and, in any event, the respondent's response was not related to race.

### **Time**

128. In those circumstances it is not necessary for us to consider the question of time. Had it been necessary to consider the question of time we would not have considered that there was any good reason for the failure to present a claim in relation to those matters which took place up to March 2019 within the time limit.



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Claims in respect of the later matters may have been in time or it may have been just and equitable to extend time, but we have not needed to consider that.

**Outcome**

129. In those circumstances the claims are dismissed.

**Employment Judge Dawson**

**Date: 08 July 2021**

Judgment and Reasons sent to the Parties: 20 July 2021

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP

The hearing was conducted by the parties attending by Cloud Video Platform. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not appropriate in light of the restrictions required by the coronavirus pandemic and the Government Guidance and it was in accordance with the overriding objective to do so.