EMPLOYMENT TRIBUNALS

Claimant: **Ms C Pislaru**

Respondent: **University of Huddersfield**

Heard at: **Leeds** **On:** **25, 26, 27 and 28 April 2017**

Before: **Employment Judge Lancaster**
Members: **Mr D C Dowse**
Ms J Noble

Representation
Claimant: Ms R Mellor, Counsel
Respondent: Mr P Wilson, Counsel

JUDGMENT having been sent to the parties on 3 May 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided taken from the transcript of the oral decision delivered immediately upon the conclusion of the case:

REASONS

The issues and the law

1 The claimant brings complaints of unfair dismissal, direct race discrimination – she is Romanian- also in respect of the dismissal, and victimisation. The victimisation claim is that having done a protected act, bringing allegations of sexual harassment against her Head of Department Professor Glover, she says that she was then subject to three detriments; her suspension being continued, disciplinary proceedings being brought and eventually she having been dismissed.

2 There has been no dispute about the law.

3 On an unfair dismissal claim of course it is for the respondents to show what was the reason, or if more than one the principal reason, for dismissal and to show that it was potentially fair. In this case the respondents have always alleged that dismissal was on the grounds of misconduct. Whether the claimant was then fairly dismissed in a conduct case depends upon analysis of whether the respondent had a genuine belief that she had carried out the misconduct in question, whether they had reasonable grounds for coming to that belief and whether they had in all the circumstances carried out a sufficient and proper investigation. In determining whether dismissal was the

appropriate sanction the fairness, or not, depends upon the circumstances and whether in those circumstances the employer acted reasonably or unreasonably in treating it as sufficient grounds to dismiss. That is, as is now a commonplace as to how it is understood, a question of whether the respondent acted within the range of reasonable responses open to a reasonable employer in those circumstances. The fairness or otherwise of the dismissal shall of course be determined in accordance with equity and the substantial merits of the case.

4 In relation to the claims under the Equality Act of direct discrimination and victimisation, the burden of proof provisions in section 136 apply. That is there is a primary obligation on the claimant to establish facts from which the Tribunal could decide in the absence of any other explanation that there has been a contravention of the provision concerned. But that does not apply if the respondent shows that it did not contravene the provision; that is that the respondent must show that the detrimental act in question was on no grounds whatsoever because either of the race of the claimant or because she had carried out the protected act.

5 In relation to the direct discrimination claim the less favourable treatment is said to be the dismissal. There is no actual comparator. The claimant relies on a hypothetical construction of a non Romanian Lecturer with the same experience, capabilities, background and who had conducted themselves in exactly the same way as she did. She asserts that she believes such a person would not have been dismissed as she was.

6 In relation to the victimisation claim there is no dispute that the claimant had done a protected act. In the course of appealing against her suspension during the disciplinary process she raised a number of allegations under both limbs of sexual harassment against her Head of Department: that is that she alleged direct, unwanted conduct relating to her sex and also alleged that because of the rejection of that unwanted conduct she had been treated unfavourably in the course of her employment. It is not however a protected act if the evidence or information given or the allegations made are in bad faith. For the respondents Mr Wilson accepts that as the respondents have raised the issue that this was not done in good faith the onus is upon them to show that.

The facts

7 The claimant was a Lecturer in the Engineering Department. She had been employed for some 10 years. She was teaching a particular module with effect from January 2016 where one of the students had a declared disability. That is the student who has been referred to across these proceedings as TES. He was a second year student. He had only declared his disability towards the end of the first term of his second year so that on 11 December 2015 a PLSP (personal learning support plan) was put in place for him. He suffered from a visual impairment. That PLSP was notified to the module tutors by e-mail, that included the claimant. At that point, in December, she had not however started teaching TES in the module on which he was enrolled where she was lecturing. The claimant did not actually read the PLSP. She was not provided with a copy of it but she was informed of its existence and there is a link through the My Student internal network which means she could access all relevant information. There was no indication that any of the other module tutors accessed the information when they were

notified of it on 11 December 2015 either.

8 As we have said, the claimant then commenced teaching the module on which TES was enrolled in January. Under the PSLP there is we note a mutual obligation, the student too has a responsibility to liaise with relevant tutors and ensure that all necessary adjustments are in place. There is no evidence that TES did that other than that the claimant does recall, and this is not controverted, that at some stage -she does not know when in the term- there was a discussion with TES about the provision of the lecture hand-outs, slides from the Powerpoint presentations, being in a larger font. As a result of that conversation the claimant undertook that all students would receive a larger format version, not simply TES. There is no suggestion that TES complained about any other failures to accommodate his impairment in the course of actually being taught the module by the claimant.

9 There was due to be a test of students conducted on 22 February. This was not an external exam which would be arranged by the Registry. It was the responsibility of the individual tutor to make the arrangements for the in-class testing. As part of the PLSP for TES it was noted that in any exams he should be provided with a copy of the questions in a larger format script and also that it should be ensured that he had the facility to have a movable chair so that he could adjust his position to bring himself closer to the script so that he could read.

10 On 2 February, that is just under three weeks before the projected test, Student Support sent an e-mail to the claimant confirming to her that there was one student in her class, TES, who required ARA (additional requirements and allowances). That part of the PLSP for him which included the adjustments for exam conditions, was cut and pasted into that e-mail. There was no evidence and nor was there any evidence before the internal disciplinary investigation, as to what initiated that e-mail from Student Support from Kathryn Brook. The respondent belatedly in the course of this hearing has checked the e-mail system and has informed the Tribunal that there is no preceding chain of e-mails. The claimant's recollection is that she had contacted Kathryn Brook to check if there were any ARA students within the class. So the situation is unclear. There is nothing obvious in the tone of Kathryn Brook's e-mail to say one way or the other whether she was providing that information on her own initiative or whether she was in fact responding to a request from the claimant. Either is perfectly plausible on the wording. It is, of course, unlikely however that student support would have even known about an in-class test has the tutor not first brought it to their attention.

11 Having received that e-mail the claimant made arrangements for a supplementary room to be provided for the use of the ARA student. On 12 February she therefore e-mailed the Timetabling and Resources Team to ask them to put that in place. That was the same time that she requested them to make the appropriate arrangements to book the rooms for the other students in the class to take the test. At that stage, because the number of students was 96 taught on this module, the claimant anticipated that two large rooms would be needed in addition to the supplementary room for the student with ARA. There is of course nothing in TES's PLSP to indicate that he would in fact require a supplementary room nor that he would need additional time to take any test or exam. The claimant's evidence which appears plausible is that she had no personal experience herself of having organised arrangements for disabled students when conducting an internal test but she had previous experience of special arrangements having to be made on

external exams. Her understanding was that this ordinarily involved a separate room and additional time. She therefore appears to have made an assumption that if she requested both those requirements for TES that would be satisfactory.

12 In the event, only one room was arranged for the other students and as it happened that was a tiered lecture theatre. This would not in the circumstances have afforded a moveable chair for TES but the claimant was not to know that when she sent her e-mail of 12 February. As well as informing the Timetabling Team that she required those rooms to be booked and invigilation to be arranged it is also perfectly clear that the claimant did make the appropriate arrangements through Student Support for a large format copy of the test paper to be provided.

13 It was not until 18 February that the Timetabling Resources Team confirmed the arrangements for the test on the 22nd. The 18th was a Thursday, the 22nd was the Monday. So there was very little time allowing for the weekend for the arrangements to be confirmed. In first asking for those arrangements on the 12th we note that the claimant had requested that she be provided with the information so that she could announce it to the students. There is no evidence as to whether she actually saw the class on the Friday before the test to announce it but equally it is quite clear that the students did know where to go on the Monday. It is also clear incidentally that between the 12th and the 18th the timing of the test had changed, it had been put back an hour for some reason. Again the students were evidently somehow made aware of the correct time.

14 When the e-mail was sent on Thursday the 18th at quarter to three in the afternoon it was primarily sent to the three people who would invigilate. The claimant was copied in but so too were the Student Support Team. There is no published policy or protocol as to how arrangements should be made for students with additional needs. The respondent's case is that it is the primary responsibility of the tutor and ultimately we accept that on the day that must be the case. Dr Pislaru in this case knew that requirements had to be made and she knew the identity of the student. However, equally she was not specifically informed that it was her responsibility within that short time between Thursday afternoon and the taking of the test on Monday afternoon that she should contact the student, particularly when she knew full well that Student Support had been appraised of the arrangements that had been made. So Student Support who had e-mailed the initial requirements on the 2nd in fact knew by the 18th that what had been arranged was a supplementary room and additional time and they did not question this arrangement. They also knew the claimant had made arrangements for a large font paper which was to be provided to the invigilator who would attend that separate room, an invigilator called Matt.

15 There was no evidence one way or the other as to whether or not TES was in fact informed by Student Support of the alternative arrangements that were available to him. It is accepted that the claimant did not contact him and her evidence, which as we say seems plausible, is that she understood from her prior experience of the way that Student Support had made these arrangements for external exams, that it was also their responsibility to confirm to the individual student that the arrangements had been put in place by their tutor. We also observe that at no stage did the student himself, TES, raise any issue as to whether appropriate arrangements for him in the exam had been made. We repeat there was a shared responsibility under the PLSP

upon the student as well as any of the staff to ensure that there was appropriate liaison.

16 We are quite satisfied that the claimant did provide the large format script but it was not available in the large lecture room where the majority of students were expected to sit the test. The respondents certainly have no evidence to suggest that she did not make those arrangements and we pause to observe that throughout the entirety of the disciplinary process the respondents did not take any evidence from Kathryn Brook, from the Resources Team who had arranged the room or from Matt the invigilator who was assigned. So they obtained no evidence whatsoever as to what the expectations of any of those people were or what arrangements were in fact put in place.

17 On 22 February, the date of the test, in actual fact TES attended with the other students at the main lecture room. It is common ground that the claimant spoke to him. Indeed it does not appear to be contentious that the claimant asked him directly if he needed a supplementary room and also whether he was the "ARA student". That is TES's own evidence as provided to the internal investigation. He was never asked whether he had already been alerted to the fact that there was a supplementary room available for his use. He said to the claimant that he did not need such a room, whether he knew about it or not. And he also said he was not the ARA student but it appeared from what he told the investigator that he was unfamiliar with that acronym and that is perhaps not surprising. He therefore took the test along with everybody else. He was not provided with the large format script which was still available in the separate invigilation room. At the end of the test, which he managed to finish with some 15 to 20 minutes to spare, he accepts that there was a friendly conversation with the claimant as he handed in his test paper on the way out.

18 The claimant's account of the start of that test and why she spoke to TES is wholly unclear. She has given various accounts at different stages and to be honest none of them appear to correspond to the other. It is wholly unclear what exactly she said or whether she actually knew that TES was the student who needed special arrangements, that is whether she even adverted to the fact that he was the named student on the e-mail on the 2nd. It is unclear whether she is saying that she did nor did not know who TES was although she had had some dealings with him as a student representative. It is unclear whether she is saying that she realised specifically that TES was the student for whom alternative arrangements had been made and that he had not gone to the separate room or whether she believed that the student for whom those arrangements had been made had indeed gone to that room. At some stage, 20 or 30 minutes into the test, she went herself to the separate invigilation room and there found that there was nobody there. As we say it is unclear whether she expected to find somebody or not and she then brought the other invigilator Matt in to join in the supervision of the main session.

19 Although there is that completely confusing account the essential facts are not in dispute. TES was certainly spoken to and asked if he was the student who might need a supplementary room. The claimant says that she then also spoke to some two or three other students and asked them a similar question but she is unable to state precisely why she would have done that.

20 Whatever the confusion about whose responsibility it was to make the arrangements ultimately the claimant had been provided clearly with the name of the student. She should have had the means to ascertain whether

that student was in the main exam room or otherwise but that did not happen. As we say, equally nor did TES take any steps to ascertain what special arrangements had been made for him. The respondent's case ultimately throughout the disciplinary was that by asking TES in those circumstances whether he needed a supplementary room or was he the ARA student, the claimant was breaching a term of his PLSP which indicates (under the heading of "general support" that should be made available to him) that she should not draw attention to the student's disability or make public announcements. As we say there is an apparent consensus as to what the claimant in fact said. There is one other student who was eventually interviewed who alleged that a public comment was made to the effect that there was "a disabled student here" but that has never formed part of the respondent's case and it is not indeed what TES himself says. Other students simply confirmed that if they heard anything, and not all of them did by any means, it was an enquiry as to whether a student needed a private room. There is certainly no evidence of any public announcement identifying TES. There was a private conversation with him in a room, where others who were close by would have been able to hear, asking the question if he needed a supplementary room.

21 The feedback for that test took place in a lecture on 15 March. TES recorded parts of that lecture on his mobile phone. He had in fact scored 98 out of 100 on the test paper. He had made one mistake and the reason for that mistake was that he had put an incorrect figure into a calculation, 220 instead of 200 (or perhaps the other way around). It appears that it is quite clear that his working out was perfectly satisfactory and if the correct number had been plugged into the equation he would have scored maximum marks. He believed when his test paper was returned to him and he realised the error that he had made that that was potentially because he had a visual impairment. That was notwithstanding the fact that he had decided after the initial exchange with the claimant at the start of the test itself to take it as it was and believed he would be able to cope with reading the paper and for the most part he clearly was able to do so.

22 He therefore sought to raise with the claimant whether she would make any concession to him because of his impairment in the circumstances. The claimant says that he was trying to attract her attention and she became annoyed at his persistence but eventually she did speak to him. She was clearly speaking to a number of students going round the room and when she came to the claimant their conversation is recorded and we have heard that ,as indeed did the investigator and the disciplinary and appeal panels.

What was said was firstly by TSE "*Here my mistake Aziz* (that is another student), *told me now given 200*…". The claimant interjects "*Yes, yes*". TSE continues "…*only because I'm visually impaired*", to which the claimant responded either "*It is whatever you read that's life*" or "*Visual whatever you read that's life*", it is not entirely clear from the audio recording which it is. TES continues, "*But I could not see the number*", the claimant says "*You could not see the number on what? You were given the test, you were offered a supplementary room and you wanted together with all the others, so that's it read*". TSE says "*OK I didn't want that only bigger font on the sheet*". The claimant says "That's it I mean at the end of the day we offered you the conditions and you don't want to go in the supplementary room I have to bring the supervisor for you so one moment you want be like a king and in the other moment like a pauper. So which one do you want? The next part is not clear,

the claimant asks again "*Like what?* TSE says "OK" the claimant closes the conversation by saying "*It's a mistake*", and TES agrees and says "*OK*". We have heard the way the claimant said that and her manner was somewhat abrupt in tone but in the context we are quire satisfied that the claimant at that point, rightly or wrongly, clearly assumed that TES had been informed of the supplementary room available to him either solely through being informed by Student Support in advance or as a combination had been informed by them and told by her at the start of the test that it was available or simply as a result of her having told him at the start.

23 So the content of what she said was clearly premised on an understanding, which may or may not have been correct, that TES had declined the opportunity of alternative arrangements. There was then a gap which was not recorded. It is unclear therefore why TES started recording again but it matters little in the circumstances because there is then a further segment of the audio recording where there is two minutes of general teaching by the claimant of the class before there is any further conversation w between the claimant and TES which does set it , at least partially, in context.. The claimant says, and it seems perfectly consistent from the recording, that she had gone to the whiteboard, was going through the solutions and she addressed generically a number of students saying "Some of you made mistakes, some of you were very close". But then there is recorded a further observation: "*And for you, you could read the other mark only the last one you couldn't read. Come on, come on haha yeah yeah*". TES said that observation was directed specifically to him. The claimant for the first time in the course of this hearing has alleged that that is incorrect, that in actual fact when other students had heard TES claim that he had been unable to read a particular number and that accounted for his error that those other students had also sought to raise a similar excuse so she now alleges in the course of this hearing for the first time that this comment was not addressed specifically at TES as he said but at those other students and the reason why, as she now concedes, her comments were mocking skeptical is because she was addressing it to students who did not in fact have a visual impairment and were trying falsely to jump on the same bandwagon as TES. We should say that we reject that account by the claimant, it is quite clear as was postulated throughout the whole of the investigation and disciplinary process that this was indeed a comment addressed specifically to TES.

24 The student on the very same day, 15 March, complained about the conduct of Dr Pislaru. That was a complaint he made to another tutor on the course, that is Peter Mather, and he produced a copy of his recordings to Mr Mather who then e-mailed the Head of Department Professor Ian Glover on that same day late in the evening, around quarter to nine. He informed him of the serious student complaint, told him he had a copy of the recording and asked to discuss the matter with Professor Glover the following day which of course would have been 16 March. There is no evidence as to whether that meeting actually took place but it appears it must have done because on 17 March the student TES then addresses a complaint in writing specifically to Dr Glover. At that point he makes out his complaint against Dr Pislaru, he does postulate that it may be a kind of racism, he says he has had a history of her speaking rudely to him as well as indeed to others, and that he believes she may single out non Romanian students or particular non European students. He says because he expected her to be somewhat dismissive and rude in her attitude that is why he decided to have a recording available. But he does conclude that initial complaint by saying "Along the whole year her attitude was the

same and that forced me to write to you in the last situation as it is personal and regarding my visual impairment and I couldn't stand that". So though he does speculate it may be a form of racism his closing observation is that it is specifically because of the comment relating to his visual impairment to decide to act when he did.

25 Professor Glover investigated the matter, he took a more formal statement from TES which was on 4 April and the following day he e-mailed the claimant to invite her to a meeting on 11 April to discuss a serious student complaint. At that point the claimant was away, she was in fact taking a group of students on an Erasmus exchange scholarship. She said she did not in fact access that e-mail of the 5th until after having returned on the 11th, she had in fact already been summoned to see Professor Glover. The original invitation to a meeting at which she was expressly told that she could be accompanied by a supporter or trade union representative was at 8:30am, the meeting in fact happened at 1:30 pm. When it happened the claimant had not made arrangements for representation but she attended that meeting, the intention was to suspend her and that is what happened.

26 Although the respondent's disciplinary policies identify that at possible suspension meetings there should be representation we do not consider it significant in these circumstances. The claimant had been offered support but for logistical reasons she had not appreciated that. However when it comes to the actual meeting the claimant is not entitled to simply adjourn a suspension meeting in order to obtain representation. There was no reason why in those circumstances it was not appropriate to inform her that she was suspended. She was then immediately able to contact a trade union representative. The better practice and one that we as a Tribunal are aware of is that if there is a recognised trade union in any workplace where there is a decision to suspend an employee who is a member of that union separate contact should be made with the trade union representative to ensure their attendance at the same time and that provides appropriate support. But of course ordinarily you would not warn an employee that they are going to be suspended, the whole purpose of suspension is to avoid certain repercussions and ordinarily it would be wholly inappropriate to give an employee advance warning that that is what is going to happen. The claimant was however clearly distressed. She tried to walk out of that meeting to continue teaching her students but as that would entirely defeat the purpose of suspension she was told to sit down.

27 The claimant was not told verbally what the accusations were at that meeting but she was given a formal letter of suspension that did identify them. That is sufficient to meet the respondent's policy. There is nothing in the policy to say she must be told in person at the meeting what the complaints are, merely that she be given the information. And the information that was then available was of course the original student complaint, the supplemental statement taken on 4 April and copies of the audio recordings that were to be relied upon.

28 Professor Glover then carried out a further investigation speaking to other students as identified by TES as being potential witnesses to what had happened as he thought they were the ones close to him at the time. He did not undertake an investigation of all students, there appeared in the event to have been some 70 in the room. That seems entirely sensible and reasonable. He did also interview the two invigilators who were present from the outset. As we have observed, for some reason he chose however not to speak to Matt or to Kathryn Brook who may well have been material

witnesses, though not of course to the actual conversation.

29 The claimant was firstly required to put observations in writing by 15 April and she was then summoned to an investigative interview herself on 20 April. On that occasion she gave her account. She says at the end of that meeting that she was told by Professor Glover that the matter would not progress, the suspension would be lifted and she would be able to return to teaching. Professor Glover denies that. There is internal evidence on the claimant's e-mails to a union representative that clearly indicates that that was her contemporaneous understanding. Something therefore must have been said that gave her that impression. However on 29 April, nine days later, the claimant was formally invited to a disciplinary meeting. Given that she had understood that she would have her suspension lifted and be able to return to teaching for the end of term, she describes the receipt of that letter as "a sick joke" but by that stage she clearly knew the matter would proceed to a formal disciplinary hearing and that potentially it could be regarded as gross misconduct.

30 The substance of the allegations was not spelt out until the receipt of the management report, also prepared by Mr Glover, which was not received until 1 June.

31 On 16 May the claimant then raised an appeal against her continuing suspension. She was not allowed to appeal the suspension until after three weeks. She did not do so immediately but she says, and this seems entirely plausible, the trigger for raising that appeal at that stage was what she perceived as Professor Glover going back on his word on 29 April and commencing disciplinary proceedings.

32 That appeal against suspension was addressed to the Vice Chancellor of the University, Professor Cryan. As well as objecting to the manner in which suspension had been imposed upon her and alleging breaches of the policy, the claimant for the first time made allegations of sexual harassment against Professor Glover. Her essential argument was that she had rejected his advances, he had therefore subjected her to detriment over a period of three years and the conduct of this investigation and in particular the going back on his word and instituting disciplinary proceedings was a further example of that harassment or victimisation of her. She itemised complaints going back to 2013, that was the first she says inappropriate sexual advances made towards her, she then set out a number of instances of unfavourable treatment in her professional life at the hands of Professor Glover and finally she made an allegation that shortly before these events, in March 2016, there had been further inappropriate, though at that stage unspecified, harassment by Professor Glover where she had warned him that he should desist and that if he did not she would make a formal complaint against him.

33 Professor Cryan dealt with the appeal against suspension purely as a procedural matter. He reviewed the processes and concluded that there was in fact nothing untoward and that given that there was by this stage a date projected for the hearing (which at that stage was due to be 7 June), and given the seriousness of the allegations of disrespecting a disabled student it was appropriate to continue suspension.

34 Insofar as the allegations of harassment were concerned he determined that those should be reviewed by another academic, Professor Steven Donnelly, Dean of one of the engineering departments. Professor Cryan did not consult with the claimant at all as to how she wished her complaints of sexual

harassment to be addressed. We assume - though no one has specifically drawn our attention to it - that the University has a policy on dealing with sexual harassment. There was no indication that Professor Cryan paid any attention whatsoever to that policy or addressed his mind as to how it should be invoked and he did not discuss the matter with Dr Pislaru at all.

35 So he referred it to Professor Donnelly and the brief was clearly that the report into the allegations should be provided immediately to the disciplinary panel, which was due as we say to sit on 7 June, so as not to delay that process. So there was certainly pressure of time. There is no indication that it was even considered at that point that there might be a possibility of the disciplinary process being postponed to await full consideration of the claimant's allegations. Professor Donnelly did not interview the claimant at all, he did not interview Professor Glover, the alleged harasser, at all. He chose only to speak to three other members of the department in a purely general manner asking them whether they were aware of any difficulties regarding the Head of Department but giving no indication of the substance of the potential allegations. He prepared five days later on 23 May a report which is a very little over two pages in length. It was entirely dismissive of the claimant's concerns.

36 Her first allegation of inappropriate contact by Professor Glover concerned an e-mail from 2013 where he had offered to attend at her home on a Saturday evening to deliver some documents for her connected with work. The claimant has always said that she construed that as him making advances and that may well be a cultural matter: she believes that certainly within her home country of Romania if a senior academic made an approach in that way to a junior it would indicate some sexual intent. On the face of it taking that e-mail on its own it may be entirely innocuous but that is how the claimant says she understood it. But she beyond that to say that that was followed up by express verbal harassment on the part of Professor Glover indicating that as Head of the Department the claimant should sleep with him. That allegation was simply dismissed in one line by Professor Donnelly as saying "There is no corroboration". One would not expect there to be corroboration where it is one person's word against another. In actual fact of course had Professor Donnelly spoken to the claimant he would have identified that there was indeed some potential corroboration in the form of the e-mail. Although of itself it may not have substantiated a complaint in context it indicated that Professor Glover wished to see the claimant privately and at the bottom of the same e-mail makes specific reference to the fact that he may be in the position to advance her career. Those two factors together may well provide some corroboration of the fact that he was, as the claimant alleges, verbally harassing her and inviting her to sleep with him.

37 Professor Donnelly then goes on to deal with the allegations of less favourable treatment because the claimant had rejected those advances and dismisses them. He does not make any reference whatsoever to the allegations of further sexual harassment in March 2016. That suggests that he had not read properly the claimant's complaint. What happened to that brief report was that it was then not sent directly to the disciplinary panel but it went through Professor Glover who was the investigating officer. As the investigating officer it was he who prepared the management report to the disciplinary hearing, which he did on 1 June, and in the body of that report he alludes specifically to the complaints against him and the findings of Professor Donnelly which he interprets as indicating there had been consideration of the

matter and a finding that the claimant's allegations had no substance. As well as that management report Professor Donnelly's conclusions were also included in documentation for the hearing.

38 That was the first time the claimant received an indication of what Professor Donnelly had concluded. She had made a complaint to the Vice Chancellor, she had not previously made a complaint through the internal grievance process, which she has explained to us because she was concerned that the matter would be dealt with in school and she did not believe it would necessarily be given the attention it deserved. There was a substantial delay in making the complaint between 2013 and 2016 and of course they are triggered by events connected with the disciplinary process, in particular in response to the letter of 29 April which as we say the claimant thought was a sick joke in context. But of course there are many reasons why a woman may delay making a complaint of sexual harassment. It does not mean it is necessarily untrue. And as we say Professor Cryan gave no consideration to actually consulting the claimant as to how, where and by whom she wished these complaints that she now had raised on 16 May to be dealt with.

39 We are unclear as to why it was necessary to put those matters including Professor Donnelly's report, before the disciplinary hearing. In the circumstances the way that this matter was dealt with there is only one conclusion we can and do draw. That is that the University did not take this particular complaint of serious sexual harassment by a junior academic against a senior academic at all seriously. We do not know whether the accusations against Professor Glover are correct or not. We do not have the evidence, it has not been a part of this claim, but they were never investigated in any appropriate manner by the University. Moreover they were investigated in a perfunctory manner which in the way those conclusions were communicated to the claimant was inevitably going to cause her distress and also in circumstances which raises the possibility of a tainting of any future disciplinary action against her on an unrelated issue.

40 The matter then came before the disciplinary panel. The hearing was adjourned from the 7th to the 15th. It had originally been the intention of Professor Glover to call two witnesses, one the student TES and one of the other corroborating witnesses but when the date was moved a decision was for some reason taken that that evidence would no longer be called. It is fair to observe that the claimant was notified of that a short time in advance. However at the start of the hearing on 15 June Professor Glover did confirm that he was actually calling no live witnesses and Professor Thornton confirmed that the claimant still wished those witnesses to be available for her to question. But Professor Thornton, made no enquiry whatsoever as to why they were not available, why they were not in the event to have been called although that had been the original intention and certainly not as to whether there could be any possible arrangements made to ensure the claimant had that facility to challenge their evidence.

41 There was then a hearing, we have the minutes of that. The minutes are however inexact, particularly with regards to what happened at the end of that meeting. It started at 9 o'clock, we do not know how long it took. After hearing from both sides, the claimant at this stage being unrepresented, the panel retired to consider the matter. The claimant said that was only for five minutes. We certainly accept her recollection that it was a very short time. The panel returned. There was nothing in the minutes to record that they then announced their decision. That is somewhat extraordinary. But it

appears in fact to be common ground that all that effectively happened was after that short adjournment they announced a finding of guilty. That was on the charges as set out in the management report: "that it is alleged that Dr Prunella Pislaru failed to treat a student, TES, with respect on 22 February 2016 by drawing his status as a disabled student to the attention of his peer group during the administration of an in-class test. It is also alleged that Dr Pislaru neglected to ensure that a large font test paper for the in-class test was available to him as required by his PLSP. It is further alleged that she spoke to TES in a disrespectful way on 15 March 2016 as evidenced by audio recordings and that her lack of respect in relation to TES was systematic over an extended period. In these actions it is alleged that Dr Pislaru failed to treat TES with respect to the extent that this behaviour constituted bullying of a student. Such failures amount to a fundamental breach of contractual obligations and as such alleged that her conduct amounts to gross misconduct".

42 There was subsequently a letter setting out the reasons but that appears to have been reflected upon at leisure following the hearing. There was no indication of any rationale that was expressed at the time the decision was first announced.

43 After announcing that the findings of guilt had been proven in the eyes of the panel the claimant was invited to make representations and mitigation. She was assisted to a degree in doing that by being allowed to consult privately with the HR representative (who had retired with the panel before the decision was announced) so that she could explain to her what was meant by mitigation. The claimant then returned to the hearing and explained that as she had been under stress particularly as a result of the health situation of her father in Romania. The panel then adjourned again, once more we accept the claimant's evidence that it was for a very short time, and returned to announce the decision that she was dismissed. That was notwithstanding any mitigation as expressed by her nor any other mitigation that should have been apparent on the face of the case, her long service, her lack of any previous disciplinary record and the positive recommendations from a number of students in contra-distinction to those allegations that on occasion she was abrupt and rude. Once again the minutes of the meeting do not even record that that decision on sanction was announced at the time, let alone what factors were allegedly taken into account in reaching it.

44 It is right that there was no reference in the course of that hearing to the matters relevant to the complaints of harassment against Professor Glover. As we say they were however clearly before the disciplinary panel. Although Professor Thornton gave evidence that he was unaware of the substance of those complaints, that simply cannot be right because as we say Professor Donnelly's report was before him. Also we note that when we come to the appeal, where Professor Thornton now presented the management case, one of the claimant's grounds of appeal was that Professor Glover should not have been allowed to present the investigative findings because of her allegation against him and at that stage Professor Thornton makes it quite clear in his management response to that ground that he knew full well of the content of the allegations. He observes that they were not in fact expressly referred to before his panel at the disciplinary hearing but they were clearly known about nonetheless. These considerations were present and therefore were potentially present in the deliberations of the panel.

45 There was then an appeal which went to a panel chaired by Professor Taylor.

The appeal was not allowed. At this stage there was express reference to the allegations of harassment. Professor Taylor asked the claimant's representative whether the claimant still wished to pursue this matter and it was said that she would simply "draw a line under it". Part of the reason for Professor Taylor asking that question, in addition to ascertaining whether there were any necessary grounds for adjourning the dismissal appeal pending any appeal against Professor Donnelly's findings on the so-called "grievance", was that he was concerned about the potential impact on the credibility of the claimant as a result of having made what he had been told were unsubstantiated allegations.

46 So that is the factual background.

Conclusions

47 The first allegation we deal with is that of direct race discrimination. The claimant has proved no facts whatsoever from which we could conclude that she had been treated less favourably than the appropriate hypothetical comparator. Whether the decision was right or wrong a non Romanian who behaved in this way, who made the comments about the disabled student in the tone which the claimant used we have no doubt would have been treated in exactly the same way. It is right that the claimant points out that in the disciplinary policy there is provision for account to be taken of any cultural differences, however the clear purpose of that seems to be to preclude any possibility of indirect discrimination and it is not material. This is a direct discrimination claim. In effect the claimant is seeking to argue that cultural allowances should have been made for Romanians being (allegedly) stereotypically loud and abrupt so that she was treated more favourably than she would have been had she been of a different nationality. This is not less favourable treatment because of race.

48 As far as the unfair dismissal claim is concerned the allegations of misconduct are solely in relation to the treatment of TES and specifically on 22 February and 15 March. There is some evidence the claimant may have spoken abruptly to TES in the past or indeed to other students but that is only indirectly relevant to the charges she faced. We have heard how she spoke to him on the 15th and her tone is harsh, as she now accepts.

49 On 22 February although the claimant must bear a large part of responsibility for ensuring correct arrangements for the test she is not solely responsible. The absence of a detailed policy provides mitigation for the claimant. In a somewhat confused situation of having to deal with arrangements for a large number of students to be taking a test as well as trying to ensure that the previous arrangements she had put in place for a special invigilation room had been adhered to it is not unreasonable that she should ask questions to try and ascertain whether the student who needed additional help was going to avail himself of that. It is we think wholly artificial to then go back to a provision in the PLSP, which the claimant accepts she had not in fact read, and conclude that there was a breach of a general requirement not to draw attention to his disability by trying to identify the student who needed specific help in the test The events of 22 February themselves we are quite satisfied would not justify dismissal by any reasonable employer.

50 When we come to the events of 15 March we of course do have the recordings. As we have observed in setting out the facts the first part of the

complaint against the claimant relates to the initial conversation with TES. As we have said she specifically was under the misapprehension at that stage that he had positively refused the offer of supplemental help. In the context, going back to the confusion over arrangements for the additional room, that is not unreasonable. She did not handle the matter well. She should have been more conciliatory. She should perhaps not have assumed that he had refused that offer without enquiring as to what had indeed taken place or why. The metaphor she chose to use about a king and a pauper was inappropriate but it was premised on her assumption that the claimant had chosen to take the test in the same conditions as everybody else but was now wishing to avail himself of retrospective preferential treatment. Again we are quite satisfied that up to that point although the claimant's conduct was reprehensible it would not justify dismissal by any reasonable employer.

51 The final observation is the one that has troubled us more. The claimant departs from teaching at the whiteboard to address, as we find, a specific comment to TES, not to any other students "jumping on the bandwagon". It is a deliberate comment designed to convey incredulity and to that extent might be regarded as somewhat derogatory. It seems to us it matters not whether it described a suggestion he was being deceitful in relation to his disability or whether he was using it conveniently as was suggested in the appeal or whether as in the management report it indicates that she was unsympathetic, belittling and mocking in tone. The claimant was always well aware of the precise content of the allegation, she knew the words in question and more particularly she knew the tone in which they had been uttered because she had the recording.

52 Although we remind ourselves that we of course must not substitute our view for that of a reasonable employer on balance we conclude that in these circumstances to dismiss the claimant for one single inappropriate comment in circumstances where she would have been entitled to a degree of skepticism in regard to TES is outside the band of reasonable responses. It does not warrant dismissal. The dismissal was therefore unfair and the claim succeeds.

53 That is particularly so when we have regard to the fact that this was a single incident. There was no allegation of any previous inappropriate behaviour by the claimant in relation to students with disability. She has a previous unblemished record and she has long service: she had not only actual years of employment at the University but a long standing relationship before that going back some 20 years. And also we have regard to the fact that we must view the fairness of the sanction having regard to all the circumstances of the case and particularly to equity. The respondents lay great store on the fact that equal opportunities underlies the very essence of the University. But having regard to equity in this case as we have observed they did not take at all seriously the claimant's own allegations of sexual harassment. They appear to think they can pick and choose whether they seek to apply an equality policy in relation to a disabled student and whether they address equally serious concerns of equality in relation to sexual harassment, irrespective, as we say, of whether that accusation is correct or not.

54 And that leads into the final claim of victimisation. The respondents have not satisfied us that these complaints on 16 May were made in bad faith. There is simply no evidence from which we can draw that conclusion. Even if there were only an allegation that the claimant believed the content of the e-mail of 2013 indicated inappropriate desires on the part of Professor Glover, if she

misinterpreted that and then construed subsequent adverse events in the department as a result of that, that would not make them in bad faith. Given that the claimant has made very specific allegations, particularly in relation to the 16 March and which had never been investigated but which do appear to have a potentially plausible context it was in good faith. However the decision by Professor Cryan to continue the suspension is clearly in no way because of the making of that protected act. He dealt with that purely as a procedural matter. Nor, as the case is framed, does the bringing of disciplinary proceedings amount to victimisation. Those proceedings were brought before the events of 16 May.

55 But the process of the dismissal we consider is tainted by the fact that the whole inadequate and inappropriate failure to investigate a serious complaint was fed into a disciplinary process where, by definition, it potentially had impact on the decision maker. On those facts we are quite satisfied that the burden of proof shifts to the respondent to show that in no sense whatsoever was it a material factor in the decision that the claimant had made those complaints against Professor Glover. And although we are still satisfied that the principal reason for dismissal was the misconduct relating to TES, we are not satisfied on the evidence of Professor Thornton nor indeed subsequently that of Professor Taylor on appeal, that they were able indeed to wholly rule out from their considerations the fact the claimant had made serious allegations against one of their other male colleagues. We observe in that context that it might well be inferred on these facts that it had an impact on Professor Thornton's decision as to how he conducted the disciplinary hearing. That may well be why (subconsciously or consciously) he did not make enquiries at all into why potentially material witnesses were not there, why he did not make any further enquiries into the circumstances regarding original confusion over the set up of the alternative arrangements and particularly therefore why he appears to have come to an unjustified conclusion that the claimant failed to provide a large scale font paper, one of the specific charges, when all the evidence appeared to suggest that she had sought to make appropriate arrangements. And also it would appear to have potential impact on the speed with which Professor Thornton and the panel came to their conclusions. There is no reference at all to them having considered all matters before they delivered their guilty verdict and within the decision letter itself there was inadequate regard apparently had to the claimant's mitigating features, as we say the stress that she was under personally, medical matters which she subsequently brought to the respondent's attention, the fact of her previous good record, the fact of the good testimonials and good report by other students. Those matters which are substantial mitigation ought to earn favour for the claimant charged with a first offence but were not adequately taken into account. So we cannot exclude the tainting of this process leading to dismissal by the knowledge of the claimant having made disclosure of harassment and thereby doing a protected act under section 27.

57 However on the unfair dismissal claim the claimant's conduct is reprehensible. It would certainly have amounted in our view to an offence justifying a final written warning and certainly she should also have been required to undertake the training that ought to have been followed up by the respondents, and indeed by herself, earlier. We have listened to the tone of the conversation. Whatever mitigation there is it is an inappropriate way to

deal with a student who she knows has a visual impairment and we go back to the observation from the initial complaint from TES as of 17 March that it was the way he was dealt with in relation to that vision impairment that prompted him to complain about the claimant's tone in lectures which he had had cause to observe earlier. We are therefore of the view that any awards both of basic award and compensatory award for unfair dismissal should be substantially reduced as a result of the claimant's own misconduct and the extent of that reduction is significant. We consider it should be 75%.

Employment Judge Lancaster

Date: 9 May 2017