EMPLOYMENT TRIBUNALS

Claimant: Dr T Islam

Respondent: University of Leeds

Heard at: Leeds **On:** 16, 17, 18, 19, 20, 23 May 2022.
24 May 2022 (in chambers).

Before: Employment Judge D N Jones
Mr R Webb
Mr J Howarth

REPRESENTATION:

Claimant: In person, assisted by Mr Harris
Respondent: Mr A Serr, Counsel

JUDGMENT

1. The claims for direct race and religious discrimination are dismissed.

2. The claims for harassment related to race or religion are dismissed.

3. The claims for victimisation are dismissed.

REASONS

1. The findings of the Tribunal are unanimous.

Introduction

2. The respondent is an educational establishment for tertiary education based in Leeds. The claimant is employed by the respondent as a lecturer in Islamic studies. He works within the Arabic, Islamic and Middle Eastern Studies Department (AIMES), part of Language, Cultures and Societies (LCS) which sits within the Faculty of Arts, Humanities and Cultures.

3. There were 10 claims for direct race and religious discrimination or harassment, and victimisation. Two of those were dismissed for having been out of

time on 2 July 2021. The remaining eight were identified at case management hearings on 22 March 2021 and 26 August 2021. It was held to be just and equitable to allow the claims to proceed notwithstanding some fell outside the primary time limit of 3 months. Each of the eight allegations give rise to one or more acts of unlawful treatment. They are individually identified in the analysis section below.

The Issues

4. The issues are:

4.1 Did the events or acts occur as alleged?

4.2 Did they constitute one or more detriments?

4.3 If so, were any of them less favourable treatment of the claimant than the respondent treated or would have treated others on the grounds of race and/or religion?

4.4 Alternatively, were any of them unwanted conduct related to race or religion? If so, did they have the purpose or effect of violating the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.5 Was the claimant subject to any detriment because he had done a protected act, namely making a complaint of race and religious discrimination in a grievance on 14 June 2019?

The Evidence

5. The Tribunal heard evidence from the claimant and Dr Mustapha Sheikh, Associate Professor in Islamic Thought and Muslim Societies. The respondent called Dr Hendrik Kraetzschmar, Associate Professor in the Comparative Politics of the Middle East and North Africa, Dr Stephan Petzold, Lecturer in German History, Dr Fozia Bora, Associate Professor of Islamic History, Dr Matthew Treherne, Professor of Italian Literature and Ms Michelle Nettleton, Head of Human Resources for the Faculty of Arts, Humanities and Cultures.

6. The parties produced a core bundle of 687 pages and two supplemental bundles. The Tribunal admitted an investigation report of 12 January 2022 which had been prepared in respect of the grievance appeal. The claimant's application to admit the report was opposed. The Tribunal was satisfied it was in the interests of justice to admit it. Although there was no good excuse for raising this at such a late stage, on the second day of the hearing, the respondent could address the matters within the remaining time available.

Background

7. The claimant is British Bangladeshi. His religion is Islam.

8. He graduated with first-class honours in Arabic and Islamic Studies in 2007 at the respondent and successfully studied for a PhD at the University of Exeter which he completed in 2008. The claimant commenced teaching on a part-time basis at the

respondent between 2009 and 2011. From 2012 he has held a Lectureship in Islamic studies. He later took on the role of Final Year Project (FYP) coordinator.

9. The claimant was absent for a period from December 2012 through ill health. He returned to work following year.

10. In 2015 the claimant founded the Iqbal Centre for the Study of Contemporary Islam with Dr Sheikh at the respondent.

11. In 2016 the claimant proposed a module on Global Jihad which he and Dr Sheikh were to teach. This was approved but the Program Approval Group stated that the newly introduced Government Prevent policy may have to be considered to ensure that the module was compatible.

12. In 2019 a student supervised by Dr Kraetzschmar undertook a final year research project (FYP) on the topic of Societal Attitudes to Homosexuality in the Middle East and North Africa (MENA). Dr Kraetzschmar marked the project and awarded a score of 75. Dr Sheikh was the second marker and awarded a score of 63. As he and Dr Kraetzschmar could not agree, the claimant was tasked as the third marker. He scored the project at 57. The nominated representative of the Lead Assessor, Dr Petzold, took the decision to take a further opinion from Dr Lars Berger, a scholar in Politics and International Studies (POLIS), a department within the Faculty but not the same school of LCS. He considered the marks the other three had allocated and concluded the appropriate score was 62. Dr Petzold reviewed all the marking, comments and feedback and provided the final award for the project of 66.

13. There had been disagreement about who the third and fourth marker should be and concern that the approach had not been compatible with the Code of Practice on Assessment (CoPA) of the Faculty. On 12 June 2019 Dr Sheikh and the claimant raised their concerns at a meeting with Professor Treherne, the Head of School, and on 14 June 2019 they submitted a formal grievance which included their belief that they had been discriminated against on the grounds of race and religion.

14. On 14 June 2019 Dr Petzold conducted a moderation exercise as module convener, the purpose of which is to ensure consistency of marking across the school. He undertook this on his own in respect of AIMES and with a co-moderator in the subject areas of French and Spanish and Portuguese and Latin American Studies. He recommended that there be a revision of marks between one and three which would have the effect on the claimant's subject area of reducing the number of first-class degrees to upper seconds. The external examiner did not agree with these proposals and the final scores remained as originally marked.

15. On 11 July 2019 Dr Stafford, Deputy Head of School, asked the claimant if he would be interested in taking on the role of LCS representative on the Faculty Ethics Committee which Dr Sheikh was to vacate and pass on the FYP Coordinator role. The claimant declined.

16. On 27 September 2019 Dr Petzold informed the claimant that two students had informed him that they had not been allocated a supervisor for their FYP and asked for an update. The claimant was responsible for allocating supervisors as the FYP coordinator. The claimant stated that most students had not submitted

prospective titles, a necessary precondition to the allocation of a supervisor. The matters were raised again by Dr Petzold in October 2019 and by Dr Kraetzschmar, to whom a student had raised the same matter, with Dr Bora who had become Deputy Head of School. On 23 October 2019 Dr Bora wrote to suggest face-to-face meetings with the students to provide reassurance. She stated students were still raising concerns about not having been allocated a supervisor. The claimant replied to say he had met the students and anyone raising concerns with Dr Bora should be referred to him. She was content to leave it at that.

17. A grievance investigation under the respondent's Dignity and Mutual Respect policy was undertaken by Dr Stuart Green, Deputy Head of School, between September 2019 and February 2020. He was supported by Ms Michelle Nettleton. The outcome report was sent to the claimant on 17 May 2020. The claimant submitted an appeal under stage 2 of the procedure on 21 May 2020. Because the grounds were broader than the initial subjects raised in the grievance, a decision was made to commission a further fact-finding exercise externally. That investigation report was submitted on 12 January 2022. The appeal remains to be determined.

The Law

18. By section 39(2) of the Equality Act 2010 (EqA):

> *An employer (A) must not discriminate against an employee of A's (B)—*
>
> *(a) as to B's terms of employment;*
>
> *(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
>
> *(c) by dismissing B;*
>
> *(d) by subjecting B to any other detriment*.

19. In **Ministry of Defence v Jeremiah [1980] QB 87**, the Court of Appeal held that a detriment would exist if a reasonable worker would or might take the view that the treatment was in all the circumstances to his disadvantage. In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** the House of Lords held that an unjustified sense of grievance would not amount to a detriment.

20. By section 109(1) of the EqA, anything done in the course of a person's employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.

21. Direct discrimination is defined in section 13 of the EqA:

> *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourable than A treats or would treat others.*

22. Section 4 provides that race and religion are protected characteristics. By section 9 of the EqA, race includes colour, nationality or ethnic or national origins.

23. By section 23 of the EqA:

> *On a comparison of cases for the purpose of section 13… there must be no material difference between the circumstances relating to each case.*

24. By section 27(1) of the Equality Act 2010 (EqA), a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act.

25. By section 27 of the EqA a protected act includes the bringing of proceedings under that Act, doing any other thing for the purposes or in connection with the Act or making any allegation (whether or not express) that A or another person has contravened the Act.

26. In **Nagajaran v London Transport [1999] ICR 877** the House of Lords held that in a victimisation or direct discrimination claim the essential question was why the employer had acted in a particular way and that the reason may be a subconscious one. Lord Nicholls pointed out that most people will not admit to acting in a discriminatory way and are often unaware they are doing so.

27. Section 136(1) of the EqA concerns the burden of proof: *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.* Section 136(2) provides that does not apply if A shows that A did not contravene that provision.

28. In **Madarassy v Nomura International plc**, the Court of Appeal held that a difference in status, namely that of the protected characteristic alone, was not of itself sufficient to discharge the burden of proof. Establishing a detriment and a protected characteristic are not of themselves sufficient to shift the burden, see **Bailey v Greater Manchester Police [2017] EWCA Civ 425.** In **Glasgow City Council v Zafar** the House of Lords held that because an employer acted unreasonably did not mean that it had acted discriminatorily. If the employer treated those with and without the protected characteristic equally unreasonably there would be no discrimination.

29. In **Laing v Manchester City Council and another [2006] ICR 1519**, the President of the Employment Appeal Tribunal said that if a tribunal was satisfied on the evidence that the respondent had provided a reason which, on a balance of probabilities, had eliminated any discriminatory cause, it was not necessary for the tribunal to trouble about whether the burden of proof had shifted in the first instance. In **Hewage v Grampian Health Board [2012] ICR 1054** and **Efobi v Royal Mail Group Limited [2021] UKSC 33** the Supreme Court stated that it was important not to make too much of the role of the burden of proof provisions: "*They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other*", per Lord Hope in **Hewage**.

30. The Court of Appeal has approved and revised guidance to the application of the burden of proof under previous legislation which remain applicable to the EqA[1].

30.1 In deciding whether the claimant has proved such facts [to discharge the burden] it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers will be prepared to admit such discrimination even to themselves.

30.2 The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead to it concluding there was discrimination but that it could.

30.3 In considering what inferences or conclusions can be drawn from the primary facts the tribunal must assume that there is no adequate explanation for those facts.

30.4 When the claimant has proved facts from which the inferences could be drawn, that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that he did not commit, or as the case may be is not to be treated as having committed that act.

30.5 To discharge that burden it is necessary for the respondent to prove on the balance of probabilities that his treatment was in no sense whatsoever on the protected ground.

30.6. That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts proved by the claimant from which the inferences could be drawn, but that explanation must be adequate to prove on the balance of probabilities that the protected characteristic was no part of the reason for the treatment.

30.7 Since the respondent would generally be in possession of the facts necessary to provide an explanation the tribunal would normally expect cogent evidence to discharge that burden.

31. By section 26 of the EqA,

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

[1] Wong v Igen Ltd [2005] ICR 931, Barton v Investec Henderson [2003] ICR 1205, Ayodele v Citylink Ltd [2019 ICR 458

Analysis

32. In respect of each allegation, we have considered all the evidence and set out our findings below, separately. Whilst we consider the allegations individually, we must emphasise that our findings have taken account of the totality of the evidence. In determining what probably happened, and why, we have had regard to the case holistically.

In June 2019 Dr Hendrik Kraetzschmar (HK), Director of the Department of Arabic, Islamic and Middle Eastern Studies (AIMES), referred a mark given to a student for a dissertation on homosexuality to be scrutinised by Dr Berger, because of HK's belief that the mark the Claimant and his colleague had given the student was not fair or reliable because of assumptions HK made about their views on homosexuality because of their religion and/or race. Alleged to be direct race or religious discrimination or harassment related to race or religion.

33. The relevant parts of CoPA provide:

> *4.5d Resolution of Discrepancies between Markers - Where first markers and second markers or check markers differ in their suggested marks for assessed work, all discussions regarding the suggested marks should proceed with reference to the marking criteria for that assessment. The discrepancy may be resolved in a number of ways:*
> *• The markers may agree on a mark between their respective suggested marks;*
> *• In the case of check marking, the check marker may examine a larger sample from the batch of assessment for the sake of comparison;*
> *• If the markers fail to reach an agreement, the Assessment Lead (or nominated representative) will be informed and a third marker allocated to review the work. The Assessment Lead (or nominated representative) will determine a decision, for the External's approval if appropriate, if none can be agreed by the three markers. The External Examiner will in any case have access to information about the process. The internal markers should only refer unresolved discrepancies in marking to the External Examiner in exceptional circumstances.*
> *4.5e The External Examiner - The role of the external examiner is to ensure comparability of the University's standards with those in peer institutions and national benchmarks. It is not to contribute to the assessment of individual students. If an external examiner cannot endorse the marks given to assessed work within a sample, they may require:*
> *- Additional marking of all the student work within the group;*
> *- +Additional marking of an element of the assessed work of all students within the group; or - Adjustment of the marks for all students within the group.*
> *In this way, the external examiner has oversight of the whole cohort of marks, rather than those of individual students. However, in exceptional circumstances, an external examiner may be permitted to determine an individual mark where they have been specifically invited to adjudicate between markers.*

34. Paragraph 3.1.8 of the External Examiners' Guide states:

In exceptional circumstances an External Examiner may be permitted to determine a mark where: • they have been specifically invited to adjudicate between internal markers; or • in specialist discipline areas (such as Bulgarian or Mongolian) where only one internal examiner has the appropriate expertise.

35. Dr Kraetzschmar and Dr Sheikh scored the FYP at 75 and 63 respectively. They had a telephone discussion on 24 May 2019 to attempt to reach an agreed mark. In his evidence Dr Sheikh said that he was initially of the view that the project was worth a 60 but he agreed to increase that to 63 following the discussion. He said that Dr Kraetzschmar was not willing to reduce his mark and so the conversation was over for him. In terms of grading that would mean the difference between a first and a low upper second. Dr Sheikh said that Dr Kraetzschmar said he felt he had let his student down. Dr Sheikh said that to his mind the problematic part of the thesis was its Eurocentric attitudes to homosexuality in the Middle East. He felt it orientalised Arabs. Dr Sheikh suggested referring the matter to the external examiner Dr Teti, but he told Dr Kraetzschmar that Dr Teti was a scholar like them and would also find problems with coloniality surrounding the thesis, its Eurocentricism and Orientalisation. Dr Kraetzschmar agreed with the proposal to refer the matter to Dr Teti.

36. In his evidence Dr Kraetzschmar said that there were no grounds to meet in the middle because they had significant differences of opinion. The average would have been 69 and Dr Sheikh said he would not go beyond 63, so Dr Kraetzschmar took the view there was no point in reducing his score. He felt the problem was methodological differences. Dr Sheikh had criticised the student's lack of critical engagement with the World Values Survey (WVS) as well as its key Western concepts. The WVS is a tool used in quantitative research. He said he was happy with a referral to Dr Teti because he knew he had worked both qualitatively and quantitatively on research and the Middle East, specifically with respect to youth views on democracy.

37. We accepted both recollections. They reflected the short, written summary of the discussion in the FYP Feedback sheet.

38. The proposal to ask Dr Teti to be the third marker was rejected by Dr Petzold. He said this was not appropriate as external examiners could no longer decide on individual marks when there was a difference between two markers. The lead assessor was Caroline Campbell, but she was working in Spain and had nominated Dr Petzold, a course permitted under CoPA. Dr Petzold therefore asked the claimant to be the third marker pursuant to the guide for examiners, which Dr Petzold had written.

39. The claimant sent his mark, 57, which would have been a lower second, and feedback to Dr Kraetzschmar and Dr Sheikh on 9 June 2019. Twenty minutes after receiving the third mark and without attempting to arrange a discussion, Dr Kraetzschmar wrote to Dr Petzold to express his concern. He stated that there were substantive disciplinary differences at play on the part of the second and third markers for which the student was being penalised. He stated, "*given that both the second and third markers are Islamic studies scholars, and the FYP a social science piece of research, I would like to know whether it might be possible to have a social*

scientist look over the thesis as well". He said he had approached Lars Berger informally who had said he would be willing to look over the thesis and that he was someone who had applied quantitative research.

40. The following day, on 10 June 2019, Dr Kraetzschmar wrote to the claimant and Dr Sheikh to say he would seek advice from Dr Petzold on how to proceed given the significant discrepancies in the marks. He stated that given the quantitative nature of the research he would prefer to use a social scientist with expertise in MENA politics and statistics to look at the thesis. He suggested Lars Berger, after which Dr Petzold could provide a definitive mark.

41. Dr Petzold's initial reaction was that he did not want to go to someone outside the school and that to use a fourth marker was uncharted territory under CoPA. The claimant wrote and proposed the external examiner Dr Teti, noting that he employed quantitative methods, but Dr Kraetzschmar pointed out that he had been ruled out by Dr Petzold when he had suggested him. The claimant then proposed other alternatives within the school, Dr Bora, Dr Soliman or Professor James Dickins. Dr Soliman suggested Dr Bora looked at the dissertation together with Lars Berger.

42. Dr Petzold consulted Caroline Campbell, the Lead Assessor. She approved his proposal, but to seek an 'opinion' rather than a 'mark' from Dr Lars Berger. When Dr Petzold informed the other markers of this, the claimant queried why Lars Berger was chosen rather than Professor Salman Sayyid, an academic in sociology. Dr Petzold said that Lars Berger was Dr Kraetzschmar's suggestion.

43. Lars Berger awarded a mark of 62 and provided his comments on 11 June 2019. Dr Petzold collated the marks and feedback and gave a definitive score of 66. He communicated this to the other markers on 14 June 2019 and asked if they were happy to accept this score. Dr Kraetzschmar replied to say he was. The claimant replied on behalf of himself and Dr Sheikh to say that they did not accept it, there had been a flagrant breach of the Code and this was pending a formal investigation.

44. This allegation is that Dr Kraetzschmar was motivated to seek a fourth opinion because he believed the marking of the claimant and Dr Sheikh was unfair. It is said Dr Kraetzschmar attributed this unfairness to views he assumed they held about homosexuality, as Muslims, or because of their race, which the claimant defined for the purpose of EqA as non-white. On a literal reading of the allegation, it could not succeed because Dr Kraetzschmar did not refer the dissertation to Dr Berger. It was the Lead Assessor who made the referral. But that would be too technical a reading of the complaint. It is intended to challenge the referral to Dr Berger by Dr Petzold upon the representations of Dr Kraetzschmar.

45. The decision not to agree with the scores and rationale for them of Dr Sheikh and the claimant but to seek another view beyond the plain wording of CoPA could be considered as undermining by a reasonable worker. Academics understandably regard their assessment of students' work as an important part of their role. It requires skill and experience. For it to be challenged without good cause would be to question their professionalism. If the reasons for doubting their assessment of the FYP were because of the protected characteristics of the claimant we would find such treatment to be a detriment.

46. It is reasonable to infer Dr Kraetzschmar's undisclosed communications with Dr Petzold of 9 June 2019 to obtain another opinion from Dr Berger was to achieve a higher mark for the FYP than would have been awarded on the three scores. Ironically this had the opposite effect. Dr Berger's score of 62 was closer to the scores of the claimant and Dr Sheikh. If any scoring was undermined, it was Dr Kraetzschmar's. Be that as it may, we accept that even the attempt to initiate a fourth view, beyond the plain wording of the CoPA, had the potential to be a detriment. CoPA contemplates two scorers in the first instance and, in the absence of agreement, a third marker. If there is then no agreement, the Lead Assessor must provide the final score.

47. Was that detriment less favourable treatment of the claimant because of his religion or race? Was it influenced in any way, consciously or subconsciously by the protected characteristics? Or was it because of a difference in methodological assessments between quantitative and qualitative research? We have applied the shifting burden provisions in section 136 of the EqA.

48. In the first instance we must ignore the explanation advanced by the respondent, so far as that is possible within the factual matrix under consideration. Are there facts from which the Tribunal could decide, in the absence of any other explanation, that the impugned treatment could be because of race or religion? We are satisfied it could, for the following reasons.

48.1 In the discussion between Dr Sheikh and Dr Kraetzschmar whereby they attempted to agree the scores, Dr Sheikh raised issues about a Eurocentric slant to the piece of work, its orientalisation and coloniality. In the written feedback Dr Sheikh referred to the author's exceptionalisation of MENA and the Muslim world. He suggested a more global perspective was necessary. The claimant's feedback, as the third marker, also raised a concern of the notion that criminalisation of homosexuality in MENA was emblematic of it being intolerant, backward and an anti-modern culture. He cited research which suggested that it was Eurocentric attitudes to homosexuality from the 19th century which affected the view in the Arab-Islamic world. Both third and fourth markers allude to religion as well as unfair Western world perspectives. Those observations could have fed into Dr Kraetzschmar's thinking about why the scoring by them might have been so far from his own.

48.2 The actions of Dr Kraetzschmar to obtain a fourth opinion from someone of a different discipline, who he expressly pleaded should be outside Islamic studies, provides material from which an inference can be drawn that he is seeking a white, non-Muslim scorer and, to ensure that happens, he suggests Dr Berger. We are prepared for this purpose to assume Dr Berger was not of the Muslim faith, although in fairness no evidence was adduced on that, and he was white.

48.3 Dr Kraetzschmar did not include the claimant and Dr Sheikh in his initiation of this proposal and had even teed up Dr Berger before making it to Dr Petzold. When he did bring the claimant and Dr Sheikh up to speed the following day, he stated he would 'now' seek advice from Dr Petzold, that Dr Berger 'comes to mind' and Dr Petzold could ask Dr Berger to take a look if they agreed. His use of language does not vouchsafe how far he had progressed down that particular road.

48.4 The course he suggested was highly unusual and outside the obvious contemplations of CoPA. He made no attempt to discuss matters with Dr Sheikh and the claimant to reach an agreement after receiving the claimant's mark but immediately approached Dr Petzold with the unorthodox proposal.

49. In summary, disregarding the explanation provided by the respondent there are facts from which we could decide that Dr Kraetzschmar thought cultural or religious influences had affected the objectivity of the second and third markers; by seeking another score he was adopting an approach which he would not have taken if they had been white or not Muslim. The initial burden is discharged by the claimant.

50. Has the respondent established, on a balance of probability, that race and religion played no part, consciously or subconsciously, in the attempt to involve Dr Berger as a fourth marker to scrutinise the FYP?

51. Having regard to the evidence of Dr Kraetzschmar and the documentary material evidence available, we are satisfied the respondent has discharged that burden for the following reasons.

51.1 From the very outset, as reflected in the note of the discussion with Dr Sheikh on 24 May 2019, Dr Kraetzschmar expressed his view that the execution of the quantitative piece of research was excellent in contrast to Dr Sheikh who regarded there to be a lack of critical engagement with the WVS. This gulf in opinion about the 'quantitative' aspects of the dissertation was present from the beginning. It is that which Dr Kraetzschmar has repeatedly said was his concern about whether the piece had not been fairly marked; not race or religion.

51.2 The claimant's feedback expressly marked the candidate down for her quantitative analysis which he thought to be foundationally weak.

51.3 The methodological approaches of using quantitative as opposed to qualitative research were acknowledged as not being predominant in the disciplines of the claimant and Dr Sheikh, or for that matter Dr Kraetzschmar. Use of that methodology was far greater in social sciences, although that is not to say the claimant, Dr Sheikh and Dr Kraetzschmar had no experience of quantitative research, just less. Dr Kraetzschmar had advised his student to go further afield to appraise herself of use of the methodology in preparing this FYP, because of his own limited experience in the use of quantitative research.

51.4 The proposition which Dr Kraetzschmar made was that a fourth marker was required because the student may have been unfairly penalised because the examiners were not sufficiently experienced to evaluate the work by that methodology. The departure from CoPA was to redress that deficiency. It was not to alienate claimant and Dr Sheikh and portray them as neither competent nor professional on the basis of racial or religious influences which had skewed their judgment.

51.5 The underhand manner Dr Kraetzschmar adopted, by not suggesting a fourth marker to the claimant and Dr Sheikh on 9 June 2019, reflected his concern about their views on the methodology and the reality that they would be unlikely to approve of the implicit criticism of them in taking this course. In other words, he went straight to Dr Petzold because he did not think they would agree to a fourth marker. We consider these actions reflected a sense

of personal responsibility for the student's FYP. We did not regard that to sit comfortably with the objectivity and detachment required of an examiner. In his feedback he said he was particularly 'proud' of the student's endeavours in quantitative analysis. His own feelings must be irrelevant to the marking process. In his discussion with Dr Sheikh, Dr Kraetzschmar said he felt he had let the student down. In evidence he said that he no longer encourages students to use quantitative research. He had encouraged this student to use a methodology with which he felt the examiners were not sufficiently specialist. We should add that was his perception; the irony was that Dr Berger (whose involvement the claimant takes exception to) was critical of the student's use of statistics. He differed quite markedly from Dr Kraetzschmar in that respect and was far closer to the claimant and Dr Sheikh. But Dr Kraetzschmar's feelings of guilt that he had let the student down energised him to find a way to correct the unfairness he mistakenly thought he had contributed to. He did that by seeking the fourth marker. His feelings of letting the student down were all to do with issues surrounding quantitative research.

51.6 Although Dr Kraetzschmar referred to his concern that the marker be not from Islamic studies, both on the occasion of allocating a third and fourth marker, his emails make it quite clear, in context, that this was because he believed they did not have the adequate experience of quantitative research, a shortcoming he then expressly attributed to other similar disciplines including his own. He was not singling out markers because of their religious or ethnic make-up but their field of study.

51.7 In suggesting the third marker be Dr Teti and not the claimant, Dr Kraetzschmar raised the same methodological concern. He thought Dr Teti's background and experience would allay it. Both Dr Sheikh and the claimant were keen to resort to the same external examiner as the third or fourth marker. Dr Kraetzschmar's first choice of Dr Teti does not support the concept that his motivation was influenced by race and religion in lining up his friend, a white academic who was not Muslim. Nor does the fact that Dr Berger fundamentally disagreed with Dr Kraetzschmar in the marking process.

51.8 In rejecting Dr Teti as the third marker, Dr Petzold stated that it was still open to Dr Kraetzschmar to ask for a third marker with a social science background. It was not pursued by Dr Kraetzschmar with the result that the claimant was to be the third marker. It would seem unlikely Dr Kraetzschmar would pass this opportunity over if he believed the claimant's religious and racial background made him unfit or unsuitable for that.

52. It follows that the complaints of direct religious and race discrimination do not succeed.

53. With respect to the alternative complaints of harassment for the reasons we have expressed, the unwanted conduct of persuading Dr Petzold to use Br Berger as a fourth marker to scrutinise the scores was not related to either race or religion. The claims of harassment do not succeed.

In June 2019 HK, Professor Matthew Treherne (MT), Head of the School of LCS, and Dr Stephan Petzold (SP), LCS Final Year Project Co-ordinator, excluded the

Claimant and his colleagues of the same race and religion from emails they sent relating to the assessment of the student's mark. Alleged to be direct race or religious discrimination or harassment related to race or religion.

54. In his written closing submission, the claimant clarified that the email traffic to which he refers was the email from Dr Kraetzschmar to Dr Petzold on 9 June 2019, sent 20 minutes after receiving the claimant's mark, and the email of Professor Treherne to Professor Petzold and Caroline Campbell on 12 June 2019.

55. The email of 9 June 2019 was sent to Dr Petzold at 17.52. He referred to the significant difference in the three scores and expressed his concern that the third mark was lower than the second. He added, "*I am very concerned about the marks given by second and third markers as I believe there are substantive disciplinary differences at play here and the student is being penalised for it. Given that both the second and third markers are Islamic studies scholars, and the FYP a social science piece of research, I would like to know whether it might be possible to have a social scientist look over the thesis as well. I approached Lars Berger from polis informally on the issue and he would be willing to look over the thesis as well. He works in MENA studies and has applied quantitative research himself. What do you think? As is, I feel the student's effort is rather harshly marked, given that I know the level of effort that has gone into making it a sound piece of quantitative research*".

56. To have excluded the claimant and Dr Sheikh from this proposal and to have emailed them subsequently, as summarised in paragraph 48.3 above, could reasonably be regarded as a detriment. To solicit a diversion from CoPA to achieve a score for the student which was higher than that the claimant and Dr Sheikh had made a professional judgment about could be seen as undermining.

57. For the reasons we have expressed at paragraph 51.5, we are satisfied this was not because of, or related to, race or religion. The claims for direct discrimination and harassment are not established.

58. The email of Professor Treherne of 12 June 2019 contained his opinion to Dr Petzold about the use of a fourth opinion. Dr Petzold had sought his view as to the propriety of this, in his capacity as Head of School. Prof Treherne had consulted the Pro-Dean for Student Education, Simon Baines, who had recommended the use of only three markers and the final decision being that of the Lead Assessor. He added that if the Lead Assessor and her nominee felt a fourth marker was warranted it should be from someone within the school. It was rather peculiar for Prof Treherne to reject Simon Baines opinion having solicited it. Professor Treherne advised that a fourth opinion could be obtained to assist the Lead Assessor and her nominee to understand the discrepancies between the first three markers, but that should not be in the form of the mark. In his email, Prof Treherne stated he had consulted with Simon Baines. The implication of that is that it had the endorsement of Simon Baines. That was misleading. It was not what Mr Baines had said.

59. The suggestion of the claimant that the communications between Dr Petzold and Prof Treherne were less favourable treatment by excluding him because of race or religion, or was unwanted conduct related to race or religion, is fundamentally unsound. There was no good reason to include the claimant and Dr Sheikh or, for that matter, Dr Kraetzschmar, in this discussion. It was a policy decision which had to be determined by Caroline Campbell and Dr Petzold. The fact that Dr

Kraetzschmar, also, was not copied into this line of communication demonstrates that race or religion was nothing to do with it.

In June 2019 Ms Caroline Campbell, the Assessment Lead in LCS, preferred HK's assessment of the student to that of the Claimant and his colleague of the same race and religion. Alleged to be direct race or religious discrimination or harassment related to race or religion.

60. There is no evidence that Caroline Campbell preferred Dr Kraetzschmar's assessment to that of the claimant and his colleague. In his written submission, the claimant states that Caroline Campbell approved the approach to obtain a fourth opinion and had not followed the wording of CoPA in order to reassure Dr Kraetzschmar. That was because in her short email from Spain, agreeing with the proposal, she responded to the following remarks of Dr Petzold, "*Basically, there appear to be methodological differences between the markers resulting in a disagreement over an FYP mark. The first marker is suggesting to consult a fourth marker who is from POLIS. As this is beyond CoPA territory, I wanted to consult with you. I don't mind as such but would rather not leave the decision to someone outside the School. So, what I suggest is that we ask the colleague from POLIS for his view to reassure the first marker and I will then decide as module leader on the mark bearing in mind the feedback from all markers"*.

61. The claimant says that no one sought to reassure him and Dr Sheikh and therefore a different approach can be discerned with respect to white academic staff. We reject that submission. The comparison the claimant invites is not of circumstances with no material difference for the purpose of section 23 of the EqA.

62. It was not Dr Sheikh or the claimant who were expressing reservations about the marks of Dr Kraetzschmar, but vice versa. There was no need to reassure them at this time (albeit that changed later when they raised their concerns with Prof Treherne and submitted a written grievance). For the reasons we have set out, Dr Kraetzschmar was exercised about the student not being given a fair and appropriate score because of a lack of understanding of the methodology of quantitative research. The use of the fourth marker was to allay that concern as is quite clear from the above extract. In other words, it was felt that on this occasion the marking process may have gone awry because, unusually, the dissertation was significantly based upon a methodology of which the markers, including Dr Kraetzschmar, were less familiar. It was Dr Kraetzschmar who was troubled by that and not the claimant, with his added concern that the student he had overseen may have received a raw deal. It was therefore he, not the claimant, who was seeking the reassurance, not primarily for himself, but for his student. The facts do not establish that Caroline Campbell directly discriminated against the claimant or subjected him to unwanted conduct related or because of race or religion.

In late June/early July 2019 the Management Committee of LCS and SP attempted to remove the responsibility for Final Year Projects from the Claimant. Alleged to be victimisation for his June 2019 grievance.

63. Dr Stafford, Deputy Head of School, asked the claimant by email if he would wish to take on the role of LCS representative on the Faculty Ethics Committee which Dr Sheikh was to vacate and pass on the FYP Coordinator role. The emails

demonstrate that arose in the context of a discussion about a fair allocation of work for the coming academic year with Sameh Soliman and Jennifer Rauch. The claimant declined.

64. We do not find this was a detriment. There was no pressure placed on the claimant to forgo the coordinator role. His view of the change was canvassed with him and his decision accepted without reservation. A reasonable worker would not regard that as a disadvantage.

65. In any event, we were not satisfied this was anything to do with the making of a grievance, the protected act. The claimant suggests that because Dr Green was a member of the Management Committee and was responsible for investigating the grievance, an evidential connection is established. The evidence from the respondent was that the Management Committee rarely involved itself in this type of decision. To that, the claimant draws attention to the email of Dr Stafford, who stated that "*it occurred to the Management Committee that you might be a good person to take over*" the LCS representative role. Even if the corresponding proposal to exchange the LCS role in place of the FYP coordinator role had been discussed by the Management Committee (which is not stated in the email or anywhere else) the tone of the suggestion is entirely supportive and not critical. It is all about not overburdening staff but sharing the load fairly. The evidential foundation for attributing this to the grievance with a view to punishing the claimant is tenuous in the extreme. The claim of victimisation is not well made.

In summer 2019, SP attempted to penalise the Claimant's students in AIMES by lowering their marks. Alleged to be: victimisation because of the Claimant's June 2019 grievance; direct race and religious discrimination because of the race and religion of the Claimant and his colleague who taught these students and the race and religion of HK; or harassment related to race or religion.

66. The documentation shows that on 14 June 2019 Dr Petzold recommended a reduction in the marking of the FYPs of AIMES students by 2 marks of those who had been scored between 76 and 79 and 3 marks between 70 and 75. In respect of French students, with a co-moderator, he recommended a reduction of 1 mark for the 73 to 75 range, 2 marks of 70 to 72 and all 2:1's by 3 marks. He and the same co-moderator recommended reduced scores of 3, within the 70 to 74 range, 2 within the 64 to 69 range and a slight adjustment to marks above the 74 range, in the Spanish, Portuguese, Latin American Studies.

67. The claimant submitted his written grievance at 19.15 hours on 14 June 2019, the same day as the moderation exercise was concluded. It is agreed this was a protected act. Dr Petzold was aware before then that the claimant and Dr Sheikh had raised their concern about the process because the claimant said as much when he declined to agree with the final mark of 66 which Dr Petzold had given to the FYP student, but there is no evidence he knew that this concern had anything to do with alleged discriminatory behaviour and therefore a protected act. We were not satisfied Dr Petzold knew of the protected act when he conducted this moderation exercise so it could not conceivably have been the reason for the treatment. The victimisation claim fails.

68. The proposed moderation was not approved by the external examiner, Dr Teti. In a brief email he said that the moderator's suggestion was well-intentioned

based on the evidence but it unfortunately had the effect of 'punishing' potentially deserving students. The claimant places reliance upon this. It is unlikely Dr Petzold's moderation would be described as well-intentioned if Dr Teti believed it had been motivated for the reasons the claimant suggests. Furthermore Dr Teti suggested that it had the effect, rather than purpose, of punishing the students. That is they would not receive appropriate recognition for their work because of an unintended consequence of the approach Dr Petzold took. The email does not have the damaging connotation contended for.

69. The claimant argues that Dr Petzold did not follow CoPA in his moderation exercise. It is not clear from what Dr Teti stated if that is the reason he disagreed but it is a permissible inference. The difficulty the claimant must confront however is why that was the case.

70. We could find no evidence to suggest this had anything to do with the race or religion of the claimant or the students in AIMES. The claimant stated that Dr Kraetzschmar was not adversely affected by the moderation because his students scored above 80, but even if that were the case (which was not apparent from the evidence) there was no evidence the random sample of papers used by Dr Petzold drew that to his attention.

71. More problematic for the claimant is that Dr Petzold made his recommendations across three subject areas, not restricted to AIMES. His actions were not to single out AIMES. The impact of his proposal would have affected students across a broad range of subjects regardless of their race or religion or that of their teachers. In evidence the claimant said that Dr Petzold must have marked down French and Spanish, Portuguese and Latin American in an effort to cover his tracks, so his unlawful actions would not become apparent. That would be extensive collateral damage beyond the alleged intended harm to the claimant and his students. We found that to be an unattractive proposition which drew no support from the evidence. There was no connection to race or religion for the purpose of either the discrimination or harassment claims.

From August to end of November 2019 SP and Fozia Bora undermined the Claimant in his running of the Final Year Project by sending emails to Dr Sheikh, Head of Department, saying or implying that the Claimant was incompetent. Alleged to be victimisation for his grievance of June 2019.

72. It was the responsibility of FYP coordinators to allocate each student with a supervisor by 20 September 2019. The student had to inform the FYP coordinator of their chosen topic first. This information was then uploaded to a spreadsheet.

73. Two students approached Dr Petzold on 27 September 2019, at the FYP lecture he gave, to say they did not know who their supervisor was. He contacted the claimant who replied to say most had not submitted prospective titles.

74. On 18 October 2019 Dr Kraetzschmar sent an email to Dr Bora to say he had been approached by a personal tutee and two to three other students who had raised concerns about their FYP's in AIMES. He forwarded an email from his tutee with her concern. He copied Dr Petzold, who had the wider departmental responsibility for this, into the email. He stated that he was in a delicate position and asked her advice on how to proceed, although he would normally have raised it

directly with the claimant. The delicate position was the fact he knew the claimant had raised a grievance concerning him. On 19 October 2019 two students raised a further similar concern with Dr Petzold, although he could not recall if it was the same two students who had spoken to him the month before.

75. Dr Bora wrote to the claimant and copied in Dr Sheikh on 18 October 2019 to relay the concerns and to suggest he met with all the students and explained the situation. She referred to an email she had sent about the same matter on 14 October 2019 to which she had received no response. She suggested Dr Sheikh might wish to attend to show the problem was being taken seriously. The claimant replied to explain he had been sending clear messages to the students and the majority had received responses and asked for the names of the students who had had a problem. Dr Bora forwarded part of the email of the student who had expressed concern. Some further correspondence followed in which the claimant said all students had been in contact with him, but Dr Petzold then heard from the students on 19 October who had no supervisor. Dr Bora brought this to the claimant's attention and he asked for those students to be referred to him. On 23 October 2019 Dr Bora stated she would drop it for the moment.

76. Dr Bora did not say the claimant was incompetent, but she accepted there must have been some validity in the concerns raised because she proposed the claimant address the matter. This was not a problem for only one student, as the claimant suggested in the hearing, but had affected a number.

77. In her evidence Dr Bora said she was not aware of the nature of his complaint although she knew a grievance had been raised by the claimant about Dr Kraetzschmar. She did not know it concerned Dr Petzold. She said that she responded to the concerns raised by the students and she sought to allay concerns. She said she had raised the problem with the claimant and it was resolved quickly.

78. Dr Bora was an impressive witness who presented as fair and considered. We accepted her evidence that she did not know of the detail of the complaint and that it had no relevance to the emails she wrote about allocation of FYP supervisors. As Deputy Head of School we would have expected her to treat concerns raised by students seriously, particularly in circumstances such as these when they had arrived from a number of sources, some time after the deadline for supervisor allocation by the claimant.

79. We accept Dr Petzold's evidence that concerns were raised with him by 2 students on 27 September 2019 and 19 October 2019, both after the deadline for FYP supervisor allocation on 20 September 2019. When he first drew this to the attention of the claimant he offered his assistance. This and his subsequent emails were entirely appropriate and measured, to address a legitimate concern which had come to his attention. It had nothing to do with the claimant's race or religion or the fact he had done a protected act.

On 30 October 2019 Ms Michelle Nettleton (MN), Head of Human Resources, offered HK support and counselling and on 30 January 2020 offered SP support and counselling, but did not offer support and counselling to the Claimant and his colleague of the same race and religion as him who had brought a grievance. HK and SP are white and not Muslim. Alleged to be direct race or religious discrimination or harassment related to race or religion.

80. In her evidence Ms Nettleton explained that during the grievance process she advised Dr Petzold and Dr Kraetzschmar at their interview on 3 October 2019 of the availability of a support and well-being service. They had each become visibly distressed and were crying. Dr Petzold did not have a representative.

81. She said she did not advise the claimant of the service. He was represented at the time and was not in a comparable state of emotional distress. She agreed, in cross examination that on 27 February, when Dr Green was reporting the outcome of his findings to the claimant, he became visibly agitated. He crossed his arms and raised his voice. She did not mention the availability of the support service at that time.

82. We accepted the evidence of Ms Nettleton that she raised the availability of the service to Dr Petzold and Dr Kraetzschmar because of their transitory loss of emotional control and not because they were white or not of the Islamic faith. She did not offer the availability of the service to Professor Treherne or Caroline Campbell, who were white. The circumstances of the comparison the claimant raises of his agitation was of a materially different circumstance. He had not broken down in tears. His agitated state presented a quite different reaction. The same treatment of others, Professor Treherne or Caroline Campbell, who did not share the protected characteristics is indicative of the fact they played no part in the advice she gave or chose not to give.

83. For the purpose of the harassment claim, not referring the claimant to the possibility of counselling or support from the well-being service was not conduct related to race or religion.

In May 2020 in their report on the Claimant's grievance of 12 June 2019, Dr Green, Deputy Head of LCS, and MN suggested that the Claimant and his colleague of the same race and religion who had also brought a grievance, could not understand the Code of Practice on Assessments. Alleged to be direct race or religious discrimination or harassment related to race or religion.

84. This complaint concerns the findings in the grievance report about compliance with CoPA by Dr Petzold. It would appear that Dr Green agreed with the claimant that there had been a failure to comply with CopA in respect of the approach to adopt when the first and second markers could not agree.

85. The claimant invites a more nuanced interpretation. He invites a finding that it was he, the claimant, who was accused of not understanding CoPA.

86. The relevant passages from the grievance outcome state:

> ***The second area of your complaint is that, in soliciting a fourth opinion/mark from Dr Lars Berger (Faculty of Social Sciences), HK, SP and CC failed to follow the Code of Practice on Assessment (4.5d).***
> *Evidence was found to corroborate the claim that SP and CC did not follow the CoPA regulations as regards cases where the first and second marker do not agree. This document states in the third bullet-point of Section 4.5d (Resolution of Discrepancies between Markers):*
> *"If the markers fail to reach an agreement, the Assessment Lead (or nominated representative) will be informed and a third marker allocated to*

review the work. The Assessment Lead (or nominated representative) will determine a decision, for the External's approval if appropriate, if none can be agreed by the three markers. The External Examiner will in any case have access to information about the process."
This regulation clashes somewhat with the role of the External Examiner outlined in 4.5e, which states that 'The role of the external examiner is […] not to contribute to the assessment of individual students."
From the interviews undertaken, it is clear that the decision not to involve the External Examiner (EE) was taken because of this latter regulation and the assumption that the role of External Examiner at UoL no longer allows for EEs to change marks awarded (the EE only being able to point to failures to comply with marking and moderation procedures).
However, no recognition appears to have been given to the External Examiner Handbook, which states in regulation 3.1.8 that:
"In exceptional circumstances an External Examiner may be permitted to determine a mark where:
• they have been specifically invited to adjudicate between internal markers"
It is evident that this exception to the role of the EE has not been communicated adequately to all involved (or to the School more generally), and that the current CoPA has not been amended in light of this detail.
Furthermore, it was noted that since the introduction of the cross-school FYP modules, EEs in specific subject areas have been asked to scrutinise FYPs supervised by colleagues with expertise in those areas, when in fact moderation of FYP modules should be the sole responsibility of those EEs asked to scrutinise cross-School modules. This inconsistency between policy and practice led to a difficult situation for module coordinator SP, as the CoPA as it stood did not allow for a satisfactory resolution to the disagreement between 1st, 2nd and 3rd markers. As a result, SP (in consultation with CC) took the decision – not allowed for in the CoPA - to consult Lars Berger.
Finally, we found that it was not appropriate for HK, as First Marker of the piece, to approach Lars Berger informally for a potential fourth opinion, without having discussed this possibility previously with SP, or for him to suggest this possibility to SP without having previously consulted with you. (The use of the phrase "I hope that is okay with you" in his email to you about this possibility without waiting for a response was particularly unhelpful in this regard.)
We acknowledge that this would have exacerbated the feelings experienced at the time mentioned in the third issue in your case.

87. The claimant says he and Dr Sheikh were patronised and infantilised by these observations. He says that CoPA is abundantly clear and unambiguous, yet Dr Green concluded that there was some inconsistency in respect of using the external examiner as a third marker. He says it reflected badly on him, impugning his intelligence.

88. The complaint in the grievance which Dr Green addresses is the decision to approach and appoint Dr Berger as a fourth marker. The finding in respect of that is unequivocal, that this was contrary to the guidance. No detrimental treatment expressly or implicitly flows from that. It can only be regarded as a criticism of Dr Petzold, Dr Kraetzschmar and, to the extent it was approved or condoned by them,

of Dr Treherne and Caroline Campbell. A distinction seemed to have been drawn by the latter two between a further marker on the one hand and a fourth person who would comment upon the three markings to allow Dr Petzold to make an ultimate evaluation, on the other. In the event Dr Berger did allocate a score. On any view his involvement was not one contemplated by CoPA, as recognised and stated by Dr Green. This can only be seen as vindicating the opinion of the claimant and Dr Sheikh.

89. The observation which has exercised the claimant is the reference to the involvement of the external examiner. Dr Green drew attention to the tension created by different sections of CoPA. He contrasted that part of paragraph 4.5e, which states that the external examiner should not contribute to individual assessments of students, with paragraph 4.5d, which states that if the first two markers do not agree a third will be appointed and then the lead assessor shall determine the decision "*subject to the external assessor's approval, if appropriate*". The paragraph does not explain the circumstances when this would be appropriate. We reject the criticism the claimant makes of Dr Green. His comments are valid although we consider they require some further examination of the passages in CoPA to highlight the problem.

90. It is important to consider the passage which immediately precedes that Dr Green has quoted in 4.5e, to put into context the tension to which he is alluding. (These are set out in full at paragraph 33 above). The role of the external examiner is "*to ensure comparability of the University's standards with those in peer institutions and national benchmarks".* It is that function which underscores the next passage, which precludes the external examiner from contributing to assessments of individual students. These passages are directed towards ensuring sufficient distance from the awarding of individual marks to facilitate the principal function of moderating to establish consistency between national educational institutions. That is to what the penultimate sentence of paragraph 4.5e alludes: *In this way, the external examiner has oversight of the whole cohort of marks, rather than those of individual students.* If he had been party to the individual marking process at one or more of the institutions the integrity of the process and his principal role risk being compromised. He would then be judging his own markings against a national standard.

91. CoPA nevertheless provides for an escape from the very prohibition it appears to impose. Paragraph 4.5d permits approval of the Lead Assessor's determination in the event he adjudicates on the proper score after, unusually, three markers have become involved. More directly, the end of paragraph 4.5e states "*However, in exceptional circumstances, an external examiner may be permitted to determine an individual mark where they have been specifically invited to adjudicate between markers".* No definition or clarification of what exceptional circumstances may be is provided, either in CoPA or the Examiner's handbook. Dr Green remarked upon this exception in the Examiner's handbook and not by reference to paragraph 4.5e, but the handbook simply reflects what the end of paragraph 4.5e states. In his evidence Dr Sheikh stated that in his opinion exceptional circumstances would arise when the first two markers could not agree, so that Dr Teti should have been the third marker. When the Tribunal queried why CoPA would not simply provide for that rather than referring to a third marker he said it had not been correctly drafted.

92. We can envisage circumstances in which a situation of necessity will arise; for example, when the timescale is so tight and alternative suitable markers are unavailable. It may be that this was what the drafter of CoPA had in mind as an exceptional circumstance to involve the External Examiner, as a last resort. We would regard it as surprising for this to extend to his use as a third marker, as suggested by Dr Sheikh, because of the risk that would pose to the integrity of his principal function.

93. Be that as it may and whatever the correct interpretation is, CoPA generates confusion as to the role of the external examiner in any individual scoring process. Dr Green was correct to draw attention to that. The claimant is wrong to say it is crystal clear. The allegation is fundamentally unsound.

94. Even had there been such a detriment as alleged, the fact that Dr Kraetzschmar shared the view of the claimant and Dr Sheikh that the External Examiner would have been an appropriate marker, undermines the claim that the conclusion of Dr Green was because of race or religion. Dr Kraetzschmar who did not share the protected characteristics would have equally been subject to that implicit criticism, so the evidence for inferring his conclusion was motivated by race or religion is absent.

Employment Judge D N Jones

Date: 5 July 2022