EMPLOYMENT TRIBUNALS

Claimant: **Ms J Linde**

Respondent: **University of East London**

Heard at: **East London Hearing Centre**

On: **9, 10 and 11 January**
In chambers on 19 February

Before: Employment Judge Jones
Mr C Mardner
Mr T Harrington-Roberts

Representation
Claimant: in person
Respondent: Mr Hignett (Counsel)

JUDGMENT

The Claimant was not an employee within the meaning of section 83 Equality Act 2010.

The Claimant was not a contract worker within the meaning of section 41 Equality Act 2010.

The Tribunal has no jurisdiction to hear her complaints of race discrimination and victimisation and they are dismissed.

REASONS

The Claimant brought complaints of race discrimination and victimisation against the Respondent, which the Respondent strongly defended. The Claimant's complaint is that she was subjected to race discrimination because she is Eastern European, which shows in her strong Eastern European accent. This is denied by the Respondent.

Evidence

The Tribunal heard from the Claimant in evidence. From the Respondent, the Tribunal heard from Ann Davies, who at the relevant time was the Senior Lecturer in Social Work – Practice Learning at the Respondent and Placement Lead; and from Alison Mulholland, who is the Respondent's HR Resourcing Manager.

The Tribunal was given a lever arch file of documents and signed witness statements from all those who gave evidence.

The Tribunal has come to the following conclusions on the disputed, relevant matters to the case. The Tribunal will only make findings on matters that are relevant to the issues in the case. We will not make findings on every piece of evidence unless it is relevant to the issues in the case.

The Tribunal apologises to the parties for the delay in the production of the judgment and reasons. This was due to the pressure of work on the judge and her ill-health.

Findings of Fact

The Claimant was born in Latvia. She qualified as a social worker in Germany in 2006. The Claimant travelled to the UK in 2013 with her son, because she had been told that the career opportunities for social workers were better here than in Germany.

The Claimant explained in her live evidence that her complaint is that all people from Eastern Europe are excluded from government jobs in the UK. She did not provide any statistical evidence to support this allegation. She simply stated that she had not noticed any Eastern Europeans in the canteen while at the Respondent. The Claimant also had no details of the number of Eastern Europeans who applied for work at the Respondent in 2020 or 2021. She confirmed that the team she worked in, at Havering Borough Council had other Eastern European professionals in it.

In relation to her status at the Respondent, the Claimant wanted to bring a witness from HR to give evidence that she was an employee. The Claimant did not make an application before us for a witness order. This was a matter that had been addressed sometime before the hearing. However, the Tribunal had live evidence and witness statement from Alison Mulholland, who was the Respondent's HR Resourcing Manager, and the Claimant was able to cross examine her.

The Claimant was a student at the Respondent from 2016 on the part-time Masters' course on Post-Qualified Professional Practice. During her time as a student at the Respondent, the Claimant made complaints of race discrimination. That was some time before the events giving rise to the complaints in this case.

At the same time, the Claimant was an employee of the Richmond Fellowship, having been employed there since 2013. At the Richmond Fellowship her role was to provide a holistic support to vulnerable people recovering from mental illnesses. The focus of her work was around service users' employment. She helped them apply for jobs, prepare for job interviews, progress in their career and maintain employment, if for some reason they are at risk of losing it. The

Richmond Fellowship was a charity and voluntary sector provider of mental health services.

Since the Claimant arrived in the UK she tried to obtain work as a social worker but was unsuccessful. It was at that point that she decided to enrol on the Masters' degree programme as she believed that it would increase her chances of achieving the social work career she wanted. The Masters' degree was completed within 4 years. After she completed the degree, the Claimant was unsuccessful in her applications for employment as a social worker. It is likely that this was disappointing and frustrating for her.

In 2017 the Richmond Fellowship registered with the Respondent as a placement provider. The Claimant ceased to be a student at the Respondent at the end of the academic year in 2020.

Ann Davies was the Placement Lead at the relevant time. As placement lead Ms Davies was in overall charge of the process of sourcing placements and allocating or matching students to them. She was supported by a placement administrator.

The Respondent offered social work courses at undergraduate and postgraduate level. It was not disputed that social work is a highly regulated profession because practitioners are dealing with the most vulnerable members of society. As part of their training, students are required to carry out placements that must meet certain criteria set by the regulator, Social Work England. Those placements must be in a social or social care setting. Each student had to have a placement as a condition of completing the course. Social Work England also set standards for the type of work and learning opportunities those placements need to provide to students.

We find that there were two types of placement providers. Firstly, Local Authorities – who provide learning opportunities which include statutory tasks. They usually have their own Practice Educators. Secondly, organisations from the private, voluntary or independent sector, which provide learning opportunities which can include statutory tasks – such as in the case of independent fostering agencies -but usually offer non-statutory tasks. These organisations are more variable in the range of tasks they provide for students who are on placement. Some organisations, often in the charity or voluntary sector, work with an independent Practice Educator to offer a placement. That Practice Educator will sometimes be chosen by the placement provider and other times they may be sourced by the Respondent. The Claimant could be either an independent Practice Educator offsite (PE) or an onsite PE working with her employer, the Richmond Fellowship, which provides the placement.

We were shown a list of the providers in both Local Authority and private, voluntary or independent sector settings that were potentially able to provide suitable placements for students. The Richmond Fellowship had been on the Respondent's list of providers in 2021 and was still on there at the time of the hearing. It is likely that this list of possible providers was not regularly reviewed. It was kept by the administrator who worked with Ms Davies.

Each placement was different, and it was possible for one provider to have different types of work in different settings, with a range of service user groups.

Statutory placements would usually happen in a statutory setting or require the student to carry out tasks involving high-risk decision making and legal interventions. For example, carrying out clinical assessments involving balancing patient care against whether the state should intervene to exercise control over them. All Local Authority placements were statutory placements.

Non-statutory placements predominantly involved forms of voluntary intervention and support for service users. Private, voluntary and independent placements were usually non-statutory although some did include statutory tasks. Private placement providers did generally offer a good quality and broad range of tasks for the student.

Provision of placements was reviewed on an annual basis through a process called '*Quality Assurance of Practice Learning'* where students, Onsite Practice Educators and Offsite Practice Educators would complete a feedback form called a QAPL at the end of the placement. This was standard practice in social work departments across the UK. The placement lead would review the QAPL forms as part of the quality assurance process and the process of planning for the next round of placements in the following academic year. The Respondent would often not reuse placement providers where they felt the placement was not strong enough.

In line with Social Work England Practice Placement Guidance and the British Association of Social Workers Practice Education Professional Standards for Social Work (2019 updated in 2022), the learning and development of students must be supervised and assessed by a Practice Educator who supervises their day-to-day work. If there was no qualified Practice Educator within a placement setting, a work-based supervisor would be allocated, and called either a Practice Supervisor or an Onsite Supervisor. When this was the case, there would also be a qualified offsite Practice Educator allocated to work alongside the work-based supervisor. The roles were clearly defined in the UEL Placement Handbook and agreed by all parties in the Placement Learning Agreement Meeting, at the beginning of each placement.

The PE (Practice Educator) would meet with the student weekly on behalf of the placement provider, to write reports and bridge the gap between theory and practice.

Even if an organisation was on the Respondent's provider list, they would not automatically be given a student. In order to be eligible for matching with a student, placement providers had to apply to the Respondent and show that they, as an organisation, met or continued to meet certain quality criteria. During Ms Davies' time at the Respondent, it was common for one student to be placed at each placement that was available.

The Respondent matched students to the most appropriate placement for that student. It did not match students to an individual PE. Although it was rare for this to happen, the PE can change during a placement as their suitability is always under review. Students would be expected to complete a 70 day placement and then a 100 day placement in line with the regulatory body, Social Work England.

The Respondent had a Social Work Practice Learning Handbook which set out the expectations and requirements for matching students to placement providers.

Placements usually started in October and January of each academic year. The Respondent paid for the benefit of the service provided by the placement provider, calculated per day of the placement. For all placements, the Respondent would pay a 'daily placement fee' to each placement provider for offering a student placement. If there was a Practice Educator on-site, the payment was paid £20 per day. If the Respondent had to use an off-site freelance Practice Educator (PE), it would pay the placement agency £10 per day and the PE £10 per day. Therefore, payment for an offsite PE for a 70 day placement would have been £700 and for a 100 day placement would be £1,000.

The process of arranging a placement would start in or around May of each year when the Respondent would proactively contact placement providers to ask how many students they would be able to accommodate in October and January of the following year. As placement lead, Ms Davies would oversee the process of reviewing all available placement opportunities that would come in as a result of that contact. She would also be responsible for sourcing placements to meet the learning needs of students in the four cohorts across the Respondent's BA and MA programmes. The Respondent was not under any obligation to proactively ask providers but did so because it assisted with planning and getting everything organised in time. The Respondent would then review the application with the student and match students to appropriate placements depending on their professional development needs, the training opportunities on offer, their previous employment, voluntary or lived experience, distance or placement and any specific requirements relating to additional needs e.g., if a student had particular mobility needs, they would need a fully accessible placement.

Once that initial matching happened, the student must submit a written application for the placement which they write with the guidance of their Tutor. The formal application would be sent to the placement provider who, often with the PE, would conduct interviews or assessments to determine to whom placements should be offered. There were more strict requirements for the 100 day placements but as the ones referred to in this case were all 70 day placements, we will focus on the process related to them.

We find that placement providers had no obligation to offer the Respondent any placement availability and the Respondent had no obligation to offer students to all providers who requested a student on placement. There was no contract to provide or accept students on placement. The Respondent tried to build collaborative relationships with placement providers so that its students would have a good selection of placements to choose from. It is highly likely that placement providers would want highly motivated students, who would contribute positively to the work they were doing with individuals and communities, knowing that they were assisting in training the social workers of the future.

Once a placement was set up, the student would meet with their supervisor, PE and Placement Tutor at the start of the placement to agree a plan for the placement, called a Practice Learning Agreement or PLA. This would set out the student's objectives for their placement. The PE would be responsible for the induction, supervision, teaching, and assessment of the student on placement. The student would also have their Tutor. Thereafter, the Respondent would keep in contact with the student during the placement to ensure that they were on course to complete their learning agreement but did not have any management responsibilities or direction of the PE or the placement provider's staff. The Respondent's Placement Tutor would chair the formal Mid-way Review and End

of Placement Review meetings, against the PLA. Each trainee PE doing a PEPS module is allocated a Practice Assessor, whose role would be to complete two or three direct observations of the PE supervising the student. The student will complete a portfolio which will include a recommendation from the Practice Educator of pass or fail of the placement.

While studying at the Respondent, the Claimant studied two modules, PEPS1 (Practice Educator Professional Standards Stage 1) and PEPS 2. These were courses for qualified and experienced social work practitioners who wish to gain the knowledge and skills to teach, supervise and assess social work students during their first or last practice learning opportunity within a social care related organisation and as social workers.

The modules provided a clear grounding in the role of Practice Educator including facilitating and assessing work-based learning through mentoring, supervision provision, training and other methods crucial to the learning and development of others including social work students, newly qualified social workers and supervisees. All teaching and assessments were in line with the British Association of Social Workers (BASW) Practice Educator Professional Standards for Social Work (PEPS). Both modules required the Claimant to take on the role of placement Practice Educator for one of the Respondent's BA or MA students on placement.

The Claimant completed PEPS1 successfully. During PEPS1 she worked with a student on placement at the Richmond Fellowship. Ms Davies was her supervisor on that occasion, and it is likely that she was involved in matching that student with the Richmond Fellowship. We find it likely that the student was placed in a different team, with the Claimant as her on-site PE. It is likely that the Claimant put the Richmond Fellowship forward for this.

In the academic year 2018 – 2019, when undertaking PEPS 2, the Claimant put herself forward for and was appointed as an off-site trainee PE (Practice Educator) for another of the Respondent's students, MN, who was with a placement provider in Dagenham. Ms Davies was the Practice Assessor for the Claimant in that year. She completed one direct observation of the Claimant with the student, which was part of her duties as practice assessor. She should have completed two or three direct observations of the PE supervising the student. During that observation, Ms Davies noticed that the student was critical of the Claimant and became upset. Ms Davies gave the Claimant feedback on how she could have better handled the situation. Unfortunately, the relationship between the student and the Claimant did not improve, and tensions developed between them. This was within the first few weeks of the placement. Either the student or her tutor, Ms Detjen, spoke to Ms Davies informally about this.

The Claimant's evidence to us was that she did not know what the student's concerns were, as she had not been told. It is likely that there was some tension between them.

The Respondent held a concerns' meeting on 19 November 2018, which involved the Claimant, her practice assessor – Ms Davies, the student and Kim Detjen. The module leader also attended. The relationship between the Claimant and the student had broken down. A concerns meeting is usually only held when

there are concerns about an aspect of placement that could not be resolved informally.

The concerns' meeting was the second meeting about this as the same people had already met on 9 November to try to agree the student's PLA. That meeting was described as difficult and ended without agreement. After that meeting, both the Claimant and the student had complained about each other. There were no concerns about the student's ability or performance in the placement. The Claimant accused the student of lying and the student said that the Claimant had been patronising towards her and treated her like a child. They both accused the other being racist towards them. Ms Davies felt that the Claimant had not shown any understanding of the difficulties in the relationship and was not being constructive. Although the Claimant considered that the student lacked professionalism, the Supervisor did not agree.

The Respondent was concerned that the relationship between the Claimant and the student could end up impacting service users in a negative way. Ms Davies also considered that from her observations, it was unlikely that the relationship could improve so that the placement could continue in its current form. Ms Davies resolved the situation by allocating a different PE to that student. She explained to the Claimant that they would need to meet separately with her PEPS 2 module leader to see what steps could be taken to ensure her that her practice education training continued. Although the student's tutor, the supervisor and the module leader all agreed that this was the right way forward, the Claimant did not accept the decision.

The Claimant was replaced as the student's PE. She was paid for 18 out of the 70 days of the placement. Ms Davies said to us that she could not recall any other occasion when the Respondent has taken the step to replace a PE part way through a placement.

The Claimant felt that as social workers do not get to choose who they work with in practice, the student should have been left to work through a difficult situation. The Respondent did not think that this was a constructive way to proceed as they had a commitment to provide the student with the training. It was not the same as a professional social worker situation, as the student was still training.

The Claimant submitted two formal complaints about this matter. The first was about being undermined and bullied by the student's supervisor. The second was that she had been bullied and discriminated against on the grounds of her ethnic origin and nationality because she had had been replaced as the student's PE. The Claimant also complained that removing her from being the student's PE caused her to lose wages and opportunities and it would take her longer to complete the course. She complained that the student mainly did not do the tasks she gave her, lied about her, did not keep her agreements, refused to sign supervision notes and did not include her in emails that she sent to Ms Davies and her supervisor about the placement.

The Respondent appointed Dr Marcia Wilson to investigate the Claimant's complaints. At the end of her investigation, she concluded, in her report dated 16 January 2019, that that there had been an irreparable breakdown in the relationship between the Claimant and the student such that the removal of the Claimant as PE was appropriate. She found nothing to substantiate the Claimant's allegations of discrimination on the grounds of her race.

Once she received this outcome, the Claimant requested that this matter be reviewed under stage 3 of the Respondent's complaints procedure. It was allocated to someone more senior than Ms Wilson, in accordance with the procedure. This was Mr T Foot, Acting University Secretary. In his outcome, he agreed with the Respondent, although the Claimant did not agree, that on the balance of probabilities, the placement had broken down and was irretrievable. He did not uphold the Claimant's request for a review and did not uphold her allegation that Dr Wilson's decision was perverse.

The Respondent had a Dignity at Work and Study Policy and Process, which was in the bundle of documents. The policy stated as follows: -

> *'Equality of opportunity, diversity and inclusion are terms that represent the values of UEL and underpin all that it aims to achieve.*
>
> *In order to provide an outstanding working and learning experience the University aims to establish an inclusive culture free from harassment, bullying, unlawful discrimination and victimisation. This policy promotes the respectful treatment of staff, students and visitors within the University and the protection of employees and students from bullying and harassment at work.'*
> ……
>
> *UEL is committed to fostering a positive working and learning environment where all staff, students visitors, general public and contractors are treated fairly, with dignity, courtesy, respect and consideration. All staff have a responsibility to create an environment that is free from harassment, bullying, unlawful discrimination and victimisation.*
> *….*
> *Any concerns can and should be raised in line with this policy and the appropriate grievance or disciplinary procedures. This policy is equally applicable to behaviour which the individual feels is unwanted or unfair, even if they do not wish to consider it bullying and/or harassment.'*

The policy stated that anyone could raise any concerns they have in line with the policy and using the appropriate grievance or disciplinary procedures. It set out how someone could raise complaints under this policy at an informal stage and then if it is not resolved, they could take it further using the Respondent's grievance policy. It is likely that the Claimant's complaints were dealt with under this policy.

The Claimant refused to accept Dr Wilson and Mr Foote's decisions on her complaint about being removed as the student's PE 2018 – 2019. Mr Foote's decision not to uphold the Claimant's request for a review ended the process.

The Claimant completed her course with the Respondent in 2019.

In March 2020, the UK began a series of lockdowns to deal with and stem the infection rate of Covid-19. There were restrictions on people going to work and general social movement. Most people worked from home during the lockdowns, unless they were essential workers, or they could not do their job remotely. Most types of social work involved a mix of duties, some which could be carried out remotely and some which could not. This meant that in the academic year 2020

– 2021, some placements became hybrid, with a requirement for some in-person work.

The Respondent had a social work student who was shielding or considered *'clinically extremely vulnerable'*, who required a placement as part of their course. It was difficult for the Respondent to place this person as her condition meant that she was effectively excluded from most placements, because as stated, as they mostly required some in-person work.

The Richmond Fellowship offered a placement which could be carried out on an entirely remote working basis. The Respondent felt that this suited the needs of this particular student, so they arranged for her to do her placement there, with the Claimant as the on-site PE. The placement offered the student the opportunity to be involved in work in employment services, which predominantly involved helping people diagnosed with mental health conditions with their ongoing employment or with their search for new employment.

We had a copy of the Placement Learning Agreement for this student, for the academic year 2020 – 2021, in the bundle. This was the only agreement document in the bundle that related to the placement. This was an agreement between the university, the student, the placement provider and the Claimant as the PE. In the form, it set out the services provided by the Richmond Fellowship and detailed what work the student could expect to do as part of the placement. The student would work from home and would join meetings remotely. They would also interact with clients remotely. She was to complete 70 hours of practice placement between 4 December 2020 and 10 May 2021. In the agreement, the student set out her self-identified specific learning needs in relation to this placement setting. The form also contained the placement learning objectives which the Claimant on behalf of the Richmond Fellowship, agreed in liaison with Ms Davies, as Practice Supervisor. It is likely that those objectives were negotiated with the student beforehand, taking into account her identified learning needs and in this instance, the limitation of her being a person who at the time was shielding at home, because of the COVID-19 pandemic.

The form referred to '*Learning Opportunities to be Provided by the Placement to enable the student to meet the relevant level of the Professional Capabilities Framework.'* It then listed the placement learning opportunities that would be available in the setting and which had been negotiated with the student to take into account their specific learning needs. On this placement the student would have the opportunity to be allocated a caseload of up to 10 clients, she would get the opportunity to deal with these clients professionally, on an individual basis, while assisting them with achieving their goals by either maintaining existing employment or finding an appropriate alternative to employment. The student would offer one to one sessions with service users, create and/or update support plans and be in contact with the service user, on a daily basis, when necessary. They would learn to develop and maintain therapeutic relationships with service users, while recognising their strengths and treating everyone fairly. The student would complete the necessary equality and diversity training and develop an awareness of equality issues which might arise in the provision of adult services. The student would be able to gain knowledge of common mental health disorders and evidence-based methods of their treatment. The student would be able to support people with mental health problems with organising their daily lives and enhancing their community participation and help them access other sources of support.

The student would be offered 1.5 hours of reflective supervision by the PE, on a weekly basis during which they would be given the opportunity to reflect on their ongoing practice. Furthermore, there would be a possibility to reflect on ethical issues and dilemmas in conversation with colleagues in the team and other professionals. Lastly, the list of learning objectives stressed in more than one place that the student and the PE would be guided by the diversity and equal opportunity policy to treat all people fairly, regardless of age, gender, ethnicity, values etc and that the student will undertake all mandatory e-learning related to equality and diversity.

As PE, the Claimant was to provide a written report to the student, after they have assessed the student's portfolio. The student would then submit their portfolio to the Respondent.

The only tasks for the PE in this agreement was to keep a written record of supervision sessions, including any issues that arose, decisions reached, action to be taken and by whom. Although the agreement does not specifically say so, it is likely that the assumption was that the PE would conduct the 1.5 hours of supervision with the student each week.

There was no other agreement between the Claimant and the Respondent that we were shown.

Ms Davies was concerned that the work the student would do on this placement could be quite narrow compared to the broad experience required by Social Work England. The Respondent had to ensure that the student had experience that would enable her to meet the Professional Capabilities Framework once she finished her course. There should have been, for instance, the opportunity to do significant clinical assessments of individuals with a range of social needs, which this placement would not include. In the planning meeting, the Claimant and Ms Davies discussed the learning opportunities that would be available to the student in this placement. Ms Davies was aware that they were limited but, given the constraints caused by the pandemic and the fact that this student was shielding, it seemed the only available option for the Respondent, so they went ahead with it. In order to make up for what she saw as the gaps in the experience offered by the placement, Ms Davies asked if the Richmond Fellowship could set the student additional tasks to give her the required variety of work e.g. to produce a leaflet or do a presentation on clinical assessments. Although it was not going to be hands-on experience, she hoped that it would give some evidence to support the student's broader learning outcomes.

Ms Davies met regularly with the Claimant and the student, throughout the placement. She was therefore familiar with the Claimant's PE style and the range of tasks students could expect to be given when on a placement at the Richmond Fellowship.

Most of the service users at the Richmond Fellowship had already been diagnosed so the placement did not involve significant clinical assessments of individuals with a range of social needs, which would have been helpful for the student to see and to do, as part of her placement. The placement mostly involved providing services to individuals with adult mental health services in relation to employment. In the hearing, the Claimant did not agree with this assessment of the placement. However, we find that it is likely to be accurate, at least in relation to this student.

During February 2021, the student emailed Ms Davies a few times to raise concerns that she had about the placement. Firstly, she was concerned that she would only have feedback from the Claimant in her midway review as she had only worked with her. Secondly, she was worried about the learning opportunities at the placement because all she mainly did was to help service users write their CVs and find them online courses; and develop a newsletter. Thirdly, she was concerned that the work that she was doing at the Richmond Fellowship was not really social work related and she was worried about falling behind her peers, whom she had heard were actively doing risk assessments.

Ms Davies responded to the student to advise her to speak to the Claimant first about this. She told the student to talk to the Claimant about the learning opportunities available to her. The student had previously had a word with Ms Davies about the Claimant's management and supervisory style and told her that she found the working relationship difficult. Ms Davies had advised her to address any concern directly with the Claimant.

In March the student wrote to Ms Davies and told her that the Claimant was cross with her because she thought that the student had complained to Ms Davies. She also raised that she and the Claimant were having a difference of opinion on how often to telephone service users. The Claimant's way of resolving this difference was to threaten to fail the student if she did not follow her instructions.

In the written midway review, completed on 24 February 2021, Ms Davies indicated that as the placement was 100% remote, the student had done well to manage the challenges she faced. As some of the clients had found it difficult to engage with the voluntary service, the student had a low caseload and Ms Davies suggested that it would be good if, in the second half of her placement, her caseload could be increased by working with others in the Richmond Fellowship. The Claimant had been giving her regular supervision and support so that was not an issue of concern.

Following the midway review, the Claimant made some efforts to find the Claimant additional work within the Richmond Fellowship. However, in her email on page 289 her efforts were that she suggested that the Claimant should use the inhouse assessment tools on the website and that she might be able to join a different team to help them prepare a Forum. She said that she might be able to give the Claimant more complex cases. She disputed whether an increased caseload or opportunities to engage with clients would be of assistance to the student. The Claimant stated that as far as she understood, the student was not interested in some of the opportunities she referred to in the email and she told her that it may affect her final report. The student clearly did want more opportunities to engage with clients and to have an increased caseload as those were the matters that she raised with Ms Davies in her email; but those options were ruled out by the Claimant. In those circumstances, it is not surprising that the student was not enthusiastic about the other proposals, such as using the assessment tools.

When Ms Davies invited the student to a meeting to discuss this and the placement in general, the student refused as she felt that the situation would not change. In her email response she stated that the learning opportunities had been the same since the midway meeting and that the Claimant did not like the idea of Ms Davies talking to her manager, as she felt that it would make her look

incompetent. As she only had 19 days left of the placement, the student told Ms Davies that she preferred to leave things as they were. She hoped that her next placement would be better.

In the Tribunal hearing the Claimant stated that any difficulties in the placement was caused by Ms Davies. She refused to accept that there had been any issues. However, she also agreed that she was resistant to some things and that she might have been impolite and a bit too strict with the student. She believed that the PE should not let the student lead. At the time, the Claimant did not deny in her emails that there were issues. We find that there were the issues outlined in the student and Ms Davies' emails.

It is likely that this placement ended sometime in April 2021.

It is also likely that sometime in May or June 2021, the Respondent sent out an email to the agencies on its list to ask whether they would be interested in offering a placement to students on the relevant courses. In response to that email, on 14 June 2021, the Claimant contacted Ms Davies to say that she could take one student in October and probably another in February 2022. She had cleared this with her manager first. With regard to what the student would be doing on their placement the Claimant stated as follows: -

> *'With regard to the placement setting, it hasn't changed a lot. We are still working from home. We are only allowed to meet clients outside in the community, after a line manager agrees to a request. As the moment, we don't have any office space where to return, but things may change quickly. If we returned to the office, this would be would rather be in part-time or occasional basis. So, I assume that a student placed with us would still have to work from home during some of the time.*
>
> *The placement setting which I am offering has already been set up for remote working. Therefore, I could offer it remotely at any circumstances, even if lockdown is completely lifted. This would be suitable for most valuable and those who leave very far from the agency. Because I am also offering flexibility of working hours, it might be also suitable from students who are having caring responsibilities.*
>
> *If you believe that the placement setting is not ideal for UEL students, I am also interested to take a Student as an off-site PE. Being a PE is very important for my progression as a Social Worker. Therefore, I hope for an opportunity for me to be fairly considered this.'*

From that email, Ms Davies believed that the placement that was being offered would be the same as that which had been offered in 2020. Ms Davies' opinion was that the last placement was difficult and had not given the student the opportunity to do work of sufficient volume and complexity to the level that she expected and would benefit the student for her future practice.

Ms Davies decided that she did not want to use the placement offered by Richmond Fellowship in the academic year 2021 – 2022. In 2020, the Respondent used the placement because it had a student who was shielding, which limited they type of placement she could take. Ms Davies' evidence was that the Respondent had adjusted its requirements so that the 100% remote placement could be suitable for that student, but it did not want to use it for

another student, in the following academic year. Ms Davies considered that there were other placements in mental health settings, which were also offered that year, which even if not the primary focus of the placement, would have given more robust opportunities to complete social work assessments, intervention, and planning and review tasks with service users. She considered that as it was the Respondent's job to get the best placements for their students, it did not make sense to recommend a student be allocated to the Claimant's team at the Richmond Fellowship, when there were sufficient other placements available.

Ms Davies did not immediately respond to the Claimant's email dated 14 June. Her evidence was that she regretted not doing so but that she failed to do so simply because of being busy. She apologised to the Claimant in the hearing for not responding sooner but denied that this was in breach of the dignity at work policy. At that time, she was in receipt of around 200 emails per day and dealt with them to the best of her ability. Ms Davies accepted that the Claimant may have felt that she was being ignored. The Respondent had many placements offered that year and chose other placements for its students. It was aware that the Claimant wanted to continue to be a PE but did not use the placement offered by the Claimant.

The Claimant chased up a response from Ms Davies by emailing her on 24 July and 24 September 2021. She added that she wanted to take students on as an off-site or on-site PE, as she believed that supervising students was very important for her to progress in her career in social work. In the email dated 24 September, the Claimant confirmed that the situation at work had not changed and that they were still working from home. She added that there was a possibility to meet clients in the community on some occasions.

On 5 October 2021, Ms Davies responded to the Claimant. She emailed her to say that she was sorry for the delay in getting back to her and that all placements for October were now filled. She also told her that the Respondent had a full complement of offsite PEs. She informed her that there was nothing available at present but that this may change in January, with the MA placements.

The Claimant replied to Ms Davies on 6 October. She expressed her unhappiness and stated that she only wanted to supervise one student, while the Respondent had thousands. She asked why the Respondent did not consider her on this occasion. She confirmed that she had applied in time and stated that she did not think that she had been treated fairly, especially as she was alumni of the Respondent and was a Social Worker who was regularly paying her registration fee.

Ms Davies immediately responded to the Claimant by email. She gave the Claimant a detailed response to her complaint. Ms Davies told the Claimant that the Respondent had only 143 students on placement that year and that over half of them had been placed in teams where they are covering statutory and legal duties. Those placements would usually have an onsite PE. The Respondent had many offers of different types of placements and decided that it would choose other placements as opposed to the one the Claimant offered. It had not in fact been able to match to all the voluntary sector placements offered. Ms Davies confirmed that the Respondent was appreciative of the Claimant's hard work and efforts to accommodate the student who did the remote placement in the previous academic year, but that was not what they wanted for this round of placements. They preferred to work with the placements that had a broader

range of learning opportunities for students. Once again, she apologised for the delay in getting back to the Claimant.

The Claimant made a freedom of information request to the Respondent on 20 October, to request copies of the Respondent's policies and procedures on how placements are selected, how students are allocated to placements, and how PEs are 'being acquired'. She requested information on how many voluntary sector placement providers requested to host students in October 2021 and how many were actually matched with a student. She asked for information on how many students were actually matched with each placement provider. Lastly, she asked for information on the matching of offsite and onsite PEs who offered to take on students, their ethnic origins and whether or not they were matched.

On 25 October, the Claimant emailed the Respondent's HR department to complain about race discrimination during the recruitment process involved in becoming an offsite or onsite PE. The Claimant did not say that she should have been allocated a student because the placement she offered was a good as or as suitable as any other. It was her complaint that because supervision of students was very important for the development of her career as a PE and a social worker, she should have been considered. This was similar to the case she presented at the Tribunal, which was partly that because she had moved to England and made personal sacrifices to qualify and have a career a Social Worker, the Respondent should have placed a student with her to assist her in her desire to supervise students as a PE.

In this complaint the Claimant stated that '*Looking back to past experiences with the UEL staff, I got the feeling that the decision not to provide me with the opportunity to supervise a student was based on my background of being an Eastern European and an EU citizen, and also on my strong Russian accent.'*

She complained that the Respondent had not given her a '*sensible'* reason for not providing her with the opportunity to supervise a student in October 2021. The Claimant confirmed that the Richmond Fellowship did not usually host students in this way but that they had agreed to do so to support the development of her skills as a PE and as a Social Worker. She was clearly expecting the Respondent to do the same.

She appeared to agree that it was at the Respondent's discretion whether or not to place a student with an organisation but also said that it was not fair to give some PEs more than one student, while others have none. If the Respondent had to somehow spread students evenly between all the organisations who applied to have a student, that would fetter their discretion to be able to choose the best placement for each student.

In terms of the placement at Richmond Fellowship, the Claimant stated that in addition to support around employment, the student would have had the opportunity to offer advice around benefits, housing and debts and would have had direct contact with clients. Also, that the student would have had the opportunity to create and update support plans, participate in meetings and teamwork and liaise with other agencies. The Claimant then outlined her history of complaints against the Respondent, going back to 2017 and gave examples of what she considered to be discriminatory treatment of her by the Respondent.

On 8 November, the Claimant submitted additional Freedom of Information (FOI) requests regarding the number of different types of placement providers.

On 10 November, the Respondent replied to the Claimant and informed her that they considered her four recent FOI requests to be vexatious as they all related to her ongoing issues with it. They referred to Information Commissioner's Guidance that allowed them to refuse a request if it could be considered vexatious. The Respondent added that the Claimant's requests were personal to her and did not have a wider value to the public. They were also very similar.

On 24 November, another response to a FOI request was sent to the Claimant, which did provide some information about policies and procedures involved in verifying placement providers and allocating students. The Respondent confirmed that it had 80 students placed in local authorities and 6 placed in private organisations carrying out statutory and legal work. The Respondent did not place any students in any voluntary sector agencies in October 2021. There were 6 voluntary sector agencies who expressed an interest in having students and no students were placed with them.

The Respondent confirmed that it had 6 off-site PEs working with placements. Most of those PEs were working with several students.

In relation to offsite PEs, Ms Davies confirmed that she was the person who provided the answer that was disclosed in response to the FOI request. The answer was that there were three offsite PEs who requested students that year and the Respondent did not have placements available for them as they did not have enough experience and they were not a good fit. She also said '*we need to update our guidance but I want to update it to say requirement for being an offsite PE is having worked with at least 5 students before'.*

The requirement for a PE to have supervised at least five students before they can be considered for offsite work, was used by Ms Davies when considering the Claimant's and others' applications, as she considered that if someone had worked with at least five students, they would have sufficient experience to be an excellent off-site PE. The period of 5 years was an internal rule of thumb which the Respondent used to gauge an offsite PE's experience. An off-site PE would be supporting students who have no one in the organisation where they are placed to support them, guide them in their practice, and answer any questions; it was important to Ms Davies and her team that offsite PEs should be capable and experienced. She confirmed that the offsite placement the Claimant had supervised while she was on PEPS1, was done to support her to complete the course. The requirement to have supervised at least five students before being an offsite PE was later included in a guidance document issued by the British Association of Social Workers in 2022. That document was not produced to us in the hearing. The Claimant had not worked with 5 students as a PE. She had also been removed partway through one placement.

The Claimant was unhappy with those responses and pursued them with the Respondent. She also referred the matter to the information commissioner who asked the Respondent to provide further clarification on a particular aspect of one of her requests. The Respondent did so on 20 March 2023. The information provided was that while placements offered in October 2021 were on a face-to-face basis, there may have been instances where elements were delivered remotely as per each of the individual providers in place at the time. The

Respondent was unable to say how often that may happened as that would have been determined by the placement provider and agreed locally with the student and their supervisor, if necessary.

Ms Davies explained what she meant by face-to-face in this context. These placements required face-to-face work, with some aspects of the placement being remote.

Alison Mulholland was asked to investigate the Claimant's complaint. The Claimant discussed the complaint with Ms Mulholland, who then investigated it. Ms Mulholland was one of the Respondent's HR Managers. She wrote to the Claimant on 15 November to thank her for taking the time to go through it with her. She confirmed that she had looked into the matter and that she was satisfied that the reason given to her for her not being made an offsite PE from October 2021 and for a student not being placed with the Richmond Fellowship so that she could be an onsite PE; were legitimate and in no way related to the Claimant being an Eastern European. The Respondent considered the matter resolved.

The Claimant did not accept that outcome. She wrote to Ms Mulholland on the same day to enquire whether it was possible to escalate the complaint further within the Respondent. She chased that email on 23 November. Ms Mulholland confirmed in her email response that she had taken the opportunity to speak to the Dean of the school and that both of them were of the opinion that the Claimant had not been discriminated against and that there was no 2nd stage of the complaint process.

Pay and Documents

The Claimant made a payment claim on a 3rd party contract claim form on 31 May 2020, for the academic year 2019 – 2020. It is the Respondent's case that these forms are used for one-off claims for payments from the Respondent, such as for claims made by guest lecturers. The Claimant was unable to say as she was not familiar with all the Respondent's forms.

The form was divided into sections covering, the personal details of the person claiming, equality and diversity information and dates worked and how much is being claimed. The Claimant had to declare that the information in the form was accurate. She also confirmed that she had another job, which was at the Richmond Fellowship.

The Claimant joined the Respondent's payroll on 1 June 2020 as the payslip referred to *'Payroll Name - End-Month'*. The Respondent paid the Claimant in response to the claim she submitted on 31 May. Tax was applied when the payment was made in June 2020. The Claimant was paid a total of £700 at the end of June 2020.

In June 2020, the Claimant wrote to the Respondent to query why tax was deducted from the payments due to her. In its response, the Respondent's payroll officer confirmed that it was the Respondent's policy to put all PE payments through the payroll and tax it at source. The Claimant raised the taxation issue with the Respondent again in April 2021.

On 3 February 2021, another 3rd party contract form was signed for October and November 2018. It was signed by the Claimant and the Respondent. This was for the 18 days the Claimant was paid for that assignment.

Both 3rd party payment forms contained the following paragraphs:

> *'Thank you for agreeing to Lecture on a course at the University of East London. Please read the following important information before completing the form overleaf.*
>
> ***Payments***
>
> *All payments are processed through the University payroll system. Pay day is the last Thursday of the month and payment is made through BACS transfer into your bank account. Please ensure that these details are provided on an accurate and timely basis to ensure payment is received.*
>
> *Wherever possible speakers should complete and submit the claim form on the day of the lecture to expedite the payment process. Your National Insurance Number is needed in order for a payment to be processed.'*

On 31 April 2021, the Respondent's Vice-Chancellor wrote to the Claimant to confirm that she had been appointed as PE. The letter stated that she had been engaged by the Respondent to undertake work that is outside of and not an integral part of the Respondent's normal academic offering and was not its employee for the academic year 2020 - 2021. It stated that her fee was £700. Attached to the letter was a claim form which the Claimant was asked to complete, sign and submit in order to be paid. She was also asked to submit expense claims in a particular way. A similar letter was sent to the Claimant dated 5 July 2021. That one stated that she had been appointed from 1 October 2020. This document was signed by the Claimant. It also stated that the Claimant's fee for this work would be £700 and that she had been engaged by the Respondent to undertake work that is outside of, or not an integral part of, the Respondent's normal academic offering and not its employee. The Respondent's case is that this is an incomplete letter, and this is likely to be true as there is no sign off on the copy in the bundle.

There was a copy of a P45 in the bundle showing that she had been paid 700 of the financial year 2020-2021, with a leaving date of 30 November 2021.

It is likely that the Claimant obtained a copy of her employment history from HM Revenue & Customs as there was a statement from HMRC in the bundle which showed that she had been paid a total of £880 by the Respondent between 1 June 2020 and 30 November 2021.

Litigation

In September 2021, the Claimant brought a complaint in the employment tribunal against the London Borough of Hackney, alleging race, age and disability discrimination. The allegations arise out of the Claimant's failed application for employment with Hackney as an Adult Social Worker in April 2021.

On 3 November 2021, the Claimant brought a complaint in the employment tribunal against the Royal Borough of Kensington & Chelsea. She alleged that

she had been discriminated against on the grounds of race, disability and age. Those allegations also arose out of the Claimant's failed application for employment at Kensington & Chelsea as an Adult Social Worker in April 2021.

The Claimant began the ACAS Conciliation process in relation to this claim on 22 December 2021. The ACAS Certificate was issued on 28 January 2022. The Claimant's ET1 complaint form was issued in the employment tribunal on 24 February 2022. In it she alleged race discrimination during a *'recruitment for a role as an occasional PE in October 2021 and January 2022'.* Although Ms Davies' letter said that there might be a possibility of the Claimant being a PE in January 2022, the Respondent never approached her. She said that she felt that this was because of her being an Eastern European and an EU citizen.

Law

The Tribunal considered the following relevant law in deciding the issues in this case.

Employment Status

There is a dispute between the parties as to the Claimant's status to bring these allegations.

The Claimant relied on sections 41 and 83 of the Equality Act 2010 (EqA 2010) to say that she was an employee. The Respondent strongly disputed this.

Before we discuss those, the general protection against discrimination is in section 39 EqA 2010 which confirms that it protects employees and applicants for work from discrimination by the employer or prospective employer. It states that: -

(1) An employer (A) must not discriminate against a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;
(b)as to the terms on which A offers B employment;
(c)by not offering B employment.

(2) 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.

Employee or contract worker?

Section 41 EqA 2010 defines the protection from discrimination for contract workers as follows:

(1) A principal must not discriminate against a contract worker—

(a) as to the terms on which the principal allows the worker to do the work;

(b) by not allowing the worker to do, or to continue to do, the work;
(c)in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
(c) by subjecting the worker to any other detriment.

(2) A principal must not, in relation to contract work, harass a contract worker.

(3) A principal must not victimise a contract worker—

(a)as to the terms on which the principal allows the worker to do the work;
(b)by not allowing the worker to do, or to continue to do, the work;
(c)in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
(d)by subjecting the worker to any other detriment.

(4) A duty to make reasonable adjustments applies to a principal (as well as to the employer of a contract worker).

(5) A "principal" is a person who makes work available for an individual who is—
(a)employed by another person, and
(b)supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6) "Contract work" is work such as is mentioned in subsection (5).

(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

Lastly, section 83 of the EqA 2010 defines employment as follows: -

Section 83(2) "Employment" means —

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

Harvey describes employment within the EqA 2010 context as follows: -

"'Employment' for the purposes of the EqA 2010 depends upon the person employed having a contract of some sort. If it is not a contract of service, it must be a contract which places one party to provide personal service. The absence of a contract between the claimant and the respondent to a discrimination case can thus be fatal, see Muschett v HM Prison Service [2010] IRLR 451, a case involving a temporary cleaner supplied to the Prison Service by an agency, who claimed various forms of unlawful discrimination when the Prison Service terminated the engagement. The employment tribunal found that there was no contract between the Prison Service and Mr Muschett and, thus, he could not bring a claim of discrimination."

If the contract is not a contract of service, it must be a contract which places the provider of services under some obligation to provide personal work. and there must be some mutuality of obligation, see *Secretary of State for Justice v Windle and Arada* [2016] EWCA Civ 459. The *Windle* case involved claims of race discrimination brought by professional court interpreters, who worked for HMCTS on a case-by-case basis and were self-employed for tax purposes. Between each assignment, there was no obligation upon the claimants to accept any work and they did not receive holiday or sick pay. The employment tribunal dismissed their claims, holding that they were not employees, even in the extended sense of that term allowed by the EqA 2010. The Court of Appeal concluded that whilst mutuality of obligation was not a pre-condition for s 83(2)(a) *'employment'*, it was a relevant consideration, capable of shedding light on the nature of the relationship. As Underhill LJ observed: *'the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense'.* Thus, lack of mutuality between assignments could be a relevant factor when determining the nature of the relationship between the parties during the assignments themselves, even if the complainant had not needed to rely on any period prior to a particular assignment, given that there was no need to show continuity of service for a claim of discrimination.

A tribunal therefore needs to consider all the relevant circumstances when seeking to resolve the question of whether a claimant is an employee for the purposes of the Equality Act.

In the case if *Jivraj v Hashwani* [2011] IRLR 827 the Supreme Court considered that the focus in deciding whether someone is an employee, or a worker should be on the contract and the relationship between the parties rather than exclusively on the purpose of the arrangement. Tribunals were advised to follow the approach laid down in the case of *Allonby v Accrington & Rossendale College* [2004] IRLR 224. In that case, the test was defined as whether the individual concerned performs services and under the direction of the other party to the contract in return for remuneration, as opposed to being an independent provider of services who is not in a relationship of subordination with that other party. The answer may be the same as applying the 'dominant purpose' test, but it may not be so; because although the dominant purpose of the contract may be personal work, it may not be personal work under the direction of the other party to the contract. The Supreme Court considered that the Allonby approach applied to all forms of discrimination.

In the case of *Halawi v WDFG UK Ltd t/a World Duty Free* [2015] IRLR 50 the Court of Appeal held that the definition of employment in the Equality Act 2010 was compatible with EU law and that it comprised two components: a requirement that the putative employee should agree personally to perform services, and a requirement that they should also be subordinate to the employer, that is, generally be bound to act on the employer's instructions. In determining these issues, the court must look at the substance of the situation. The Court decided that the tribunal had been entitled to have regard to the absence of control in determining that Mrs Halawi was not employed for the purposes of the EqA 2010.

Time Limits

The Claimant brings complaints of discrimination against the Respondent under the Equality Act 2010. The Respondent submitted that the claim was out of time. Section 123(1) of the EqA 2010 states that proceedings on a complaint of within 120 should be brought after (a) the end of the period of 3 months starting with the date of the act to which the complaint relates; or (b) such other period as the employment thinks just and equitable.

The effect of the ACAS conciliation process on time limits is contained in section 140B of the EqA 2010. It states that:

2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.]

In applying section 123(1)(a), the Tribunal has to decide when the act or failure to act occurred so that it can decide whether it has been issued in time. When a claimant makes allegations about a series of acts/omissions, the Tribunal has to consider, and whether they a series of single one-off acts, or that they could be considered as part of a continuing act so that any earlier potentially out-of-time allegations are considered in time. Firstly, the tribunal has to decide whether any of the discrimination complaints are out of time. If they are, we have to determine whether the allegations are part of a continuing act each of which could be described as a 'one-off'. If the Tribunal decides that they are 'one-offs' then time would run from each separate allegation.

The leading case on setting out principles that a tribunal must consider when analysing whether there was a continuing act or an act extending over a period, is the Court of Appeal case of *Hendricks v Metropolitan Police Comr* [2003] IRLR 96. This case made clear that the focus of inquiry must be on whether there was

an ongoing situation or continuing state of affairs in which the Claimant was treated less favourably. In deciding whether a particular situation gives rise to an act extending over time it will also be appropriate to have regard to (a) the nature of the discriminatory conduct about which complaint is made, and (b) the status or position of the person said to be responsible for it. The tribunal is also to be careful to distinguish between the ongoing effects of a one-off discriminatory act as opposed to an act that extends over a period of time.

If some of the allegations in a claim are out of time, the Tribunal has to consider whether apply section 123(1)(b) and extend time on a just and equitable basis to enable the Claimant's allegations to be considered.

The Tribunal is mindful that time limits are to be exercised strictly in the employment tribunal and there is no presumption that a tribunal should exercise its discretion to extend time on the just and equitable ground unless it can justify failure to exercise a discretion. Instead, the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time. It has been held that whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case is not a question of either policy or law; it is a question of fact and judgment, to be answered in each individual case, by the tribunal at first instance, which is empowered to answer it.

In considering whether to apply this discretion, a tribunal can take into account and can apply similar formula to that given to the Civil Courts by section 33 of the Limitation Act 1980 and referred to in the case of *British Coal Corporation v Keeble* [1997] IRLR 336. The tribunal is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: -

(a) the length of reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had co-operated with any request for information;

(d) the promptness with which the Claimant acted once she knew the facts giving rise to the cause of action; and

(e) the steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Although, these factors will frequently serve as a useful checklist, there is no legal requirement on the Tribunal to go through such a list in every case, provided that no significant factor has been left out of account by the tribunal in exercising its discretion (*London Borough of Southwark v Afolabi* [2003] IRLR 220).

The Claimant makes complaint of direct race discrimination and victimisation. The law related to each is as follows:

Direct discrimination

Section 13 of the EqA states that A person discriminates against another, B if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 23 states that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

In this case the Claimant was relying on hypothetical comparators.

Victimisation

Section 27 of the EqA defines victimisation as follows: -

(1)A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) Bringing proceedings under this Act

(b) Giving evidence or information in connection with proceedings under this Act

(c) Doing any other thing for the purposes of or in connection with proceedings under this Act

(d) Making an allegation (Whether or not express) that A or another person has contravened this Act.

(3) The first question for this Tribunal was whether the Claimant did protected acts. The Claimant relies on her written complaint about race discrimination on 16 February 2017 and two further complaints of race discrimination in December 2018. The Respondent agreed that those were protected acts.

(4) The Tribunal then has to decide whether the Claimant was subjected to any detriment because she did the protected acts.

Burden of proof in relation to all the discrimination complaints

The burden of proving discrimination complaint rests on the employee bringing the complaint. However, it has been recognised that this may well be difficult for an employee who does not hold all the information and evidence that is in the possession of the employer and also because it relies on the drawing of inferences from evidence. The concept of the "shifting burden of proof" was developed to deal with this aspect. This concept is discussed in a number of

cases and is set out in section 136 of the Equality Act which states that 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. If A is able to show that it did not contravene the provision, then this would not apply. (See *Igen v Wong* [2005] IRLR and subsequent cases including *Madarassay v Nomura International Plc* [2007] IRLR 246).

In the case of *Laing v Manchester City Council* [2006] IRLR tribunals were cautioned against taking a mechanistic approach to the proof of discrimination in following the guidance set out above. In essence, the employee must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer had committed an unlawful act of discrimination against them. The tribunal can consider all evidence before it in coming to the conclusion as to whether or not a claimant has made a prima facie case of discrimination (see also *Madarassay* referred to above).

In every case the tribunal has to determine the reason why the claimant was treated as she was. As Lord Nicholls put it in *Nagarajan v London Regional Transport* [1999] IRLR 572 "this is the crucial question". It was also his observation that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reasons. It is sufficient that it is significant in the sense of being more than trivial.

In assessing the facts in this case, the tribunal is aware (*Bahl v The Law Society* [2003] IRLR 640) that simply showing that conduct is unreasonable and unfair would not, by itself, be enough to trigger the reversal of the burden of proof. Unreasonable conduct is not always discriminatory whereas discriminatory conduct is always unreasonable. It was also stated in the case of *Griffiths-Henry v Network Rail Infrastructure Ltd* [2006] IRLR 865 that an employer does not have to establish that he acted reasonably or fairly in order to avoid a finding of discrimination. He only has to establish that the true reason was not discriminatory. Obviously, if unreasonable conduct occurs alongside other factors which suggest that there is or may be discrimination, then the tribunal should find that the claimant had made a prima facie case and shift the burden on to the respondent to show that its treatment of the claimant had nothing to do with the claimant's gender or her status as a disabled person or the fact that she made protected disclosures (as applicable) and in so doing apply the burden of proof principle as set out above.

If the Claimant is successful and there is a remedy hearing, the Tribunal will set out the law that it applies to decide the Claimant's remedy, in a separate document.

Applying this Law to the facts set out above

In this section of the judgment, the Tribunal will go through the list of issues, beginning at page 49 of the bundle of documents, prepared for the hearing.

In coming to its decision on the issues, the Tribunal applied the law set out above to the facts we found, taking into consideration the written and oral submissions of both parties.

The first issue for the Tribunal was to determine the Claimant's status with the Respondent in October 2021. And her status in relation to January 2022.

Issue 1 – Employment Status

1.1 – Was the Claimant an employee or a contract worker of the Respondent within the meaning of sections 41 and 83 of the Equality Act 2010?

When considering employment status, the Tribunal must consider all the relevant facts.

In her ET1 Claim Form, the Claimant stated that she had been the Respondent's employee from 1 December 2020 – 1 June 2021.

We noted that the Claimant was first a PE for the Respondent while she was a student. There is no contract in the bundle relating to that time. It is likely that she did not get paid for being the offsite PE in 2018 – 2019. She does not claim to have been an employee between 2018 – 2019.

The Claimant claims to have been an employee in October 2021 and to be an applicant for employment in January 2022. The Tribunal has to assess that relationship to see whether the Claimant was an employee at that time.

Was the Claimant an Employee?

Was the work the Claimant did for the Respondent in 2020 under a contract of service or any other contract personally to execute any work or labour?

The first thing we look for is whether there was a written Claimant between the Claimant and the Respondent. It is our judgment that there was no written contract between the Respondent and the Claimant for the period 2020. There was the placement learning agreement at page 306, which related to the placement of the student and the Respondent. It was an agreement between many parties: - the student, the Respondent, the Claimant as PE and the Richmond Fellowship, as placement provider. The Claimant signed this document as the PE but in our judgment, the agreement was between the Respondent and the Richmond Fellowship rather than with the Claimant directly.

In our judgment, the agreement is focussed on the student and set out the arrangements to ensure that the student had a good placement. As outlined in the findings of fact above, the placement agreement set out in detail a description of the agency – Richmond Fellowship – and an induction checklists and practical arrangements for the student. Part of the arrangements for the student is for her to have the Claimant as her PE. It is also a fact that the Claimant applied to be able to provide this placement and that she mainly did so, in order for her to get experience as a PE to help progress her career. The agreement is for the Richmond Fellowship to be the student's placement provider. It is our judgment, from reading the agreement and the circumstances around it, that the purpose of the placement learning agreement is to provide the student with a placement, as

an essential part of their course. The agreement is not one that is just between the Respondent and the Claimant.

The Respondent writes to the organisations on its list to ask them if they want to host students this year. The Respondent did not write to the Claimant personally but to the Richmond Fellowship. The Claimant cannot be an onsite PE on her own, she can only do so if she is doing it on behalf of her employer, Richmond Fellowship. She could be an offsite PE to a student placed elsewhere than the Richmond Fellowship, but the student would still have needed to be placed at a suitable independent or voluntary organisation which would have been responsible for ensuring that the student was given the opportunity to get the necessary experience.

The Respondent did not advertise for PEs. It wrote to organisations and asked them if they wanted to host students.

The Respondent did not tell the Claimant how to do her PE work. The written agreement simply put some responsibility on the PE to support the student, to meet regularly with them as supervision, to keep records of supervisions sessions and to write a report at the end. But as the PE, the Claimant had to do so independent of the Respondent. There were no stipulations in the agreement as to how she had to do the supervision or write the report of write the notes.

Also, it is the placement provider (Richmond Fellowship) who has to ensure that the student achieves their placement learning opportunities, is supervised and supported. The placement provider may choose to do so through the PE, but the written agreement does not specifically require that. The placement provider takes responsibility for training the student. That is why when Ms Davies was worried about the breadth of work that was outlined in this agreement, she raised the possibility of the Claimant doing work for other people within the placement and suggested talking to the Claimant's manager. This was not followed up because the student asked Ms Davies not to do so.

It is this Tribunal's judgment that the dominant purpose of this contract was to secure a placement for a student at a suitable placement provider and not to provide work for the Claimant or to engage the Claimant's services for the Respondent.

As set out above in the case of *Muschett*, the absence of a contract between the Claimant and the Respondent is fatal to her being an employee under section 83 Equality Act 2010.

In addition, the Claimant only worked as a PE for the duration of this agreement. She worked for less than the full placement of the previous student (MN), in 2018/19, when she was the offsite PE. She was replaced. The placement continued. Her being removed from the placement did not cause it to stop as the placement provider remained the same. The Claimant did not work as a PE again until she became PE to the student who was on the remote placement from 4 December 2020. Once that placement came to an end in May 2021, the Claimant did not work again as a PE for one of the Respondent's students. This, as stated in the *Windle* case above, tends to suggest that she was providing casual and intermittent services as an independent contractor for the Respondent.

It is our judgment that the nature of the Claimant's work under this agreement is in the nature of a one-off assignment, which is expected to last for the duration of the placement. It is our judgment that there were no mutual obligations between the Claimant and the Respondent. The Respondent reserved the right to substitute a different PE, if she was not performing, which they did when she was an offsite PE. There was no duty to continue to provide her with work as a PE. She was not given another student in substitution.

The Respondent and the Claimant knew each other, as she had been a student since 2016 and was known to Ms Davies and others but that does not mean that she was an employee.

The Claimant was providing a personal service, but she could be replaced at any time. There was no obligation to pay her a wage and she was not entitled to employee benefits such as sickness benefits, holidays or rights on termination in this agreement, as the Tribunal would expect to see in an employment contract.

The Claimant was able and had the right to work for others while performing the PE role during the term of this agreement.

There are other documents for us to consider. These are the letters and the P45 which are in the bundle. It is our judgment that the letters were written retrospectively. The letter dated 31 April 2021 referred to work done by the Claimant during the academic year 2020 – 2021, which by then had ended. The next letter dated 5 July 2021 referred to work done from 1 October 2020, which was also the previous period. Both quote a set fee of £700 for each one. The letters clearly state that these arrangements do not make the person concerned an employee. It is our judgment that these are letters are not contracts. They make it clear that they do not confer employee status. What they do is to record previous arrangements to pay the Claimant for her work as PE in relation to these two periods of time. They also give her instructions on how she can claim the fees due for her work. They do not contain offers and acceptance of a job. They do not contain terms and conditions of employment. They do not impose any obligation on the Respondent to provide the Claimant with work or on her to accept any work offered to her by the Respondent. It is our judgment that these letters are not evidence of contracts of employment.

The P45 and the statement from HMRC show that the Claimant was treated as a PAYE for tax purposes. The Claimant was unhappy about this and complained about it at the time. However, this demonstrates the Claimant's tax status only and as submitted by the Respondent, tax status alone does not confer employee status on a worker.

It is therefore our judgment that these documents are not records of contracts or evidence of a contract between the Claimant and the Respondent but instead, set out how the Claimant should go about submitting invoices to be paid.

It is therefore our judgment, taking into account all the facts found above and the evidence and submissions of both parties, that the practice learning agreement was not a contract of employment as between the Respondent and the Claimant.

It is also our judgment that the Claimant was not the Respondent's employee in 2020/2021 and even if she had been appointed as a PE in 2021/2022 under a similar agreement, she would not have been an employee then either.

The Respondent had indicated that the Richmond Fellowship may be considered for a student in January 2022. However, the Respondent did not consider it. The Claimant was not appointed as a PE in January 2022.

It is our judgment that the Respondent had no duties to the Claimant as she was not an employee. In January 2022, the Respondent chose to work with other placement providers as they proposed practice learning agreements and environments that better suited the Respondent's requirements.

Was the Claimant a Contract worker?

In order to be a contract worker within the ambit of section 41 Equality Act the Claimant must have been employed by another person and supplied to the Respondent in furtherance of a contract to which the Respondent is a party.

Do the fact of this case fit this description?

The Claimant was not part of the Respondent's business. She was not employed by the Respondent. The Claimant was a former student, who was known to Ms Davies and some of the Respondent's other tutors, but she was not employed by the Respondent.

If she had been employed by the Respondent and supplied to Richmond Fellowship in furtherance of a contract between the two, she could have come within the definition of contract worker here.

She was employed by Richmond Fellowship at all relevant times. However, it is our judgment that the Claimant had not been supplied by the Richmond Fellowship to the Respondent in furtherance of a contract to which they were a party and furthermore, there is no complaint before us about the Richmond Fellowship suppling her to the Respondent or as principal.

The Claimant was neither supplied by the Respondent nor by the Richmond Fellowship. She applied, on behalf of the Richmond Fellowship, to the Respondent to be able to take on a student as part of the student's training and because it would be good for her personal career and because her employer agreed to be a learning placement provider.

It is our judgment that in the circumstances, the Claimant was not a contract worker according to the definition in section 41 Equality Act 2010 as she was not and employee and not an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

The Tribunal would only has jurisdiction to consider the Claimant's complaints of direct race discrimination and victimisation if she came within the definition of employee within the meaning of sections 41 and 83 of the Equality Act 2010.

In this Tribunal's judgment the Claimant was not an employee as set out in section 83 Equality Act 2010. She was also not a contract worker within the definition of section 41 Equality Act 2010. It is likely that the Claimant was an independent contractor.

In the circumstances, this Tribunal does not have jurisdiction to consider the Claimant's complaints of discrimination against the Respondent.

The Claimant's complaints fail, and her claim is hereby dismissed.

Employment Judge **Jones**
28 October 2024