EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr Maria Konstantaki	**v**	**Buckingham New University**

Heard at: Aylesbury **On:** 14-18 December 2020

Before: Employment Judge Andrew Clarke QC
Members Mr D Sutton
Mr M Bhatti

Appearances:

For the Claimant: In person
For the Respondent: Mr T Sheppard, counsel

JUDGMENT having been sent to the parties on 9 February 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed by the respondent university, latterly as a Senior Lecturer in Sport and Exercise Science, from 1 September 2002 to 16 July 2019. She was summarily dismissed on that day following a disciplinary process which considered three inter-related allegations of gross misconduct.

2. The claimant presented her claim on 7 December 2019 and it is accepted that, in so far as it might relate to acts of alleged discrimination prior to 9 July 2019, the claim was presented outside the primary limitation period.

3. At a preliminary hearing before Employment Judge Himsworth various of the claims set out in the ET1 were dismissed on the basis of lack of jurisdiction. The Employment Judge concluded that although the box on the form had been ticked to indicate a claim for age discrimination, one was not advanced in the narrative on the form. An application to add claims for race and age discrimination where the act of discrimination was the dismissal of the claim was refused.

4. The claims before us were, therefore:

4.1 Unfair dismissal and wrongful dismissal.

4.2 Direct race discrimination where the treatment relied upon was a failure to promote to Associate Professor in June 2019.

4.3 Harassment by remark made by a colleague (Dr Fiona McCormack) in about September 2018. Again, the protected characteristic relied upon is race.

5. We heard evidence on behalf of the respondent from:

5.1 Paul Morgan, the Head of School for Human and Social Sciences. He had been a colleague of the claimant for some 14 years, starting as a lecturer and enjoying various promotions to his present role. He was the overall manager of the School in which the claimant taught and, hence, the manager of her line manager. He was the investigating officer in respect of the allegations against the claimant.

5.2 Dr Fiona McCormack. She is an Associate Professor in the same department as the claimant, although whist the claimant is a physiologist, she had a different specialism. She was senior to the claimant, albeit they had been colleagues and collaborators for several years. It was she who was initially most directly concerned with the exam marking issues which the disciplinary process addressed.

5.3 Julia McLeod who was the interim Pro-Vice Chancellor of the respondent at the time of the claimant's dismissal. She was an experienced Pro-Vice Chancellor who now works at another university. She chaired the disciplinary panel.

5.4 Anna Crabtree, a Chartered Accountant who is an independent member of the respondent's council and who sat on the appeal panel in this case. That panel was chaired by Dr Maggie James, another independent council member who works in the pharmaceutical industry. We read a witness statement from her, but she was unable to attend the hearing. Ms Crabtree confirmed her evidence.

6. All of the respondent's witnesses struck us as careful and measured in their evidence. We are satisfied that they gave truthful answers to questions put to them, being careful to explain why they disagreed with some of what the claimant suggested and indicating the limits of their recall.

7. The claimant gave evidence on her own behalf. We heard live evidence from her and we also read several witness statements on her behalf (some in the form of emails) which fell into two categories. Some were testimonials as to the claimant's abilities in her field and as a teacher. Others dealt with the disturbances by students in the road where she lives. Neither her past record, nor the fact of such disturbances was in issue. We also had some medical evidence from a nurse practitioner as to the claimant's state of health in the period following her suspension. That evidence was not in dispute and she was, therefore, not called to give it.

8. The claimant believes passionately in her case. It may be this that caused

her to appear an evasive witness on occasions. Despite periodic guidance, she would often fail to engage with more challenging questions, choosing instead to attempt to respond to what she believed to be the ultimate destination for a line of questioning. She referred repeatedly to what she described as her 'error of judgment', but it was not possible to pin down precisely what she accepted she had done wrong in relation to the marking of student exam papers. Indeed, at times she appeared to reject the suggestion that she had done anything wrong, but was penalised for trying to behave fairly to all students.

9. We received an electronic bundle of over 1000 pages. We read all the material within it to which we were referred. Before making her closing submissions, the claimant sent to the tribunal two further policies of the respondent, her CV and a grievance raised in October 2019 which she complained should have been in the bundle but was not. We read those documents and allowed her to make submissions on them. In fact, on reading the grievance it became clear that it (or a very similar document) was in the bundle and had been considered by the appeal panel. The claimant had not cross examined on it, but reference had been made to topics covered within it. The same was true of those parts of the policies to which she referred.

Findings of fact

10. Three students have a part in the events leading to the claimant's dismissal. We shall refer to them as students X, Y and Z. Each student is given a number for examination purposes. The numbers given to X and Z were sufficiently similar to lead to the possibility of some confusion between them. Those marking exam papers should not know the identity of the students whose scripts are being marked.

11. In the autumn term of 2018 the claimant was concerned about poor behaviour in her classes. She was critical, in particular, of X and, to a lesser extent, Y who was a friend of X. We have seen emails which show that the claimant was raising the problems in an appropriate way. We note that X denied any poor behaviour (whilst accepting that some others did behave poorly in class) but apologised if anything that she had done had concerned the claimant.

12. The claimant lives on a road which is used by students returning to their halls of residence, especially after visiting students' union. The residents on that road had complained to the respondent university and to the police about anti-social behaviour by students, especially at night. We cannot judge whether the responses of the respondent and the police were adequate or appropriate. However, it is clear that, despite the complaints, the problems persisted.

13. On 5 December 2018 there was a further disturbance in the road. This time the claimant's sister's family were disturbed by banging on their window during the night.

14. On 18 December X emailed the claimant asking for her comments on part of an assignment. The claimant responded on 19 December declining to assist (as she had already done so) and commenting upon X and Y's

unacceptable behaviour in class. She then added this:

> "Furthermore your drunken behaviour and your banging on the window on the night of Wednesday 5 December has also been recorded.
>
> This is the house where my sister and her family lives and where I often stay to look after my niece.
>
> You can deny it if you want but my brother-in-law heard your friend calling your name and also has a photo of you."

15. There can be legitimate dispute about whether it was right for the claimant to raise the issue of disruption in class directly with X, especially as she had already raised it with the respondent through the appropriate channels. However, to raise the allegedly drunken behaviour almost two weeks before in this way was not appropriate. The respondent had procedures which the claimant should have followed (at the time) especially given that the police had been involved in these disturbances. In the disciplinary hearing the claimant accepted that this aspect of her behaviour was inappropriate.

16. More concerning (to the respondent and now to us) was that the claimant was making these allegations on the basis of little evidence. The first name of X was heard that night, but it is not an uncommon name and this simply established that someone of that name was on the road at that time. The alleged participants in the disturbance were seen on the road, but in poor lighting, at a distance of some 100 meters. They were all of similar appearance, being in fancy dress as cheerleaders. There was no photograph of X.

17. Sometime after, following further disturbances, the email to X was seen by the respondent's Head of Security, as the claimant forwarded it and others to him. He alerted the Student Resolution Office who, in turn, contacted Mr Morgan due to concerns about the appropriateness of the email.

18. Early in 2019 X, Y and Z together with many others, had their papers for an exam marked by the claimant. The marking process is that after primary marking of all scripts, some scripts are sent for moderation internally and, somewhat later and after publication of the provisional marks, would be sent to the external examiner for moderation. All 'fails' (including borderline pass/fail papers) are sent for moderation, together with a sample script from each pass grade. The moderations are not intended to be a re-mark of those papers. The internal moderators and the external examiner are required to see that a uniform and fair approach has been adopted generally. The marks are published to students after the internal moderation, but these are subject to possible change in the light of any comments from the external examiner.

19. None of the scripts of X, Y or Z were sent to the internal moderator. All three had passed and none of their papers were selected as a grade representative. At this stage X had received 46%. The marks given question by question totalled 46%. Both Y and Z received a lower pass mark of 41 and 40 respectively. All of those marks were published on 21 February following completion of the internal moderation process.

20. On about 4 March the claimant handed to the administrator two student scripts, being those of Y and Z with a Post-it note attached. This asked that they be 'checked' to see if they were 'a borderline fail or a marginal pass of 40%'. Y's script was now marked down at 37% and Z's at 36%. These were, of course, different marks to the marks previously given and published. Although one of the two scripts handed to the administrator was Z's script, the number given on the Post-it note was X's candidate number. The two numbers were, of course, similar. The discrepancy between the script attached and the candidate number of the candidate whose mark was apparently to be reduced was pointed out by the administrator to the claimant who appeared unconcerned.

21. Despite the claimant's lack of concern, the administrator remained concerned. Hence, she spoke to Dr McCormack. Leaving aside the discrepancy referred to, her concern was that marks had been lowered by the claimant after marking and moderation was complete and when no such change should have been made by her.

22. Dr McCormack wrote to the claimant on 6 March advising her that the marks should not be changed in this way. In her response the claimant noted that these two papers were 'both fails', but had not been seen by the internal moderator. Of course, had they been 'fails' at the time when papers were sent for internal moderation they would have been sent to the moderator. Dr McCormack responded by telling the claimant that moderation was complete and that she (the claimant) could not now decide to change the marks.

23. Dr McCormack reiterated this point when she saw the claimant on 7 March. Then and before us Dr McCormack referred to an occasion during exam marking the previous year. In that instance, both she and the claimant had wished to change marks as a result of a suggestion by the external examiner. In other words, a suggestion made after internal moderation and after the results had been published. The board would not permit this. It noted that making suggestions for remarking individual papers was not the role of the external examiner and that the original marker could not revisit their marks for individual papers after moderation and publication.

24. On 8 March the claimant provided the Registry with revised marks to be uploaded to the internal blackboard 'being the place where marks were published'. These revised marks showed that X now had 36% and Y 37%.

25. This was, or course, contrary to Dr McCormack's instructions. The claimant commented at the time, when challenged regarding X's large reduction in marks, that X did not deserve to pass as she had not worked hard enough. This, we accept, showed that the claimant knew whose papers these were and was targeting these particular students, X and Y, as in the relevant exchanges X and Y were dealt with by their numbers.

26. The claimant also sent to the external examiner an email saying that he was shortly to receive X and Y's scripts for review. That email stated that the internal moderator had 'made a comment that perhaps they [the two scripts] should return to their borderline fail status.'

27. In fact, the internal moderator had not even seen the scripts in question and

had made no such comments. In any event, it was not his role to suggest revision of individual marks, rather to comment on overall marking issues. Had he raised one, then all scripts would have had to be re-examined with that in mind. That would, of course, taken place prior to the marks being published.

28. In this instance, the internal moderation had been finished over two weeks prior to the claimant's intervention and before the results had been published. As we have made clear the role of the external examiner was similar to that of the internal moderator. It was not to remark individual scripts. The claimant was well aware of this, in particular as a result of what had happened the previous year.

29. The claimant has suggested that the email to which we have just referred did not say that the internal moderator had looked at these two papers. On the contrary, we are satisfied that it clearly indicated that. The claimant says that she was referring to a conversation with the internal moderator. She said that she had asked about giving marks for attempting questions, but not getting the right answer. The internal moderator recalls such a conversation where he said that he had counselled caution with regard to such an approach. Of course, had the claimant then become concerned about that approach being adopted generally (and had the internal moderator agreed) then all papers would have had to be re-examined.

30. We note (as set out above) that not only had X and Y's marks been adjusted, but Z's mark had also been reduced. For that no justification was ever advanced. The only conclusion that could be drawn is that the claimant had meant to deal with X's paper but had got the numbers wrong so that she had sent Z's script attached to a Post-it note which referred to X's student number.

31. The reduction in marks on X's paper, when she made it, was 10 marks. She explained this by saying that the original mark had been 40, not 46, and that the confusion arose when she changed the mark back to 40 and forgot to tippex out the 6 of the number 36. In fact, the score of 46 appeared on the original marks sheet and was that which was entered onto the blackboard on 21 February, before any of the changes were made. Also, as we have already noted, the scores for each question added up to 46. Those matters further support the conclusion that the claimant was targeting X and Y and that the reduction had nothing to do with a realisation that she had marked too leniently or inappropriately.

32. We conclude that the claimant targeted X and Y for a reduction in marks because of her belief in their inappropriate behaviour, that she made the reductions for no valid reason and thereafter lied to cover this up. We also note that the claimant had obviously taken steps to ascertain the identities of the students when all marking should be done anonymously.

33. The administrator was concerned when she saw the email to the external examiner and by email sought urgent guidance from Mr Morgan and Dr McCormack. Of course, so far as Dr McCormack was concerned this also revealed that her express instructions had been ignored.

34. We note here that the matters that led to the claimant being disciplined

were all drawn to the attention of Mr Morgan and Dr McCormack by others because of their concerns as to the conduct in question. The claimant has alleged that these two persons had been plotting her dismissal for two years and took advantage of these situations.

35. The suggestion of plotting was not explored with either witness and we reject it. These two persons were confronted with serious matters which required to be investigated in accordance with the respondent's disciplinary processes.

36. The claimant also alleged that the real reason for her dismissal was that the respondent was trying to get rid of older lecturers. This was never explored in evidence and there is nothing in any document which we have seen to support that allegation.

37. On 14 March 2019 the claimant was suspended in accordance with the respondent's disciplinary procedures. Mr Morgan was appointed as investigating officer and he began a process which resulted in a detailed report of 26 April 2019. He interviewed all the relevant persons and assembled and considered all the relevant documentary material. This included interviewing the claimant and she produced such explanations and documents as she considered relevant. The report and its appendices represent a thorough and considered account of material matters and record the claimant's various explanations for her conduct and matters by way of mitigation.

38. On 4 April the claimant wrote to Mr Morgan raising a series of incidents of what she called 'micro aggression and unprofessional behaviour' by Dr McCormack over a long period. She complained of Dr McCormack's behaviour in relation to the remarking of the scripts of X, Y and Z. She considered it un-collegiate and stated that Dr McCormack should have cooperated with her to change the marks, not point her to the regulations as a justification for not doing so.

39. One allegation in that letter was that Dr McCormack had stated that 'during your very long absence, we had to make decisions without you.' That is now relied upon as the sole instance of racial harassment, although race is not mentioned in the claimant's letter.

40. Something along those lines was said in September 2018 to explain why certain changes to a course had been made in the claimant's absence. At a late stage the department had been required to refresh the course in question. The claimant had worked on it before she went on holiday and submitted it to the board. In August, whilst she was on holiday (and after Dr McCormack had returned from her holiday), the board rejected the claimant's proposal and further changes were needed before it could be resubmitted.

41. Time was now short. This was late August and the deadline for submission was on 3 September. Furthermore, the course had to be ready to be taught from the beginning of term in October. Hence, Dr McCormack and others worked on the revisions, keeping the claimant informed by email. The further submission was, indeed, made in her absence.

42. When she returned the claimant appeared to Dr McCormack to be a little upset at her work having been rejected by the board. Dr McCormack explained that as this had happened, they had done further work in her absence as it could not wait for her return, given the deadline from the board and the practical deadline of the approach of the new term. Although the claimant had been kept informed (by email) it was certainly the case that some decisions had had to be made in her absence. The comment to that effect had nothing to do with the claimant's race and it was the board's rejection of her work that upset the claimant, not the making of the comment.

43. We find that Mr Morgan's investigation was thorough and careful. He found a case to answer on three matters and this led to the formulation of disciplinary charges sent to the claimant on 8 May.

44. The letter of 8 May inviting the claimant to a disciplinary hearing set out the allegations to be considered by the disciplinary panel in some detail. In summary, the allegations were that:

    a. On 19 December 2018 the claimant had sent a highly inappropriate email to student X accusing her of disruptive conduct in class and anti-social behaviour outside her sister's house.

    b. The claimant had committed a number of 'irregular actions' in relation to the marking process regarding students X, Y and Z in February and March 2019. In particular, the marks of those three students had been changed after internal moderation had taken place so that pass marks were reduced to a failure level.

    c. The claimant had emailed the external examiner on 8 March in relation to the papers of X and Y and in that email she had asserted that the internal moderator had commented that these papers should perhaps return to a borderline fail status. Not only was that untrue, because the internal moderator had not seen the papers, but it flew in the face of what she had been told by Dr McCormack in relation to the appropriate procedures.

45. The claimant then raised grievances against both Mr Morgan and Dr McCormack. These were considered and rejected. An appeal was also rejected. In so far as relevant to the disciplinary charges, the matters dealt with in the grievances were raised and dealt with in the context of the disciplinary hearing and the appeal therefrom. In particular, there was considerable focus on the claimant's workload and state of health and the respondent's knowledge of and response to these (or lack of it).

46. The disciplinary hearing eventually took place on 16 July. The panel was chaired by the Interim Vice Chancellor. It had been delayed or two reasons. First, it was considered important to deal with the grievances before the disciplinary hearing as aspects of them related to matters before the disciplinary hearing and allegations were being made against the investigating officer. Secondly, the claimant had raised issues as to her health and it was considered important to ascertain her current health situation and whether she was fit to attend the disciplinary hearing. An Occupational Health report was commissioned and it concluded that the

claimant would be fit to return to work and was fit to attend a disciplinary meeting.

47. The claimant has two fundamental criticisms of both the disciplinary hearing and the subsequent appeal hearing and their outcomes. It is convenient to deal with them at this juncture:

    46.1 First, that due regard could not have been had to her mitigation evidence. Her view is that had her mitigation been properly taken into account a penalty less than dismissal would have been bound to have been imposed, so these matters could not possibly have been properly considered.

    46.2 Secondly, the panels (and Mr Morgan) looked at matters by asking themselves what was likely to have happened (a balance of probabilities test) whereas they should all have looked for absolute certainty, or (at the very least) proof beyond any reasonable doubt. The claimant complains that this approach should have been adopted both in relation to the issues of fact, but also in relation to issues as to her motivation. Hence, so she argued, if the panels could not conclude with absolute certainty that she meant to target students by her actions, then they could not conclude that she did so.

48. We deal first with the consideration of the mitigation material. We deal with it at this stage as it was the claimant's principal focus in her evidence before us and was a central issue when she was interviewed by Mr Morgan and when conducting her defence at the disciplinary hearing and at the appeal.

49. This itself falls under three broad headings, albeit that two are inter-related. First, the claimant says that she was very significantly overworked, being asked to do far more than was possible for a lecturer. Secondly, she says that she was ill at the material times with what she describes as a 'life threatening' condition of vitamin D and iron deficiency. Thirdly, she relies upon her unblemished employment record and her valuable work for the university over a long period of time.

50. The panels (and Mr Morgan in his report) considered carefully the contention of overwork. They rejected it and did not consider that the claimant being stretched by a full workload contributed to the actions complained of.

51. They had regard, in particular, to

    (a) the lack of complaint from the claimant as to being overworked until after her suspension,

    (b) their own assessment of her workload as being full, but not excessive,

    (c) her willingness to take on extra work (of which she now complains) when an experienced and senior lecturer would have been expected to take steps to balance her workload if there were problems,

(d) her seeking through a formal process an additional payment for the extra work and her using her commitment and broad range of work to seek to justify promotion without ever suggesting (or showing signs) that her workload was too heavy.

52. We consider these conclusions to be ones which the respondent did and properly could come to on the available evidence which largely compromised material presented by the claimant. Indeed, having heard the evidence of Mr Morgan and Dr McCormack and that of the claimant herself and having examined the documents she relies upon, these are conclusions we share.

53. We next turn to the claimant's medical history, as far as relevant. There is no dispute that the claimant had blood tests shortly after her suspension which showed vitamin D and iron deficiencies. She was prescribed tablets and by the time of the Occupational Health Report in June the symptoms she had described had largely resolved. There is no evidence to support the claimant's assertion that her condition was life threatening, save for two medical papers which explain how these deficiencies can, in certain extreme circumstances, be extremely serious if not treated.

54. We consider the seriousness of the condition to be something of a red herring. What matters here is, first, the extent to which she was experiencing the tiredness, loss of concentration and interruption to sleep that the claimant alleges, secondly whether this was at the material times in December 2018 to March 2019 and, thirdly, whether this impacted in a material way on the behaviour complained of.

55. We accept the respondent's evidence that the claimant did not complain to colleagues of any of these symptoms in that relevant period. She says that she did so (which we reject) and that her condition must have been apparent to (for example) Dr McCormack because it impacted her daily life so much. She cited the example of being unable to climb the stairs on many days. We accept that had she been experiencing the kind of severe symptoms of which she now complains, colleagues (including Dr McCormack) would have noticed this. They did not. Hence, we consider that she did not exhibit them, but appeared to be tired towards the end of the busy autumn term, in common with all of her colleagues.

56. We read the unchallenged evidence of the claimant's nurse practitioner. This stated that it was impossible to say how long these levels of vitamin D and iron had been low and that all of the claimant's previous blood tests had not identified any abnormalities.

57. The panels both formed the view that the claimant's behaviour could not be explained or excused by any tiredness and loss of concentration resulting from the medical condition relied upon. She had not complained of, or demonstrated, these symptoms at the time. Furthermore, the behaviour in relation to the marking of papers for the two students showed a deliberate and sustained targeting of them, inconsistent with someone who was exhausted and unable to concentrate. For example, when told not to do something she went ahead and did it anyway. She picked on two students when her explanation of why she acted as she did would have involved reconsidering all papers. She sought to mislead the external examiner.

Her explanations for involving Z at all and for lowering X's mark from 46% to 36% were obvious falsehoods and did not suggest that changes resulted from confusion or error.

58. We consider that the panels were acting reasonably in reaching that conclusion. Their analysis of the position in the outcome letters (and the evidence to us) shows that they looked at this matter with care, having weighed the material before them. Having heard the claimant's evidence in cross examination and looked at the contemporaneous materials, we have reached the same conclusion. We do not detect confusion here, or a muddled attempt by someone unable to concentrate to act so as to achieve the legitimate aim of being fair to all students. That was the claimant's case and we must reject it. What we do detect is a misguided attempt to punish students she regarded as guilty of misbehaviour (both in her lectures and in her street) and un-deservous of passing the exam

59. We next turn to what she says about the standard of proof that the panel should have required. We accept that they approached the matter on the basis of asking themselves what was the more likely explanation for what had happened. They were entitled to do so and we have approached the matter in the same way. Of course, given the seriousness of the allegations (and the possible consequences of their being proved) they were obliged to look at the evidence with great care, both to ensure that the investigation was adequate and to see if it supported the allegations. We are satisfied that both panels did this.

60. Finally, as regards mitigation, we turn to the claimant's unblemished record and her previous valuable contributions to the work of the respondent. Mr Morgan and Dr McCormack each acknowledged both elements of this aspect of the mitigation. The disciplinary panel and the appeal panel both acknowledged it. However, each was of the view that when this was added to the balance, the seriousness of the claimant's conduct far outweighed it. The disciplinary panel did not set this out in its reasoned letter of dismissal' but its written response to the claimant's appeal explains the panel's thinking in this regard and the evidence to us also made this clear. The claimant's contentions in this regard were considered in detail in the letter rejecting her appeal.

61. The disciplinary panel heard the case on 16 July 2019. The claimant was accompanied by her trade union representative. She had the opportunity to put forward all written material she wished to rely upon in relation to each of the three allegations which were all clearly framed and understood. Each was considered separately at the hearing. The dismissal letter contains a reasoned analysis of each allegation and an account of how matters in dispute had been resolved. The claimant's mitigation was considered. In particular, the issues of workload and health were examined in detail. They were considered not only as possible matters of mitigation, but the panel asked itself whether they provided a possible explanation for her behaviour.

62. The outcome was summary dismissal and the letter explains why the panel regarded the allegations, taken together, to be of such seriousness as to require that penalty. The lesser penalty of a final warning was considered and rejected.

63. The claimant's closing submissions before us complain that she was confronted by hostility at this disciplinary hearing. We reject that. We do accept that the panel tried to get the claimant to answer its questions on what it regarded as key issues and, as before us, the claimant demonstrated a marked reluctance to do so.

64. The claimant appealed against her dismissal. She did so by way of a lengthy document (subsequently revised) setting out each of her grounds of appeal and explaining them. They were answered point by point in a management response from the panel. Both documents were before the appeal panel.

65. The appeal panel, which convened on 15 October, was comprised of members of the respondent's council. The chair worked in the pharmaceutical industry and the member from whom we heard was a chartered accountant. Before us the claimant complained of their lack of knowledge of the respondent and of working in an academic institution. She made no such complaint at the time. We are satisfied that the individuals comprising the appeal panel were independent persons experienced in their own professional fields and being, in the case of Ms Crabtree, from whom we heard, someone with experience of handling disciplinary hearings and with a sufficient grasp of the organisation of a university. Furthermore, the panel was provided with detailed evidence and explanation on all relevant matters.

66. The outcome of the hearing was delayed beyond the 10 day period allowed for in the respondent's regulations. This had been foreshadowed at the end of the hearing. It had taken significantly longer than expected, the claimant had raised new matters which required further work and there was a considerable volume of material to be reviewed. Furthermore, busy professional people had to find a slot in their diaries to enable them to get together for what would be a time consuming review of all of the materials.

67. The appeal was by way of review and not rehearing. However, given the way the appeal progressed, it amounted to a reconsideration of all matters looked at previously, together with a consideration of a number of additional points.

68. The appeal was rejected by letter of 10 December 2019. Over some 30 pages each of the allegations against the claimant was analysed and the various points made by the claimant in her appeal letter and orally were dealt with. The panel's reasoning is careful and clear. In short, the members considered that the claimant's email to the student X was inappropriate (as she had accepted) and inaccurate, that she thereafter deliberately targeted X and Y by reducing their marks for an examination (and accidentally reducing Z's marks as part of that exercise) and had sought to mislead the external examiner, as well as giving dishonest explanations for her conduct. It endorsed the views of the disciplinary panel.

69. Finally, we look separately at the facts relating to the issue of promotion. In April 2017 the claimant applied for promotion to Principal Lecturer. Five candidates were short listed, including the claimant and Dr McCormack. They were interviewed and two were selected for a further interview by a

panel. Dr McCormack was eventually successful. The field was strong and the panel selected the person they viewed as the best candidate. There is nothing to suggest that the claimant's lack of success had anything to do with her race.

70. In the run up to June 2019 the respondent was undertaking a restructuring exercise. The post of Principal Lecturer was being removed and a significantly smaller number of Associate Professor posts created. All Principal Lecturers were at risk of redundancy and the Associate Professor posts were ringfenced for those who would otherwise be redundant to apply for. Dr McCormack was still a Principal Lecturer and she was appointed an Associate Professor as part of this process. The unsuccessful Principal Lecturers were, in due course dismissed as redundant.

71. The claimant complains of not being promoted to Associate Professor in June, when Dr McCormack was promoted. In fact, there was no open recruitment process for these Associate Professor posts at that time. The reason the claimant was not considered for promotion was that she was not a Principal Lecturer under threat of redundancy. Hence, her failure to be promoted (indeed the failure to consider her for promotion) was unrelated to her race.

The submissions of the parties.

72. Both parties provided written submissions. In the case of the claimant these were provided after she had delivered her oral submissions. We are grateful to the parties for helpfully drawing together the key stands of their cases in this way.

73. The claimant's submissions concentrated exclusively on matters of fact. She did not respond to the respondent's submissions on the law.

74. The parties' respective positions on matters of fact appear sufficiently from our findings of fact and several of the claimant's key submissions are dealt with further when we apply the law to the facts as found. Hence, we do not consider it necessary to summarise the submissions here.

The law

75. The law applicable to this case is, in our view, uncontroversial. We can summarise it quite briefly, cross referencing to the principal authorities to which we were referred by the respondent's counsel.

76. We deal first with the claim of unfair dismissal:

    75.1 Where an employee alleges unfair dismissal then, provided they have sufficient qualifying service (which is not in issue here) a burden falls on the employer to show that the reason for the dismissal was one of the potentially fair reasons for dismissal set out in s.98(2) of the Employment Rights Act 1996 or was some other substantial reason (see s.98(1)(b) of the 1996 Act).

    75.2 If the tribunal is satisfied that the reason (or if there is more than one reason the principal reason) for dismissal was one of those

permissible reasons then the tribunal has to determine whether the employer acted reasonably in dismissing for that reason, having regard to the provisions of s.98(4) of the 1996 Act.

75.3 There are many reported cases offering guidance on the correct approach to be taken by a tribunal to the enquiry as to reasonableness. We were referred to Iceland Frozen Foods Limited v Jones [1983] ICR 17 and, in particular, the following guidance:

> '(1) The starting point should always be the words of [s.98(4)] themselves;
>
> (2) In applying the section [the] tribunal must consider the reasonableness of the employer's conduct, not simply whether they the members of the tribuanl consider the dismissal to be fair;
>
> (3) In judging the reasonableness of the employer's conduct [the] tribunal must not substitute its decision as to what was the right course to adopt for that employer;
>
> (4) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
>
> (5) The function of the …tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.'

75.4 This 'range of reasonable responses test' applies not only to the decision to dismiss but it also applies to the procedure by which that employer reached its decision (see J Sainsbury Plc v Hitt [2003] ICR 111).

75.5 When considering misconduct dismissals, the tribunal should keep in mind the guidance set out by the EAT in the well-known Burchell case, so that the employer needs to produce evidence to demonstrate that (1) it believed that the claimant was guilty of the misconduct alleged, (2) it had in mind reasonable grounds upon which to sustain that belief and (3) it had carried out as much investigation into the matter as was reasonable in all the circumstances.

75.6 Taylor v OCS Ltd [2006] ICR 1602 established that a tribunal should look at the procedural fairness and thoroughness of any appeal and the open-mindedness of the decision maker when deciding whether any previous procedural deficiencies are thereby cured.

77. We now turn to wrongful dismissal. The approach of a tribunal to a claim for wrongful dismissal is essentially different to that which must be adopted in respect of a claim for unfair dismissal. The tribunal is here not investigating the reasonableness of the employer's decision, but whether the conduct relied upon by the employer on the part of the claimant amounted to a repudiatory breach of contract. It is for the tribunal to determine whether, in its view, that conduct was repudiatory and the

repudiation accepted (when the claim must fail), or whether the conduct in question was not repudiatory of the contract and/or the purported repudiation was not accepted so as to bring the contract to an end (in which case the claim for wrongful dismissal should succeed).

78. All contracts of employment contain an implied term as to trust and confidence. If a claimant acts in a manner calculated or likely to destroy (or very seriously damage) the required trust and confidence between an employer and its employees, then that conduct is repudiatory of the contract of employment.

79. We now turn to the discrimination claims, being a claim for direct race discrimination and a claim for harassment. Before turning to the substantive law, we need to deal with two preliminary matters. The first concerns the law relating to limitation periods in respect of claims under the Equality Act 2010. The second relates to s.136 of the 2010 Act.

80. The limitation periods applicable in respect of claims under the 2010 Act are set out in s.123. The primary limitation period is one of three months starting with the date of the act to which the complaint relates. Where conduct that is said to amount to an act of discrimination extends over a period of time it is to be treated as done at the end of that period. There is a secondary limitation period. A tribunal can permit a claim to proceed where it is presented outside the three month primary limitation period where the tribunal considers it just and equitable to extend time up to the date when the claim is presented. In the light of the findings of fact which we have made it is unnecessary for us to set out the law in these regards in any greater detail.

81. The second point to be dealt with at this stage relates to the burden of proof and the provisions of s.136 of the 2010 Act. As a result of that section a burden of proof can be placed upon a respondent to demonstrate that its actions were not wholly or partly motivated on by (in this case) the claimant's race. However, before that stage in the process is reached, the claimant has to prove facts from which the tribunal could decide, in the absence of any other explanation, that the respondent had committed one or more unlawful acts of discrimination. We need say no more about this provision, because (as our findings of fact make clear) we have been able to reach conclusions as to the respondent's motivation in respect of matters complained of as acts of discrimination without reference to any special provisions relating to the burden of proof.

82. With regard to direct discrimination, we have reminded ourselves of the provisions set out in s.13 of the 2010 Act. In simple terms, an employer discriminates against its employee if, because of a protected characteristic, that employer treats that employee less favourably than it would treat others. Race is, of course, a protected characteristic. That includes a person's colour, nationality and ethnic or national origins (see s.9(1) of the 2010 Act). The exercise here is one of comparison. A claimant needs either to identify an actual comparator or to suggest the characteristics of a hypothetical comparator. In either case there must be no material difference between the circumstances relating to each case (see 2.23(1)). As Lord Hope put it in MacDonald v MOD [2003] ICR 937, "All the

characteristics of the complainant which are relevant to the way his case was dealt with must also be found in the comparator."

83. We next turn to harassment. We have reminded ourselves of the provisions of s.26 of the 2010 Act. A person harasses another if that person engages in unwanted conduct related to a protected characteristic (here that of race) and the conduct has the purpose or effect of either violating the other's dignity or creating an intimidating, hostile, degrading or offensive environment for the other. An assessment of the purpose of particular conduct will involve looking at the alleged discriminator's intentions. With regard to whether the conduct has the effect referred to, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have the effect complained of.

Applying the law to the facts as found

Unfair dismissal

84. We are satisfied that the reason in the mind of the disciplinary panel for dismissing the claimant was her conduct. It had nothing whatsoever to do with a desire on the respondent's part to remove older lecturers, as the claimant contended.

85. The procedure adopted was a fair one. There was a thorough investigation which led to the formulation of clear disciplinary charges. The claimant was given an opportunity to formulate her response both before and at the disciplinary hearing on 16 July. That hearing was appropriately delayed in order to resolve outstanding grievances and to ensure that the claimant was fit to attend and participate. At the hearing and before preparing their decision, the panel carefully weighed all the evidence presented to them, including the matters raised by the claimant by way of explanation and mitigation for her conduct.

86. The appeal against dismissal was intended to be by way of review of the original decision. In fact, there was what amounted to a reconsideration of all of the evidence previously examined, together with a wealth of new material, including the claimant's grounds of appeal and the management responses to them. We were struck by the careful and thorough 30 page outcome letter. It showed that a great deal of properly focussed work had been undertaken.

87. Both the disciplinary panel and the appeal panel believed the claimant to be guilty of misconduct, being the conduct relied upon to frame the allegations. They had reasonable grounds to form that belief and a comprehensive investigation had been conducted.

88. We detect no procedural failings on the part of the disciplinary panel. Furthermore, had there been any, they would have been 'cured' by the thorough appeal process.

89. The panels both found that:

    88.1 The claimant had sent an inappropriate email to X, being one which

made assertions about the evidence demonstrating her alleged misbehaviour which assertions were, at best, highly exaggerated.

88.2 The claimant had lowered the exam marks of X and Y by way of a deliberate act of retaliation for what she perceived as their anti-social behaviour both inside and outside class and she had inadvertently lowered Z's marks as part of this same process.

88.3 The claimant had persisted in this conduct despite instructions not to do it. The instructions (from Dr McCormack) should have reminded her of what she well knew, namely that the process that she was purporting to follow (involving the internal moderator and the external examiner) would have been inappropriate even if properly and honestly motivated.

88.4 She had given an untruthful account of her motivation for changing the marks.

88.5 She had sought to mislead the external examiner as to what had been done and said by the internal moderator.

90. To dismiss her in those circumstances would, in the absence of compelling mitigation and/or explanation for her conduct, plainly, in our view, fall within the band of reasonable responses.

91. Both of the panels considered that her mitigation based on her previous record was insufficient to outweigh the very serious misconduct of which they had found her guilty. In those circumstances, having weighed that mitigation with care, they both remained of the view that the appropriate penalty for that serious misconduct was dismissal.

92. The panels rejected her explanation advanced for her conduct by way of an alleged excessive workload and ill-health. That rejection was a reasoned one. In the circumstances, the panels did not consider her workload excessive. They did not accept that she was showing the tiredness or lack of concentration (which might have resulted from the illness she relied upon) at the material times. The considered that the acts complained of themselves demonstrated that this was not the case and there was no other contemporary evidence of her exhibiting the symptoms she now relied upon. In our view, they were entitled to come to that conclusion on the evidence before them. Hence, dismissal still fell within the range of reasonable responses to the allegations once they were proved.

Wrongful dismissal

93. Unlike the claim for unfair dismissal, this claim involves us asking ourselves whether we consider that the claimant's conduct amounted to a repudiatory breach of contract.

94. In our findings of fact we have set out our own conclusions relevant to this claim. In short, we have reached the same conclusions as the two panels, having reviewed the evidence before them and the additional evidence before us. As we have made clear, we were assisted in this process by their careful and detailed reasoning, but we have re-examined everything

ourselves and reached our own conclusions.

95. We are satisfied that the claimant was in repudiatory breach of her contract of employment. It contains the usual non-exhaustive definition of gross misconduct and makes clear that such conduct may lead to dismissal. Examples include (as one would expect) bringing the respondent into disrepute and dishonesty. We do not consider it necessary to analyse which examples are engaged here. This conduct (in particular the changing of student marks for such a purpose and in such a way) is obviously distructive of the trust and confidence necessary between an employer and employee in the sphere of education. The respondent accepted that repudiatory breach, as we consider it was entitled to do, hence bringing the contract of employment to an end.

Direct race discrimination

96. This claim fails for a number of reasons which we deal with below. We note (as we did in the introduction to these reasons) that the attempt to amend the claim to include the act of dismissal as an act of direct discrimination failed at the preliminary hearing. However, it follows from our findings as set out above that such a claim would, in any event, have failed.

97. The act relied upon is said to have taken place in June 2019 at the point that the claimant was not promoted. Hence, the claim was presented outside the primary limitation period. There is no question of this amounting to a continuing act. Hence, we have to consider whether it is just and equitable to extend time. Here the key feature of that enquiry is the merits of the claim.

98. The claim is factually without merit. As explained in our findings of fact, there was no opportunity available to the claimant (or any other Senior Lecturer) to be appointed as an Associate Professor in June 2019, or at any other material time. The few new Associate Professor posts were ringfenced for that cohort of principal lecturers who were at risk of redundancy. Her non-consideration for those posts (and, hence, her non-appointment) had nothing whatsoever to do with her race.

Harassment

99. This tribunal is concerned only with a single act of alleged harassment, namely that involving what Dr McCormack said to the claimant in September 2018. This was a conversation relating to the work done by Dr McCormack and others in the refreshing of a course in the claimant's absence on holiday.

100. Again, this claim was presented outside the primary limitation period. There is no question of a continuing act. Once again, we consider it key to any extension of time that the claim is wholly without merit.

101. As we set out in our findings of fact, remarks along the lines suggested were made. They were inoffensive. They accurately explained what had happened in the claimant's absence. There was no offensive 'tone' employed by uttering any of the words that Dr McCormack used. The remark had nothing whatsoever to do with the claimant's race and, indeed,

she did not suggest in cross examining Dr McCormack that it did.

102. In her closing submissions the claimant sought to extend the scope of this claim to include all of the 'instances of micro aggression' listed in the grievance she raised against Dr McCormack. She also relied upon what she described as the 'plenty of evidence in the bundle' on the deliberate blocking of her promotion and unfair allocation of roles and responsibilities, as well as various other matters referred to in extremely general terms. Save for the heading to this section of her submissions, there is no reference made to race in this context. Furthermore, although some of these matters were raised in evidence, there was no evidence directed to showing how the conduct related to the protected characteristic of race.

103. These new allegations of harassment were made far too late in the day to be considered by us. The respondent had been given no opportunity to deal with them in evidence. Furthermore, they lack particularisation. In so far as they relate to the failures to promote (in June 2019 and, earlier, when Dr McCormack was promoted), or to allegedly excessive workloads and failures to respond appropriately to displays of extreme fatigue at work, all would fail on the basis that the required substratum of fact has not been established. There were failures to promote (one of which was the subject of the direct discrimination claim) but no evidence linking those failures to the claimant's race. She had raised allegations of excessive work and extreme fatigue in her grievance and those we have dealt with above in the context of the unfair and wrongful dismissal claims. No formal application was made to amend the claim to include these further matters raised, for the first time so far as these proceedings are concerned, in closing submissions. Had any such application been made it would have been rejected for the reasons set out above. In those circumstances, we did not consider it necessary or appropriate to invite such an application.

Conclusion

104. In all of the circumstances each of the claimant's claims must fail and is dismissed.

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Employment Judge **A Clarke QC**
Date: …**16 February 2022**……..

Judgment sent to the parties on

....24 February 2022, GDJ.....