

SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT DUNDEE

[2022] SC DUN 40

DUN-A247-21

JUDGMENT OF SHERIFF GREGOR MURRAY

in the cause

LISA KEOGH

Pursuer

against

THE UNIVERSITY COURT OF ABERTAY UNIVERSITY

Defender

**Pursuer: Crabb, Advocate; instructed by MML Law**  
**Defender: C. O’Neill KC, Solicitor Advocate, instructed by Brodies**

Dundee, 12 December 2022

**Introduction**

[1] In this action, the pursuer seeks damages from the defender for alleged breaches of both the Equality Act 2010 (“the Act”) and her human rights as a result of the defender’s handling of a complaint made against her while she was a student at Abertay University (“the University”).

[2] These proceedings have generated some publicity. As this Judgement may be read by those who are not legally trained, it may be necessary to make two initial points. First, it only addresses the defender’s preliminary argument that the action should be dismissed without evidence being led. Second, a court may only sustain such an argument if an action is bound to fail, even assuming all the averments in a pursuer’s written pleadings are true (see e.g. *Jamieson v Jamieson* (1952) SC (HL) 44 at pp50 and 63).

[3] That assumption explains why I must not address two further issues which are clearly important to the pursuer - first, the truth of what happened during two courses which she undertook at the University and, second, the validity of certain gender critical beliefs which she expressed during them.

### **Procedural history**

[4] At a Debate on 22 August 2022, I heard submissions from senior counsel for the defender and counsel for the pursuer. Each expanded on written submissions which they had lodged in advance. I am grateful to their instructing agents for preparing electronic and printed versions of a Joint List of Authorities and a Case Bundle, which both greatly assisted production of this Judgement.

[5] While parties' submissions may be disposed of relatively briefly, it is first necessary to explain the pursuer's case in detail.

### **The pursuer's factual averments**

[6] The pursuer's factual averments are detailed in in her written pleadings and documents referred to in them. Those narrate (a) the framework within which the University deals with complaints against students (b) the complaint against the pursuer and (c) the manner in which it was dealt with. The footnotes below, unless otherwise stated, show the location of each statement or document within the court process.

### *The University's complaints framework*

[7] The defender is a creature of secondary legislation<sup>1</sup> which also confers discretion on it to produce any code of discipline it considers necessary to maintain good order at the University<sup>2</sup>. Separately, it is the University's "responsible body" for the purposes of Part 6 of the Act<sup>3</sup>.

[8] On 11 November 2020 the Defender published a *Code of Student Discipline: Non Academic Misconduct* ("the Code")<sup>4</sup>. So far as relevant to the pursuer's claim, the Code provides:-

"...These regulations require all members of the University community to observe certain standards of behaviour. This code provides a route map as to...the process through which allegations of misconduct will be considered...The purpose of the Code is to...to ensure consistent and fair treatment for all...<sup>5</sup>

#### Investigation

... Alleged misconduct... will initially be investigated by an Authorised Investigator (AI)...(T)he student...against whom an allegation has been made will be described as the Responding Student...and any persons making an allegation as the Reporting Persons.

#### Responding Student

As part of any investigation, and before making a report to the Student Disciplinary Panel, the AI will conduct an interview with the student against whom the allegations of misconduct have been made. The AI will inform the student as soon as possible of the alleged...offence and give reasonable notice of the time, date and place at which the student may attend. The student will have an opportunity to submit a written statement regarding the allegations before the meeting, which should indicate whether she intends to admit or deny responsibility. At the meeting, the student may only be accompanied by another member of the University community... (and) will have the opportunity to present...if she wishes.

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<sup>1</sup> see Condescence 2 - The Abertay University (Scotland) Order of Council, Scottish Statutory Instrument 2019/163

<sup>2</sup> Article 5(2) and Schedule 1, para 9

<sup>3</sup> Condescence 2

<sup>4</sup> Condescence 4; a copy of the Code forms number 6/3 of process

<sup>5</sup> para 1

... The AI will also gather evidence from other sources, such as witness statements and may also conduct interviews with members of staff and/or other students. The AI will consult Student and Academic Services to ascertain whether the student has a previous record of misconduct.

### Reporting Persons

At the same time, an AI with no prior involvement with the student against whom the allegations (have) been made will contact the students making the allegations...The AI will give reasonable notice of the time, date and place at which the students may attend. The students will have an opportunity to submit a written statement regarding the allegations prior to the meeting, at which they may be accompanied by another member of the University community...and to present evidence.

The AI will also gather evidence from other sources, such as witness statements. They may also conduct interviews with members of staff and/or other students...

The AIs will each submit the reports of their investigations to the Student Disciplinary Panel, which will take a view on whether, based on the balance of probabilities, misconduct has occurred and whether escalation to a formal Student Disciplinary Board hearing is warranted.

### Student Disciplinary Panel

...The Panel will be chaired by the Student Services Manager or appropriate nominee, who will convene meetings with at least two members of Abertay staff not previously involved in the investigation, the Abertay Students' Association Vice-President or their nominee and a clerk.

In assessing the reports on the investigation, the Panel will give consideration to:

- The severity of the alleged misconduct
- The individual and organisational risks posed by the alleged misconduct
- The risk posed to the Reporting Students by the Responding Student

Following discussion, the Panel may:

- (a) dismiss the allegation of misconduct,
- (b) decide that, although misconduct did occur, the matter has now been resolved,
- (c) decide that misconduct did occur and offer the Responding Student(s) the option of a written reprimand,
- (d) where the Responding Student(s) does not accept a panel decision under (c)
- (e) where the Panel believes that further consideration is required, refer the matter to a meeting of the Student Disciplinary Board to consider the alleged

misconduct and determine the case in accordance with the procedures set out in Appendix B

### Student Disciplinary Board

The Student Disciplinary Board will normally be chaired by the Head of Governance or nominee...and will comprise, of two other members of University staff, the Abertay University Students' Association President, or their representative and a clerk...

The Disciplinary Board will consider the evidence and reach a decision, which will be sent to the Responding Student(s) in writing normally within five working days...

If misconduct is admitted or, following the meeting, established, the Disciplinary Board may impose one or more of the following penalties, as appropriate (this list is not exhaustive):-

- (a) A written or oral reprimand.
- (b) Exclusion for a period not exceeding 28 days.
- (c) Suspension of matriculated student status for a period.
- (d) Suspension of access to University facilities, such as IT and Library services.
- (e) Restitution or compensation for damage caused.
- (f) Expulsion from residence in University Halls of Residence.
- (g) Recommendation to the Principal that the student be expelled from the University...<sup>6</sup>

[9] Appendices A and B to the Code, so far as relevant, provide:-

“Appendix A – Examples of Misconduct/Offences under the Code

A person who, without good cause, seriously disrupts, abuses or interferes with the functions, duties or activities of any member of the University community or any University activity, is guilty of misconduct under this Code. Examples of offences include, but are not limited to...

- Using threatening, abusive or offensive language, whether expressed orally or in writing...
- Behaving in a violent... or threatening manner...
- Harassing any member of the University community. For these purposes “harassment” means behaviour or language which is regarded by the person to whom it is directed as harassment and which would be regarded as harassment by any reasonable person

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<sup>6</sup> Para 2

- Discriminating against any member of the University community on any ground such as ...race...sexual orientation...gender, gender reassignment...or any other unfair distinction...

## Appendix B – The Disciplinary Board...

### Conduct of Disciplinary Board meetings...

The Convener will outline the procedures to be followed by any witnesses after which any witnesses will be called to give evidence.

The Convener will outline the procedures to the Responding Student, and then outline the nature of the allegations against the Responding Students, and invite them to state whether he or she admits or denies the allegations.

The Convener will invite the Chair of the Disciplinary Panel to make a statement regarding the decision reached following the investigation at the meeting of the Panel.

The Board will take the opportunity to seek clarification on any points raised with the Chair of the Disciplinary Panel.

The Convener will invite the Responding Student to make a statement.

The Responding Student and her representative may at this stage present supporting evidence to the Disciplinary Board. Evidence may include oral evidence of witnesses or written submissions, including mitigating evidence, which should have been submitted to the Clerk no less than two working days before the meeting. The Responding Student or representative may not call as a witness or cross-examine the Reporting Persons.

The Board will take the opportunity to seek clarification on any points raised, both with the student and any witnesses.

The Responding Students and/or their representative will be invited to address questions through the Convener to the Chair of the Disciplinary Panel on witnesses' statements in their written submissions.

The Responding Student and her representative will be invited to give a concluding statement. This will be the final stage at which new evidence can be submitted.

Where a Responding Student introduces new material at the hearing, it will be at the discretion of the Board whether to accept the evidence. The Board reserves the right to consider any new evidence separately and may suspend or defer the hearing in order to consider any such submission.

When all statements have been made, all witnesses heard and all questioning completed, all persons present other than the members of the Disciplinary Board must leave the room. The Clerk will, however, remain with the Disciplinary Board.

The Disciplinary Board will consider the evidence and reach a decision, which will be sent to the Responding Student in writing normally within five working days. The decision will also be communicated to the School and to Student and Academic Services, in order to be lodged in the Responding Student record.”

*The Complaint against the pursuer*

[10] In 2021, the pursuer was a final year law student at the University, during which she took courses in *Gender, Feminism and The Law* and in *Human Rights*<sup>7</sup>.

[11] On 19 March, the University received a complaint (“the Complaint”) about the pursuer’s behaviour during a seminar on 15 March and on other occasions during both courses<sup>8</sup>. While the Complaint was submitted by one student, it incorporated similar allegations made by several others<sup>9</sup>.

[12] The Complaint *inter alia* alleged that the pursuer:

- i. made “inappropriate contributions in module discussions, perceived to be both hateful as well as discriminatory by many students”
- ii. made allegations of “extreme sexism and transphobia as well as racism” including... “the only thing [she] may notice about a black person is that they’re black” ...
- iii. made “multiple transphobic and sexist comments”

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<sup>7</sup> Condescence 3

<sup>8</sup> Condescence 3; a copy of the complaint forms 6/1 of process and is incorporated into the pursuer’s pleadings

<sup>9</sup> see Condescence and Answer 3

- iv. “referred to women as the weaker sex and whilst discussing the critical race theory as well as others, stating that all (who she considers to be) women be the same regardless of race, asserting that racism isn’t a real thing”
- v. “repeatedly referred to trans women as men and said that they were not real women, also stating “a man can’t be a real woman so to speak and visa versa” additionally, “I can’t agree that a biological man is a woman” “when told by a student that these statements were not only transphobic but also hurtful for certain people in that very class, she responded “it’s not transphobic, it’s fact”
- vi. became hostile and aggressive at the seminar on 15 March, during a discussion of students’ personal experiences of “things like sexual assault and rape, as well as having a conversation as to what existence in public looks like to us as individuals”, shouted at (her tutor) and referred to (her classmates) “as nothing more than man hating feminists, unprovoked saying we were calling her sons rapists”

### *The handling of the Complaint*

[13] The University appointed a Responding AI to investigate the Complaint with the pursuer<sup>10</sup>. On 16 April 2021, she asked to interview the pursuer,<sup>11</sup> which took place by arrangement six days later. A Minute of the interview was prepared<sup>12</sup>.

[14] The Minute records that the AI read over the Complaint to the pursuer for the first time then asked her questions, to which the pursuer freely responded. The pursuer denied making some of the comments attributed to her in the Complaint but otherwise maintained

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<sup>10</sup> Condescendences 3 and 4

<sup>11</sup> Condescendence 3; the e-mail forms number 6/2 of process

<sup>12</sup> 5/2 of process; see also Condescendence 6 - a copy of the Minute was attached to the Clerk’s email of 20 May 2021



that it related to her having expressed gender critical beliefs in class. She advised the AI that she and her children had been subjected to aggression and “vile comments” from other students and she had been mocked by the organiser of the *Gender, Feminism and The Law* course.

[15] On 19 May 2021, the Clerk to the Student Disciplinary Panel sent an e-mail to the pursuer<sup>13</sup> stating:

*Student Disciplinary Panel 18 May 2021*

“The meeting of the Student Disciplinary Panel took place on the above date and the allegations raised in an interview and report by the Authorised Investigator (AI) on 28 April 2021 were considered.

Those charges were that you:

1. Made inappropriate comments during class discussions for modules LAW430 and SOC408, which could be construed as discriminatory, and you continued to make offensive comments and behave in a disrespectful manner during class discussions, despite being made aware that your behaviour was hurtful to others and despite reminders about the University’s policies related to conduct.

In reviewing the information available, including AI reports and witness statements, the Student Disciplinary Panel members noted that there were inconsistencies between your account and the others. It was agreed that a review of the original class recording was required to understand the comments, context and tone of the interactions and determine whether your behaviour constituted misconduct. In addition, and due to the commentary in the public domain, the Panel agreed that you should be given an opportunity to put forward your case in person.

Therefore, the Student Disciplinary Panel agreed to refer the case to the Student Disciplinary Board, as per outcome (e)<sup>14</sup>...”

[16] On 20 May, the Clerk sent a further e-mail to the pursuer<sup>15</sup>, to which several documents were attached. These included copies of the Complaint, the pursuer’s

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<sup>13</sup> Condescence 6; the e-mail forms number 6/4 of process

<sup>14</sup> e.g. in terms of paragraph 2 of the Code as quoted above

<sup>15</sup> Condescence 6; the e-mail forms number 6/5 of process

responses to it, the AI reports, the statements obtained during their investigations and a hyperlink to the Code<sup>16</sup>. The e-mail stated:

“As you will be aware, the Student Disciplinary Panel has referred an allegation of misconduct against you under the Code...for consideration.

You are therefore required to attend a meeting of the Student Disciplinary Board, which will be held on Thursday 27th May 2021...

It is alleged that you:

1. Made inappropriate comments during class discussions for modules LAW430 and SOC408, which could be construed as discriminatory, and you continued to make offensive comments and behave in a disrespectful manner during class discussions, despite being made aware that your behaviour was hurtful to others and despite reminders about the University’s policies related to conduct.

I would be grateful if you would reply by email... to admit or deny responsibility for the alleged misconduct and whether you intend to be present at the Board...Please note that, in the event you do not attend, the Board will proceed to reach a decision based upon the balance of probabilities.

You may wish to submit written statements or call witnesses. You are also entitled to be accompanied by another member of the University community...as a supporter...”

[17] At a meeting on 7 June, the Student Disciplinary Board decided not to uphold the

Complaint<sup>17</sup>. The following day, the Clerk e-mailed the following letter to the pursuer<sup>18</sup>:

“Student Disciplinary Board – 7 June 2021

The meeting of the Student Disciplinary Board took place on the above date and the allegations raised in an interview and report by the Authorised Investigator (AI) on 28 April 2021 were considered...

As was explained to you by the Board, the allegations were not in relation to your personal opinions, which you are entitled to, but rather to alleged behaviour in class, including online break out rooms. There is an expectation on students to engage with the University’s code of conduct and rules of engagement in class discussions.

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<sup>16</sup> see 6/5 of process

<sup>17</sup> Condescence 6

<sup>18</sup> Condescence 6; the e-mail forms number 6/6 of process and is incorporated into the pursuer’s pleadings

The Board noted that some video and chat recordings were not available for review. It was explained to you that this was because break out rooms were not routinely recorded, and one class recording was stopped due to a sensitive disclosure made by another student.

On reviewing the evidence available, including the witness statements, class recordings and chat transcript:

- The Board found no evidence that you had discriminated against another member of the University.
- The Board found that you had not intentionally shouted in class.
- In relation to pursuing sensitive topics where comments could be harmful to others, the Board noted that you and your class had been reminded of the Universities policies related to conduct in class by the lecturer. You articulated to the Board that when made aware that others found your comments hurtful you did not repeat them.

As a result, the Board found that there was insufficient evidence to support the allegations made against you on your behaviour in class and, therefore, decided to not uphold the charge of misconduct.”

### **The pursuer’s averments on the law**

[18] Against that background, the Pursuer then avers:

**Article 7 of Condescendence** - “The Pursuer’s gender critical beliefs are a protected characteristic within the meaning of sections 4 and 10 of the 2010 Act. The Pursuer’s beliefs: are genuinely held; relate to a weighty and substantial aspect of human life and behaviour; are cogent, serious, cohesive, and important; and are worthy of respect in a democratic society. Her beliefs amount to a philosophical belief within the meaning of section 10 of the 2010 Act.

The Defender, as the governing body of a Scottish University, must not discriminate against students, inter alia, by subjecting them to any other detriment. Reference is made to the Equality Act (the 2010 Act) Part 6 Section 91. Under section 149 of the 2010 Act as public authorities, universities must have due regard to the need to eliminate discrimination, harassment and victimisation and other conduct prohibited under the 2010 Act, the need to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it, and the need to foster good relations between persons who share a relevant protected characteristic and those who do not share it. This is known as the Public Sector Equality Duty (PSED). When dealing with the complaints against the pursuer the defender has failed to have due regard to the PSED. In terms of section 3 of the Human Rights Act (HRA) the 2010 Act must be read and given effect to in way which is compatible with European Convention of Human Rights (ECHR). The Defenders are a public authority within the meaning of section 6 of the HRA. In terms of section 6 it is unlawful for a public authority to act in a way which is

incompatible with Convention rights. The Pursuer's rights under Articles 8, 9, 10 and 14 of the ECHR were engaged by the events hereinbefore condended upon."

**Article 8 of Condescence** - "The Defender directly discriminated against the Pursuer because of her gender critical beliefs. The Pursuer would not have been subjected to disciplinary proceedings but for her gender critical beliefs. The Pursuer herself was subjected to inappropriate treatment in class but the other students were not subjected to disciplinary proceedings. The other students did not hold gender critical beliefs, which was the only material difference between their circumstances and those of the pursuer. Separatim, esto she ought to have been subjected to disciplinary proceedings at all (which is denied), the Pursuer's case would not have been escalated to the Student Disciplinary Board but for her gender critical beliefs. There was no evidence that the pursuer had discriminated against anyone. There was insufficient evidence to support the remainder of the allegation. Esto the circumstances do not amount to direct discrimination against the pursuer because of her gender critical beliefs, they nevertheless amount to indirect discrimination. Separatim the Defender failed to read and give effect to its duties under the 2010 Act in a way which was compatible with the pursuer's human rights and the Defender's actions breached her rights under Articles 8, 9, 10 and 14 of the Convention.

**Article 9 of Condescence** - The effect of the foregoing was that the Pursuer was subjected to a detriment by being subjected to disciplinary proceedings, and by being subjected to a hearing before the Student Disciplinary Board... The events...took place shortly before her final exams and while she was completing her examinable coursework and did not conclude until after her final exam had taken place. As a result of these events, the pursuer has suffered injured feelings, stress, anxiety, and sleeplessness. The pursuer sought help from her general practitioner, who prescribed medication to help with her symptoms."

### **Defender's submissions**

[19] The defender's first and second pleas in law should be sustained, the pursuer's pleas in law repelled and the action dismissed.

### ***The PSED***

[20] The pursuer's case relating to breach of the PSED was irrelevant, lacked specification and the action so far as founded upon it should be dismissed. At worst, the relevant averments should be excluded from probation.

[21] Breach of the PSED did not confer a right of action at private law (*Act, s.156*). The Court did not have jurisdiction to adjudicate on any claim for a failure to meet it (*Act, s. 114*). The pursuer simply averred that the defender failed to have regard to it. The pursuer neither detailed the respects in which any failure occurred nor gave fair notice of any the complaint against the defender.

***Direct and indirect discrimination***

[22] The pursuer's pleadings complaining of direct and indirect discrimination under the Act were both irrelevant and lacked specification. The action so far as founded upon both areas should be dismissed.

[23] In this case, direct discrimination required relevant averments of being treated less favourably and of being subjected to detriment (*Act, ss.13(1) and 91*). The pursuer only averred that the defender "must not discriminate against students, inter alia, by subjecting them to any other detriment. Reference is made to the Equality Act...Part 6 Section 91" and that such detriment arose by her being subjected to disciplinary proceedings and a hearing before the Student Disciplinary Board.

[24] Neither mental distress alone nor "an unjustified sense of grievance" were sufficient to meet the detriment threshold (*Derbyshire v St Helens MBC* [2007] ICR 841, per Lady Hale at para 68 and Lord Hope at paragraph 27, citing *Barclays Bank plc v Kapur* (No 2) [1995] IRLR 87; *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, paras 35 and 105).

[25] The defender was entitled to take steps to investigate complaints. It could not be guilty of discrimination simply because it did so (*Forstater v CGD Europe and others*, Case 2200909/2019, 6 July 2022, para 302). Following investigation in this case, the complaint

against the pursuer was not upheld. She did not plead that the defender behaved dishonestly or unreasonably by following its complaints process.

[26] The pursuer's averments that she had been treated less favourably because of a protected characteristic also lacked relevancy and specification. Assuming the pursuer held relevant beliefs, she only averred that she was the subject of a complaint, not that she made a complaint that she felt she was treated inappropriately. Instead, she averred she felt unable to make such a complaint. In context, there was a material difference between the circumstances of the pursuer and those of other students - in the first case there was a complaint and, in the second, there was not.

[27] Further, to relevantly aver direct discrimination, the pursuer had to aver that the defender treated her differently from other students who did not hold and/or did not express her beliefs, had a complaint been made against them (*Shamoon*, paras 51 to 54, per Lord Hope). She failed to do so. She also failed to distinguish between her beliefs and the reason why the defender undertook an investigation (see by analogy *Islington London Borough Council v Ladele* [2009] ICR 387 per Elias J at para 55).

[28] The pursuer's secondary case that the complaint would not have been escalated to the Student Disciplinary Board "but for" the pursuer's gender critical beliefs was also irrelevant. First, the test was whether the referral was made "because of" her beliefs, not whether it was escalated "but for" them. Second, her averments that there was "no evidence that [she] had discriminated against anyone. There was insufficient evidence to support the remainder of the allegation" ignored the Panel's power to refer a complaint to the Board if it felt further consideration was required (*Code*, page 4). The Panel's letter of 19 May 2021 made clear that was the reason for the complaint being escalated to the Board.

[29] Any case of indirect discrimination required to meet the test in s.19; however, the pursuer's single, bare averment did not address any part of it. Her claim of indirect discrimination should be dismissed, which failing the averment should be excluded from probation.

### ***Convention Rights***

[30] The pursuer's pleadings regarding breach of her Convention rights similarly lacked specification; again, her case under it should be dismissed. She did not aver how her article 8 right was engaged when she contended that she was expressing views in a public forum. She did not aver how and in what respect her article 9 right had been interfered with. She did not aver how and in what respect her article 10 right had been impinged. She did not aver the basis upon which her article 14 right was engaged or to which of the other substantive rights the article 14 claim related. Articles 8, 9 and 10 all allowed enjoyment of the relevant protected right to be curtailed in specified circumstances.

### **Pursuer's submissions**

[31] The defender's preliminary pleas should be repelled.

[32] The pursuer's averments regarding the PSED were relevant to her claim for damages for discrimination. Failure to comply with the PSED was a relevant factor in assessing whether the defender had met its obligations under the Act. The averments did not represent a separate ground of action and gave the pursuer fair notice that the defender's actions had been disproportionate and unjustified *inter alia* as a result of its failure to comply with it. Her averments in Articles 1 and 7 arose in the context of the University's duty not to discriminate, not at private law.

[33] The Equality and Human Rights Commission's Codes and Guidance supported that analysis (*Guidance* para 1.8; *Services Code*, para 5.36). Both were designed to ensure and facilitate compliance with the Act (*Equality Act 2006*, ss.14(1) and (2)) and were highly persuasive. It was relevant to consider whether a public body had complied with the PSED when determining whether it had complied with other obligations in the Act. There was no justification for the defender's failure to comply with PSED duties (*R (on the application of Coll) v Secretary of State for Justice*, ([2017] UKSC, at [42])).

[34] As regards direct discrimination, the pursuer relevantly averred detriment in Article 9 as the disciplinary proceedings took place just before her final exams. The defender was obliged not to discriminate against the pursuer by subjecting her to any detriment (*Act*, s.91(2)(f)). Detriment was assessed by reference to whether a reasonable person would take the view that an individual had been disadvantaged. Neither physical nor economic consequence were necessary (*Bailey v Garden Court Chambers* ET/2022172/2020 at [263]). Any discriminatory act which caused or was reasonably thought to cause distress or upset was likely to be perceived that way by the person who is subject to it (*Deer v University of Oxford*, [2015] EWCA Civ 52, at [25]). A reasonable person would consider that the defender's actions would likely cause her distress.

[35] As the pursuer's gender critical beliefs and her belief that a person's sex was an immutable biological fact were protected characteristics (*Forstater* at [283] - [290]; *Bailey* at [289] to [293]), the defender treated her less favourably than it treated or would have treated others (*Act*, s.13).

[36] She did not have to construct a hypothetical comparator (*Forstater* at [270]). Her protected belief did not need to be the sole reason for the defender's treatment of her; it was enough if it was a substantial reason or had a significant influence (*Nagarajan v London*



*Regional Transport* [1999] IRLR 572 (HL), cited in *Forstater* at [272]) or could have been a subconscious or unconscious reason for treating her less favourably (*R (R(E) v JFS Governing Body* [2009] UKSC 16, at [64]).

[37] As courts should look for indicators or inferences from the surrounding facts (*Anya v University of Oxford* [2001] EWCA Civ 405 at [6]), separate aspects of the case explained why the pursuer's protected belief was a substantial reason for, or had a significant influence in, her treatment: the nature of the course she took and the accusations made against her; the Code entailed a preliminary investigation; the nature of the complaint was not initially disclosed to her; while she accepted some of the things attributed to her, she denied her beliefs or the way she had expressed them were discriminatory and accepted others were entitled to hold beliefs and express them; she had been subject to aggression and "vile comments" from other students and had been mocked by the course organiser; the allegation before the Student Disciplinary Board was framed differently; the defender published press releases and tweets about the case; the Disciplinary Board concluded that there was insufficient evidence to support the charge; the other students were not subjected to disciplinary action; though there was no evidence that she had discriminated against anyone, the complaint was escalated to the Student Disciplinary Board.

[38] If as the defender appeared to argue, its actions related to the pursuer's manifestation of her belief, the question became whether objection could justifiably be taken to that manifestation (*Forstater* at [275]). Such objection had to be considered in the context of the case (*ibid* at [294]).

[39] In context, neither the pursuer's comments nor the manner in which they were manifested could be said to be justifiably unreasonable; even beliefs that may be profoundly offensive or distressing to others required to be tolerated in a pluralistic society (*ibid* at

[283]); if a phrase could have been expressed in more moderately, it did not follow there had been an inappropriate manifestation of belief in a context of public debate (*ibid* at [284]); expressions of the protected gender critical belief, about concerns for women's safety at school and work were reasonable (*ibid* at [286.1] and [286.3]); those which mocked those who did not share the same beliefs were part of the "common currency of debate" (*ibid*, at [286.5]), could be expressed in "robust, campaigning terms" (*ibid* at [290.1]) and even those which were linked to an extreme case were capable of being used to illustrate some legitimate arguments (*ibid* at [290.4]).

[40] Gender theory was a belief about a weighty and substantial aspect of human life, especially when reform of the law based on that belief may have significant practical consequences for women as currently defined in law (*Bailey*, at [291]); in a democratic society, free speech included the inoffensive, irritating, contentious, eccentric, heretical, the unwelcome and the provocative, provided it does not tend to lead to violence. A freedom only to speak inoffensively was not worth having (*Bailey* at [296] citing Sedley LJ in *Redmond-Bate v DPP*, (1999) EWHC Admin 733).

[41] The defender's reference to her not making a complaint was irrelevant. Even if lack of a complaint was relevant, it materially strengthened the pursuer's case by demonstrating the defender subconsciously discriminated against her in its underlying treatment of her (*R(E) v JFS Governing Body*, [2009] UKSC 16, at [64]).

[42] While the defender could not have indirectly discriminated against the pursuer if it showed that its acts were a proportionate means of achieving a legitimate aim (*Act*, section 19(2)), the pursuer pled a legal basis for the defender's actions being disproportionate and unjustified, inter alia, based on the failure to comply with its PSED duty.

### Contextual analysis

[43] I accept that a court should look for indicators or inferences from the surrounding facts (*Anya*). As some contextual aspects of this case are not immediately evident from the pleadings, it is necessary to explain them.

[44] The Code was promulgated by the defender in the exercise of statutory discretion to that effect. The pursuer neither criticises the exercise of that discretion, the Code's stated aims, its definition of misconduct or the procedures within it to determine such complaints. As such, the court is entitled to rely on the Code.

[45] The Code makes provision for a hierarchical structure within which complaints are considered and finalised as appropriate at an appropriate level by those tasked to that effect.

[46] It provides that any complaint is investigated by two AIs, who must report to the Student Disciplinary Panel. Thereafter, the Panel fulfils one or more of three functions as necessary. The Code confers no other power or function on it.

[47] First, it acts as a complaint gatekeeper: it must consider the AIs' reports then decide whether, on the balance of probabilities, having regard to specific factors, misconduct occurred. If it decides that it did, its second function is engaged. If it decides it did not, it may dismiss the complaint or exercise its third function.

[48] The second function is engaged if the Panel considers misconduct occurred and specified criteria apply. In that event, and only if the student consents, the Panel may finalise the complaint by issuing a written reprimand. It has no power to impose any other sanction if it considers misconduct occurred.

[49] The third function is engaged if the student does not accept misconduct occurred or if the Panel believes the complaint needs further consideration. In either event, it may refer a complaint to the Student Disciplinary Board.

[50] In line with the Code hierarchy, proceedings before the Board are more formal and more tightly regulated: its members occupy more senior positions in the University or Students' Association; the manner in which it deals with complaints is more fully specified, not least as it must determine more weighty issues than the Panel and can impose significantly more serious sanctions.

[51] Contextual aspects disclosed by the Complaint also need explained.

[52] In common with the pursuer, the person who submitted it and at least one other complainer were final year law students. It makes a wide range of allegations: during classes, the pursuer was repeatedly hostile and aggressive and made comments which were variously hateful, discriminatory, sexist, racist and transphobic. At interview with the Reporting AI, the submitting complainer also alleged the pursuer was misogynistic, prone to disruptive outbursts and behaviour in class and ignored repeated requests by students and a lecturer to desist.

[53] Those observations and the summaries of the Code and complaint above enable a number of conclusions to be drawn.

[54] In isolation or accumulation, the allegations were serious, not least as they were said to have affected at least several other students. Had the pursuer accepted even some of them, it is unlikely that a formal reprimand, the only sanction the Panel could competently impose, was appropriate.

[55] When the AI's reported to it, the context before the Panel was: the complainers maintained wide ranging, serious allegations; the pursuer denied some allegations and, as regards the others, explained that her comments were expressions of her gender critical beliefs; there were inconsistencies between the students' and the pursuer's accounts; while the Panel felt these could possibly be resolved by review of the original class recording, it

had no power to ask that be produced or to consider any documents beyond those already submitted; finally, as the complaint was by then in the public domain, the Panel felt the pursuer should have a chance to put her case forward in person.

[56] In that context, the Panel's hands were tied by the functions and powers conferred on it by the Code. As it felt unable to decide whether misconduct had occurred, it had no basis upon which to dismiss the complaint or decide that it had resolved itself. As misconduct was not admitted, it could not have issued a written reprimand. In those circumstances, the Panel's only option was to refer the complaint to the Board, a body which had standing and power to address the outstanding issues.

[57] That context also makes it plain that the timing and nature of the complaint put the University in a difficult position: while it was obliged to investigate, the complaint was made shortly before the pursuer and at least two of the complainers were due to sit final examinations; some of the allegations were serious, complex and disputed and others related to apparently differing expressions of gender belief during a recent class. Delaying investigation until after the final examinations risked distressing at least two of the complainers during a stressful period and might also lead to their recollections, and those of the pursuer, becoming stale. In context, it may be reasonably inferred that the University decided investigating and determining the complaint immediately was potentially fairer to the complainers and the pursuer.

## **Discussion**

[58] It is convenient to firstly address the issue of direct discrimination. It was accepted before me that to advance a relevant case, the pursuer required to aver that she was

subjected to detriment and she was treated less favourably because of a protected characteristic.

[59] On detriment, the pursuer avers she was “subjected to disciplinary proceedings, and by being subjected to a hearing before the Student Disciplinary Board” as a result of which “she suffered injured feelings, stress, anxiety and sleeplessness as a result”.

[60] In my opinion, for a variety of reasons, those averments are irrelevant.

[61] First, those developments could not have subjected the pursuer to detriment. In the context explained above, the Code obliged the defender to investigate the complaint. The number, nature and timing of the allegations, and the involvement of at least three final year students who were about to sit examinations, all placed the University in exactly the type of “tricky territory” that entitled it to investigate immediately (*Forstater* (para 302)).

[62] Thereafter, again in the context explained, the Code obliged the Panel to refer the complaint to the Board: that reason, contrary to the pursuer’s averments, was unrelated to her gender critical beliefs. The consequences which the pursuer relied upon by do not amount to detriment (*Derbyshire*, para 68). For these reasons, the pursuer’s averments conflate her beliefs with the reason for the defender’s investigation (*Ladele* at para 55)

[63] Second, while I accept gender critical beliefs are protected for the purposes of s.10 (*Grainger v Nicholson* (2010) ICR 360; *Bailey*, paras 286 and 293), the pursuer’s averments only take her over the first of three hurdles: she does not aver that she was treated less favourably than other students and, while a comparator might not be necessary, she does not narrate even a hypothesis upon which her case could be founded (*Shamoon*, para 52). In those circumstances, that her beliefs are protected becomes irrelevant.

[64] I also accept the defender’s criticisms of the pursuer’s averments of indirect discrimination and breach of her Convention rights. In each instance, the pursuer’s

averments amount to bare statements which do not give fair notice to the defender of her case.

[65] On the former issue, indirect discrimination requires the identification of a provision, criterion or practice which discriminates against a person with a protected characteristic which is not a proportionate means of achieving a legitimate aim. The provision, criterion or practice must apply to persons who do not share the protected characteristic and must or would, when compared to others, disadvantage those with the protected characteristic. As the pursuer's averments do not address any of these points, they are irrelevant.

[66] On the latter, I agree with all the points taken by the defender as narrated in paragraph 30 above. While, as I raised during the debate, those points were not foreshadowed in the defender's Rule 22 Note, I am prepared to hold that cause was shown for them to be advanced – first, the criticisms could hardly have surprised the pursuer; second, as it was more expedient and cost effective to deal with them at this stage, it was in the interests of justice for them to be debated; finally, even if the pursuer was prejudiced, that is capable of being compensated by an award of expenses.

[67] In light of those conclusions and as the pursuer accepts her case is not founded on it, I need not determine the defender's PSED point. However, I do accept the pursuer's averments might have been relevant; at least in the case of indirect discrimination, the Supreme Court has already held that if a person with a protected characteristic alleges that unlawful conduct occurred at a public authority, breach of the PSED may mean the public authority cannot demonstrate that any indirect discrimination was a proportionate means of fulfilling a legitimate aim (*Coll v Sec of State* ([2017] UKSC, at [42]).

**Decision**

[68] For the reasons given, as the pursuer's averments are irrelevant and lack specification, the action falls to be dismissed in terms of the defender's second plea in law and the pursuer's pleas in law repelled.

[69] I was not addressed on expenses and have assigned a date for that to occur. If it is not convenient to counsel, can they please liaise with the Clerk.