**SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH**

**[2024] SC EDIN 33**

A301/18

JUDGMENT OF SHERIFF JULIUS KOMOROWSKI

in the cause

LOUISE STEVENSON

Pursuer

against

THE OPEN UNIVERSITY AND THE COUNCIL THEREOF

Defenders

**Pursuer: Briggs, Advocate; Turcan Connell**
**Defenders: Olson, Advocate; Shoosmiths LLP**

EDINBURGH, 25 MARCH 2024

**The sheriff, having resumed consideration of the cause, finds the following facts admitted or proved:**

1. In 2015, the pursuer enrolled in a course of higher education provided by the defenders which leads to a degree in psychology. That course is studied part-time over a period six years. That course is provided through distance learning.

2. The pursuer has not participated in her course with the defenders since the academic year 2017/2018.

3. Throughout her time undertaking studies with the defenders:

    a. The pursuer suffered from *bulimia nervosa* and associated mental health problems.

b. To manage her mental health, the pursuer has engaged in a very rigorous routine of eating and exercise and has abstained from social activity.

c. The pursuer's mental health would fluctuate.

4. For the academic years 2015/2016 and 2016/2017, the pursuer had been provided with recordings of online tutorials.

5. For the academic years 2015/2016 and 2016/2017, the pursuer had performed well as a student.

6. In the course of the academic year 2017/2018, differences arose between the pursuer and the defenders, principally concerning the defenders' practice regarding the recording of live online tutorials. The defenders' practice on recordings during that year was not uniform, and its underlying policy altered so that by the end of the academic year the defenders would not provide recordings of online tutorials (though would instead provide "empty room" tutorials). In particular:

a. The defenders' policy at the outset of the academic year was to permit, but not require, the provision of recordings of live tutorials, with the discretion left to tutors.

b. The first online tutorial for that academic year was not recorded.

c. The second such online tutorial did not have a complete recording, the tutor only deciding to record part way through, having been prompted by participating students.

d. Recordings were provided for the third and fourth online tutorials.

e. No recording of any kind was provided for the fifth online tutorial.

f. No recordings of the live online tutorials were provided in respect of the sixth and seventh live online tutorials. Instead, "empty room" recordings were

provided, which differed from the online tutorials in that there was no live virtual student attendance, and thus no provision of live comments or questions from students.

g. On 21 March 2018, the defenders intimated to students a new universal policy not to provide recordings of live online tutorials to any students.

7. The absence of recordings of the live online tutorials put the pursuer at a disadvantage compared to those without the pursuer's needs arising from her mental health, as she would either have to:

a. fit virtual attendance at those tutorials in with her regime of eating and exercise;

b. miss classes where either they could not be reconciled with her regime or where her health had fluctuated making her too unwell to attend at the appointed time; or,

c. where this was available, make do with a recording of an 'empty room' tutorial.

This contrasts with the position had she not been disabled, in which case she would not have to fit in attendance with a rigorous regime to maintain her health, or with fluctuations in her health.

8. Albeit not mandatory, and whilst many students did not avail themselves of the facility, the tutorials were part of the defender's provision of education as part of the degree course, giving students an opportunity to improve their knowledge and understanding of the curriculum generally, and to improve their background knowledge and aptitude in completing tutor examined assessments.

9. "Empty room" tutorials served the same ends as live tutorials, but the recordings of the former were an inferior provision to the latter in these, related, respects:

a. These were not interactive events between tutor and students.

b. There was no provision for the tutor to check understanding with the students, or for students to query points, nor for students other than those enquiring to discover latent gaps in their knowledge.

c. The style of presentation was different between the engaging manner of a live presenter and the static presentation of a lecturer.

d. The empty room tutorials, designed also for those with visual impairments, could not use visual elements to illustrate points.

10. At the material times when the defenders' practice was being followed, or their policy was being adopted, the defenders knew of:

a. The pursuer's poor mental health;

b. The consequences of the pursuer's mental condition and its impact on her day to day living;

c. The disadvantage to the pursuer posed by the absence of recording of live tutorials, including the inferior nature of empty room tutorial recordings.

11. There was no technological impediment to the defenders offering live recordings to the pursuer.

12. The defenders' practice and policy for 2017/2018 resulted in the pursuer not completing the last two tutor-marked assessments for that year which, in turn, resulted in her being assessed as having failed that academic year, and further to her not continuing her studies with the defenders.

13. The pursuer suffered considerable inconvenience and distress because of the defenders' practice and policy for 2017/2018.

14. The pursuer's career prospects, including the prospect of her attaining her ambition of becoming a forensic psychologist, have been materially damaged as a consequence of the defenders' practice and policy for 2017/2018. The prospect of her attaining/realising this ambition has been materially diminished and/or delayed.

15. The pursuer's prospects of becoming a forensic psychologist, and her career prospects more generally, are also substantially limited by the pursuer's mental health and her needs arising from that.

**Finds in fact and law that:**

1. The pursuer was, whilst conducting studies with the defenders, a disabled person in terms of the Equality Act 2010: section 6(1), (2).

2. The defenders' practice and policy for 2018/2019, and in particular the policy intimated on 21 March 2018 not to provide recordings of live tutorials, was a provision, criterion or practice that put the pursuer at a substantial disadvantage in terms of the Equality Act 2010, section 20(3).

3. The defenders failed in their duty under section 20 of the 2010 Act to take such steps as are reasonable to avoid the disadvantage.

4. The pursuer's injury to feelings is reasonably quantified at £25,700 (twenty five thousand seven hundred pounds) and is reasonably deemed to have been sustained on 21 March 2018.

5. The pursuer's diminution of her employment prospects is reasonably quantified at £5,000 (five thousand pounds) and is reasonably deemed to have been sustained on 21 March 2018.

**THEREFORE** sustains the pursuer's fourth plea-in-law, and **GRANTS DECREE in part only in terms of the third crave, for payment by the defenders jointly and severally to the pursuer of the sums of (1) £25,700 (TWENTY FIVE THOUSAND SEVEN HUNDRED POUNDS) sterling together with interest thereon at the rate of eight *per centum per annum*, from 21 March 2018** until payment and **(2) £5,000 (FIVE THOUSAND POUNDS) sterling with interest thereon at the rate of four *per centum per annum* from 21 March 2018 until the date of decree, and thereafter at the rate of eight *per centum per annum*** until payment; *quoad ultra* repels parties' remaining pleas-in-law and dismisses the pursuer's craves so far as inconsistent with the aforesaid decree for payment, meantime reserves all questions of expenses and appoints any party seeking an award of expenses to enrol such a motion within fourteen days of the date of decree.

**NOTE**

**The law**

[1] A disabled person includes a person with a mental impairment which has had a substantial effect on her ability to carry out normal day-to-day activities for at least twelve months (Equality Act 2010: section 6(2), (6); schedule 1 (para 2(1)(a)).

[2] Universities have a duty to make reasonable adjustments in respect of their courses of further or higher education (2010 Act, section 92(6)). That duty includes a requirement, where they have a provision, criteria or practice that puts a disabled student at a substantial (ie more than minor or trivial) disadvantage in compared to a non-disabled student in

relation to services provided to them, to take such steps as it is reasonable to have to take to avoid the disadvantage (section 20(1), (3), (13); section 212(1); schedule 13 (para 5(4)(b)). That duty also includes a requirement to take reasonable steps to provide an auxiliary service or other such aid where the student would be at a substantial disadvantage without that aid in relation to services provided to students (section 20(5), (11)).

[3] A court may award damages to the student for her losses, including her "hurt feelings", resulting from any breach of that duty, provided the court has first considered other disposals (2010 Act: section 119(1), (3)(a), (4), (6)).

**The conduct of the case**

[4] A proof followed by the hearing on evidence took place on 13 November 2023 and the three subsequent days.

[5] The volume and manner of presentation of the pleadings and other materials, and how some of the evidence was elicited, has proven something of a challenge. The amended closed record has twenty-six articles of condescendence and whilst I suspect the infelicity of the pleadings of one side has been influenced by the drafting by the other side, neither party has been entirely faithful in confining their averments to a concise, logical statement of the facts they intend to prove. The pursuer's affidavit is at points unfocused. It incorporates argumentative material and discussion of matters which is explicitly acknowledged by her to be outwith the terms of her pleadings. At other points the pursuer refers the reader to her pleadings for further detail and purports to "adopt" Articles 1 to 23 as her evidence. What could have been a helpful timeline prepared by the pursuer was made use of occasionally by her but was never formally adopted as her evidence. On the other hand, the manner of counsel for the defenders' cross-examination of the pursuer, involving extensive reading of

documents to her, caused her, not unreasonably, to ask what the "structure" of his questioning was and whether it was for her just to be a "listening exercise". The pursuer ultimately lodged 133 productions, and the defenders lodged 121 productions. The provenance of much of these was helpfully agreed, albeit only at the end of the proof.

***The pursuer's motions regarding her case on employment prospects***

[6] At the outset of the diet of proof, I heard and granted certain motions by the pursuer. So far as those motions were opposed, they concerned:

A. amending the pursuer's case to aver a route to qualification as a forensic psychologist after her completion of her degree with the defenders through further distance-learning;

B. allowing an employment consultant, Dr Daniel Carter, to be added as a witness and for his two reports to be received albeit late.

[7] Whilst the timing was lamentable, I considered that there was no real prejudice to the defenders. The new point about the distance learning courses arose from a suggestion in a report of a psychiatrist instructed by the defenders that the pursuer could not qualify as a forensic psychologist without attending a face-to-face course. The averments made in respect of Dr Carter's evidence appeared to cover the sort of ground that would typically be canvassed in any case where employment prospects were in issue, and indeed would often be considered by a court in a personal injury claim or an employment tribunal without an employment consultant's report. His testimony appeared not to be required as a strict necessity to equip the court to consider the relevant issue, but rather as the convenient product of someone using their specialist knowledge to collate and present the relevant material in an efficient manner (*Kennedy* v *Cordia* [2016] UKSC 6, 2016 SC (UKSC) 59,

paras 46-47). Evidence of that latter kind is more readily capable of being tested or verified, and challenged in cross-examination, without the need for a competing expert or extensive research.

[8] Having granted the motions, there was no consequent motion by the defenders to discharge the proof. The cross-examination of Dr Carter was reasonably circumspect, seeking to reiterate certain limitations to his opinions which he had candidly set out in his report. The defenders' psychiatrist did not give oral evidence nor was his report agreed as his evidence *in lieu*.

***The witnesses***

[9] The pursuer gave evidence followed by the pursuer's psychiatrist and the pursuer's employment consultant. For the defenders, three of their teaching staff gave evidence in this order: Dr Frowley, Ms McDougall and Dr Patent. The pursuer and Dr Patent gave evidence by video-link. The pursuer's psychiatrist and employment consultant spoke to, and adopted as part of their evidence, their respective reports. Each of the other witnesses adopted affidavits as their evidence.

***The joint minute***

[10] At the conclusion of the defender's case, a joint minute was presented agreeing the provenance of various productions as well as two recordings of an "empty room" tutorial and the ordinary tutorial in respect of the same element of the course.

*The video recordings*

[11] Despite counsel having seen fit to include provision for video recordings in the joint minute, neither initially invited me to watch those recordings.

[12] I raised with counsel for the defenders during his submissions on the evidence whether the pursuer's own testimony of what the tutor said in the empty room tutorial viewed by the pursuer (as to how that form of tutorial compared to the ordinary tutorial) might be significant. This, I think, ultimately prompted counsel for the defenders to invite me and the assessor to view the recordings. He said, following such a viewing, I could reconvene the hearing to allow for further submissions if I thought this necessary. Counsel for the pursuer did not object to the defenders' proposal.

[13] Having considered the matter, I informed parties of my misgivings as to the appropriateness of viewing the recordings if this were with a view to assessing from my own impressions the differences between the two forms of tutorial. In response to this, counsel for the defenders proposed instead that time be allowed for the defenders to lodge a transcript of the introductory remarks for the empty room tutorial. The concern he expressed was with the brief quotation of the empty room tutorial presenter's remarks being taken out of context. That proposal was objected to by counsel for the pursuer on the grounds of achieving finality of the proceedings. I advised I was disinclined to take this new course proposed by the defenders, and confirmed in an interlocutor shortly after the hearing that I had rejected it. It ultimately appeared to me that, whatever the appropriate approach might be to consideration of the contents of the recordings, a transcript of part of the empty room tutorial, provided by one party after the close of each party's case and the submissions thereon, was not the right way to go about this. It seemed liable to result in further disputation and delay.

[14] After further consideration, I concluded that the recordings are a species of real evidence which, once provenance was agreed, it is incumbent upon me to consider, and that I ought to view them in full. Just as I need not have read to me in the hearing every sheet of a set of medical records whose provenance is agreed before I must have regard to it, the absence of anyone taking the step of playing the recordings during the proof itself does not excuse me of my duty to consider them. A video may form part of the evidence in the cause even though it is not played during the hearing (*Carmichael* v *Ashrif* 1985 SCCR 461). My misgivings about the value of a comparison exercise are not proper reasons to decline to do this and can affect only the weight I gave to such impressions as I might form.

***The equality assessor***

[15] On 2 November 2023, Ms Valerie Lockhart was appointed as an equality assessor (2010 Act, section 114(8)).

[16] I consulted with the assessor in advance and in the course of the proof and the hearing on evidence. The assessor observed the evidence and submissions by video-link. We both separately viewed the tutorial video recordings and exchanged a note of our impressions. I also discussed my deliberations with her upon this judgment. My discussions with the assessor have provided a welcome opportunity to consolidate my understanding of the evidence and to progress my consideration of the issues.

[17] My decision, and my findings underlying it, remain solely my responsibility and are entirely a product of my own evaluation of the evidence led and submissions thereon. No new points, legal or factual, have been introduced into my deliberations as a result of my consultations with the assessor.

**General assessment of witnesses**

[18] I consider each of the witnesses to have given evidence in accordance with what they considered to be true, though there was an occasional tendency for a witness's expressed opinion or characterisation to be influenced by their awareness as to how that answer might affect the outcome of this case. In particular:-

a. The pursuer had unsuccessfully sought to complete another psychology course after leaving the defenders, and had been insistent in e-mails with teaching staff there on having only one point of communication with them; in oral evidence she said this was strategic in case litigation might require to be pursued later, whilst at the time of that contact ascribing it to being a need arising from her health. I think what she said at the time is closer to the truth.

b. Ms McDougall in her oral evidence at one point appeared to reject the suggestion that tutorials had any discernible educational benefit, a surprising view not least because of her obvious care with which she conducted the session in the live tutorial recording which I viewed.

That tendency, though, was no more than ordinary human fallibility and did not indicate any lack of probity.

[19] Conscious, though, of that fallibility, and also the passage of time since the events in question, I have had primary resort to:

a. E-mail correspondence in determining what the pursuer and the defenders' staff knew, thought and believed (see *Simetra Global Assets Ltd* v *Ikon Finance Ltd* [2019] 4 WLR 112, [2019] EWCA Civ 1413, para 48). This correspondence is extensive, not least because the pursuer insisted on solely written (rather than oral) communication at least during the period critical to this litigation.

b. What is inherently plausible, drawing upon what logically and reasonably is to be expected given the other circumstances.

[20] Rather than recite this separately, I discuss later the material parts of the testimony of each witness and other evidence in the course of explaining my reasons for arriving at my findings-in-fact.

**Reasons for findings-in-fact**

***Finding 3 – the pursuer's health***

[21] Albeit not a matter of admission on record or agreement in the joint minute, the defenders did not dispute at the proof that the pursuer was disabled within the meaning of the Equality Act 2010, section 6.

[22] Dr Craig, the pursuer's psychiatrist, spoke to his report of 28 July 2020, which was the latest available. In that report he stated that:

a. The pursuer has suffered from bulimia nervosa since the age of thirteen (ie 1994).

b. The pursuer had been medicated for anxiety and depression associated with bulimia.

c. The disabling features of the pursuer's condition included a need for excessively rigorous routines around (amongst other things) diet, exercise and work, with a risk of extreme loss of control over appropriate comestible consumption.

In examination-in-chief, he:

a. confirmed that the pursuer had anxiety and depression associated with bulimia.

b. agreed with the suggestion that if the pursuer *perceived* a disruption to her routine, or a threat to this, it might lead to her losing control over her condition, depending on its severity (giving the example of altering the timing of tutorials).

He was not cross-examined.

[23] The pursuer's written and oral testimony for this hearing was of a tenor consistent with Dr Craig's opinions and evidence. Equally significant, in my view, was what the pursuer said when she began her course with the defenders. On 26 August 2015, she completed the defenders' disability support form stating that:

a. Her conditions included an eating disorder and recurrent depression.

b. She had a "very strict, rigid pattern" and had "great trouble doing anything outside of a rigid routine".

[24] I am satisfied that the need for strict or rigid routines or patterns has a substantial effect on the pursuer's ability to carry out normal day-to-day activities.

[25] So far as the fluctuating nature of the pursuer's condition is concerned, I take this both from her medical history and her own description.

[26] The medical history taken by Dr Craig and set out in his report notes that:

a. In 2003 the pursuer left her work at a call centre as her "bulimia was out of control" due to the challenge of commuting;

b. Between 2007 and 2009, the pursuer was "off a lot on sick leave which was designated as permanent", albeit said to be exacerbated by disputes over her making complaints about wrongdoing at her then workplace;

c. A college course between 2012 and 2013 came to an end because of "exacerbation of her bulimia".

The pursuer also notes in her affidavit a six month spell off work from 22 June 2022 to 3 January 2023 for "psychological trauma".

[27] Albeit these spells of ill health may have been prompted by environmental factors or the acts of third parties, life inevitably has its vicissitudes, and collectively these spells suggest a vulnerability of the pursuer which will result, from time to time, in periods of acute illness.

[28] Again, in August 2015 the pursuer noted in her disability support form that her condition was "very unpredictable which has lead led to absences from college". In an e-mail of 7 November 2017, she stated to Dr Frowley that she required video recordings for tutorials as her health had variable effects.

***Finding 4 – video recordings for 2015/2016 and 2016/2017***

[29] I am satisfied on the basis of the pursuer's unchallenged and uncontradicted written testimony that she was provided with video recordings of online tutorials for the first two years of her course.

***Finding 5 – the pursuer performed well during 2015/2016 and 2016/2017***

[30] The defenders admit the pursuer's averment that she performed well for the first two years of her course, albeit under explanation that this earlier part of the course was not as demanding.

***Finding 6 – the defenders' practice and policy regarding tutorial recordings***

[31] The provision of video-recordings became the subject of a rather involved and somewhat antagonistic exchanges by e-mail between the pursuer and her father, on the one

hand, and the defenders' staff on the other, during the 2017/2018 academic year. The situation was further confused by delays in making some recordings of tutorials available, as well as a concurrent concern by the pursuer (which does not form part of her claim to this court) that the content of the tutorials did not closely correspond with the subjects directly relevant to the assignment questions. Whilst the manner in which the defenders' staff had dealt with the pursuer's e-mail correspondence was a matter to which the pursuer took considerable exception at the time, and counsel for the defenders thought it necessary to take the pursuer through these e-mail exchanges in detail in her cross-examination, I think the important elements of substance of what transpired would be lost by a recitation here at that same level of detail.

[32] The key points can be expressed briefly. Dr Frowley did not record the first video tutorial, though this was an unthinking omission rather than deliberate policy choice. When the pursuer complained about this omission he ultimately provided his slides for the tutorial as well as written comments on those slides, he agreed to an extension of the deadline for her first assessment and he said he would record future tutorials. Mr Grant Jeffrey did not record the second tutorial from the outset - he was initially disinclined to due to concerns about student privacy amongst other things - but began the recording when students in virtual attendance at the tutorial asked about this. There was also some delay in this becoming available. Ms MacDougall offered: slides for that same tutorial, further support by means of advice and clarification by e-mail, and an extension of an assignment deadline. Recordings of the third and fourth tutorials were provided, though there was some delay in providing the latter recording. I have no evidence as to why the fifth tutorial was not recorded. After that point, staff of the defenders decided as a matter of policy not to provide recordings of live tutorials but instead provide recordings of 'empty room' tutorials.

[33] Where there were delays in providing live tutorial recordings these appear to be as a result of inattention or technological difficulty rather than deliberate policy choice or anything that might properly be characterised as a provision, criteria or practice. In any event, the precise extent and reasons for the patchy or delayed provisions of live video recordings is a matter of minor detail overshadowed in its consequences by the defenders' ultimate decision not to provide any live tutorial recordings in future, and instead to provide only empty room recordings. Put another way, what preceded the switch to empty room recordings is mere background to that switch.

***Findings 7 to 9 – disadvantage to the pursuer***

[34] In my assessment, it follows from the pursuer's health condition and the effects on her day-to-day life that the absence of recordings of the live tutorials put her at a substantial disadvantage compared to the situation that would obtain if she was not disabled.

[35] It does not matter, contrary to what counsel for the defenders submitted, that the tutorials were optional and that many students did not, for want of opportunity or inclination, virtually attend the online tutorials. In my view, the appropriate comparison is between the pursuer with her disability and without. Functionally, the same question is answered if one compares the pursuer with a hypothetical non-disabled student in otherwise identical circumstances. The student to whom the pursuer is to be compared is the student who, like the pursuer, was keen to observe the online tutorials. A student who had no desire to observe the tutorials was not in the same position as the pursuer. A student who could not virtually attend tutorials due to conflicting employment or care commitments is not in the same position either, as the pursuer was not prevented or inhibited from virtually attending tutorials by such commitments: what inhibited her was her need for

routine and her variable condition. The proper comparison is between a student with the same inclination to attend, and the same level and kind of outside commitments, but without the disability. On the approach for counsel for the defenders, an employer might argue that its policy on workplace absence did not put those with disabilities at a substantial disadvantage because those with, for example, care commitments or family emergencies would also be at a disadvantage, but such an argument is plainly unsound.

[36] To the extent that the defenders' witnesses' evidence might be understood as suggesting that observing the live tutorials was no more than of marginal benefit to students, I reject that evidence.

[37] Dr Frowley when asked in cross-examination whether the lack of video tutorials (of any kind) would be an "educational deficit", said the absence would be a "pity", he hoped tutorials would have some benefit, but he wanted to emphasise that most students did not come to tutorials. Ms McDougall in cross-examination disagreed both with the contrasting propositions that: (a) an absence of access to tutorials would be an "educational deficit"; and, (b) the tutorials served no educational function. The way she preferred to put it was that they were a "helpful optional extra" that some students benefitted from and that a minority of students took advantage of. When I sought clarification from her as to the purpose of the tutorials, Ms McDougall described them as providing an opportunity for students to gain transferrable skills, which include the sharing of ideas, which would indirectly "feed" into an ability to complete the degree. In re-examination, she said that the first two years of the six year degree were concerned with study skills or "hand-holding", whereas the next part of the degree moved to independent learning.

[38] There appeared to be a certain lack of reality in the positions of Dr Frowley and Ms McDougall. That many students seemed to perceive attendance as not worthwhile tells

us little about the benefit derived from those who did choose to attend. There is a significant tension in their positions and the way the course programme was laid out, with each part of the year from the second section onwards having at least one tutorial and being described in connection with the assignment due that followed upon that tutorial (eg "LE2 – Understanding minds and TMA01"; "LE3 – Relationships with others and TMA02"). There is the same such tension, when the pursuer made complaints about the absence or delays in the provision of tutorial recordings, in her being offered extensions for deadlines for the corresponding assessments. The reality was, in my assessment, as one would expect for a university course, that all elements of the tuition provided were intended to be a significant aid to the students (irrespective of whether all students took up all elements of it) in developing their knowledge and understanding of psychology and that it would aid, even if only at a general level of developing background knowledge and skills, their ability to complete the assessments.

[39] I am also satisfied that the lack of provision of live video recordings still caused the pursuer a substantial disadvantage if one compared it with the provision of "empty room" recordings, rather than a complete absence of any recording, and that the provision of "empty room" recordings was not sufficient to discharge its duty to make reasonable adjustments. I base this principally on what was said during one of the empty room recordings that:

> "This presentation is, by its nature, very different to tutorials which focus on student *engagement* and *interaction* around module topics, theory, methods and skills development. It therefore cannot, and doesn't seek to, replicate the learning experience gained from tutorials."

(italics in original text displayed in the recording; underlining applied where text was put in blue rather than black in the recording).

[40] In my assessment, the plain meaning of the tutor's comment is not simply that the empty room tutorial is in a different format but is different in substance, and in quality. The plain implication from what she says is that something is lost in the empty room tutorial format compared to the live tutorial experience which uses student engagement and interaction to develop skills, &c. This also fits with what one would expect from everyday experience of lectures, presentations, talks, radio programmes, podcasts and the like. There is simply a different dynamic with a presenter where they are subject to some stimulus from an audience or interlocutor, even where that stimulus is limited. That tutors during the live tutorials allow students the facility of commenting is done for a reason; it is not an idle exercise.

[41] It was the empty room tutor's comment, mentioned by the pursuer in her oral testimony, that I raised with counsel for the defenders during his submissions which appeared to prompt his invitation to me to watch the recordings. Having now viewed the recordings, I am satisfied that the comment the pursuer spoke to was recited accurately, and that the wider context of the tutor's remarks does not alter how they ought to be construed. Further, so far as I can gain any reliable impression from viewing and comparing the live and empty room tutorials, that impression tends to confirm rather than belie what I take from the empty room tutor's comment. Ms McDougall during the live tutorial stopped regularly to check and review texted comments by students, sometimes responding to these. My impression was that her engaging manner of delivery was spurred on not just by the students' comments in themselves but the knowledge she has speaking to a live audience who could respond. By contrast, the empty room tutorial provided what might have been a very informative but uninspiring hour. Part of the reason for this was the sole reliance on verbal communication rather than any graphics. This was dictated, as explained by the

empty-room tutor, by the need to make that recording of use for visually impaired students. There was a noticeable difference between the lecture-style tone of the empty room tutor and the conversational, lively delivery of Ms McDougall.

[42] I continue to hold reservations as to the value of this comparative exercise given the no witness was asked to view and comment on the recordings I was provided with, my lack of expertise in psychology or university teaching methods, and the possibility that the recordings for this tutorial were not representative of the tutorials for other elements of the course. But if the exercise does have any value, it confirms what I would have concluded but for consideration of the videos.

[43] It follows from what I have said that I am satisfied the benefit of observing the live tutorials derives not just from the "break out" sessions (which were never recorded) between students that took place in an interval in the tutor's presentation for live tutorials, nor just from the ability of a particular student to make her own comment or raise a query. The student engagement is likely to improve the quality of the tutor presentation for all, for active commenter, passive observer and later viewer alike. A student can also benefit from the queries of others which might uncover ambiguities or gaps in the material that were not obvious to her. One does not always know what one does not know.

[44] I reject Dr Frowley's evidence that the difference between a live tutorial and an empty room recording would be very small. He based this on the limited interaction he experienced when conducting live tutorials though he also said empty room recordings were outside his expertise having never been asked to record one. A question to Ms McDougall as to whether the deficit from missing live tutorials would be offset by empty room recordings was objected to by counsel for the defenders given that she did not accept there was any deficit from missing live tutorials. Given her stated position, she could hardly

give a view as to the difference in value from watching recordings of the two kinds of tutorial. Dr Patent in his written evidence was inclined to think the only benefit from student interaction was the interaction itself, but I think that overlooks the consequential effect that has on the quality and content of the presentation generally.

[45] I reject counsel for the defenders' submission that the potential availability for funding for additional tutoring from the Student Awards Agency for Scotland, for additional tuition by e-mail, or for extension of assignment deadlines, alone or in combination, either removed or obviated the substantial disadvantage or fulfilled the defenders' duty to make reasonable adjustments. None of these measures was closely connected to the nature of the disadvantage. Additional tutoring, in person or by e-mail, and extensions of deadlines, would necessarily entail additional demands on the time of the pursuer and would have to be accommodated within her exacting routines and the variable nature of her health.

***Finding 10 – the defenders knew of the pursuer's ill health and its consequences***

[46] I am satisfied that the defenders had sufficient knowledge of the pursuer's mental health, its effect on her and the substantial disadvantage it put her to in the absence of live tutorial video recordings given the following:

a. As I have already noted, in August 2015, the pursuer completed the defenders' "disability support form" noting her eating disorder and related mental health problems and their variable nature. She also noted her need for routine and that she "like[d] to listen to recordings where possible to learn."

b. On 7 November 2017, the pursuer explained by e-mail to Dr Frowley that her request for recordings of tutorials as being for a reasonable adjustment to cater for variations in her health that made reliable attendance very difficult.

c. In 29 or 30 November 2017, the defenders' disability and education adviser had the pursuer's student needs profile amended to add a need for recordings as the pursuer could not predict when she would be well enough to attend.

d. As I have noted, the pursuer informed Ms McDougall on 7 December 2017 of the stress the "hiccup" about tutorials had caused her.

[47] So far as the disadvantage the pursuer would be placed at by provision only of empty room recordings is concerned, this is not a point the defenders can tenably disclaim knowledge of as it followed from what was said by the tutor in one of the empty room tutorial presentations that I have already discussed, that those reliant on such recordings would be missing something from the experience of observing the equivalent live tutorial session.

***Finding 11 – provision of recordings of live tutorials was a reasonable adjustment***

[48] Dr Patent is a lecturer with the defenders, who, according to his written testimony, did not have any personal dealings with the pursuer but could "speak about the decision made about the recording of tutorials and the reasons for it." His evidence was that:

a. Before the 2017/2018 academic year, recordings of tutorials were done on a discretionary basis. He believed this was potentially a good thing, though there were also "some arguments against" this, including "for example",

discouraging tutorial attendance. He was involved in a "long discussion" about this in the psychology school.

b. In around October 2017, with new software being implemented, he instituted a practice of tutorials being recorded at the tutors' discretion and subject to the consent of the virtually attending students.

c. That approach was "superseded by privacy and data protection concerns raised" at a broader faculty level.

d. The concern within the Faculty of Arts and Social Sciences was that a recording, once made, might be disseminated on the internet, with personal information shared by students in a tutorial being disclosed, possibly with derogatory commentary about the tutor or the tutorial contents.

e. Because of this concern, a decision was taken to discontinue recordings across all modules within the Faculty, "pending a review", in around January 2018. The decision was made "strictly at Faculty level", and Dr Patent was not involved in the making of that decision.

Dr Patent's oral testimony did not materially add or detract from what was said in his affidavit.

[49] The parties have admitted that documents produced are true copies of the written defenders' policy (updated on 11 December 2017) and protocol (in force till January 2017) for recording tutorials. Consistently with Dr Patent's evidence, they reflect a discretion by tutors to record subject to student consent. As they predate the defenders' change to a complete ban, they do not assist with understanding the reasoning behind that ban, albeit the policy notes "sensitivities around" students not wishing to be recorded and also "confidential information (for example relating to the discussion of case studies etc.)".

[50] An e-mail dated 9 January 2018 from the defenders' staff tutor for psychology to the pursuer's father notes that there were "many issues with privacy, students feeling forced to agree to recordings". On 21 March 2018, an electronic message to all the defenders' students referred to the provision of empty room recordings *in lieu* of live tutorials because of "concerns around privacy and accessibility".

[51] The material properly adduced as to the defenders' reasons and reasoning for prohibiting any recordings is thus limited and indirect. If I was to take a degree of licence and have regard to the chronology prepared and lodged by the pursuer, and sometimes used by her as an *aide-memoir* during her oral testimony albeit never expressly adopted as her evidence, I would note also an e-mail from Dr Patent of 2 April 2018, which the pursuer describes in the chronology as referring to "concerns about the security of recordings on module websites (in particular, the possibility that students may make copies of the recordings and share them online)".

[52] I am not satisfied from this material that any real difficulty in provision of recordings has been established. Any concern appears to have been theoretical and has not been shown to be borne out by experience. No direct evidence, whether in the form of contemporary report recommending the change, or minute of a meeting at which the change was considered, or from a person who participated in the decision to change the policy, as to the reasons or reasoning for the change has been led. Thus nothing has been put forward directly from a decision-maker responsible for the new policy. Nor has there been anything put forward vouching the general concerns described by the defenders and its staff. I have not been given examples of, nor have the defenders' witnesses referred to, for example, instances of videos of the defenders' tutorials being shared on the internet revealing private information about students or case studies or with derogatory commentary, or of student

surveys revealing students' apprehensions about tutorials being recorded, or representations from the defenders' student association, or complaints from students, or of negative experiences at other universities.

[53] That a practice has been followed in one way in the past does not mean it ought to necessarily continue in that fashion in the future. Nor does the absence of actual harm prevent a prudential course being adopted. But where a course has been followed without demonstrated difficulty in the past, which can indicate that a concern is theoretical rather than real. In the present case, the concerns as to privacy and the like appear to be vague and unsubstantiated. If there is a reasonable case for not providing video recordings, it has not been established on the evidence put forward in this proof.

[54] I was not addressed in submissions in any real detail as to whether there was any barrier arising from, or practical difficulty following on from the requirements of, data protection legislation. Nothing was put before me which went beyond an assertion that concerns arose from the data protection legislation.

***Findings 11 to 15 – the lack of live video recordings caused the pursuer compensable loss***

[55] The pursuer in her written testimony states that she did not submit the final two assessments for the 2017/2018 academic year due to the decision not to provide recordings of live tutorials together with "the failure to provide support I was offered, but did not receive." I am not clear from that reference precisely what support is referred to there. She explains she subsequently formally withdrew from the course on 9 October 2018. In her oral evidence she spoke of "everything" from March 2018 onwards, alluding to how her enquiries and complaints had been handled, and a feeling of having been abandoned, as leading to her decision to withdraw. It is apparent from her e-mail correspondence that the

initial concerns about lack of live tutorial recordings developed into an associated concern about whether the defenders' staff were taking an appropriate understanding approach to her or rather, as she perceived, were being disingenuous with her. A concurrent concern also developed of a mismatch between the content of tutorials and the assignment questions. The issue then arises to what extent was the pursuer's cessation of her studies with the defenders properly attributable to the decision not to provide recordings of live tutorial recordings or to other matters which do not incur liabilities under the Equality Act 2010.

[56] In my assessment, the e-mail correspondence consistently with the pursuer's oral and written testimony show that the issues over provision of recordings precipitated, and thus was probably both the *sine qua non* and the real or proximate cause, of her not completing her assessments. My impression from the e-mail correspondence is that this is the first concern that heightens the pursuer's sensitivity to other issues. Her written and oral testimony tends to confirm that. This fits with the pursuer's psychiatrist's agreement with the suggestion that a perceived threat to her routine might precipitate a health crisis. It is consistent with what she said at the time. On 7 December 2017, the pursuer in an e-mail to Ms McDougall referred to the "recent hiccup with the tutorial issue" having "put … [her] out a great deal" and she was finding it "quite difficult to feel settled again".

[57] But for the issues with recordings, I think it probable she would have completed the course. She had made satisfactory progress in the first third of the course and, despite her anxieties expressed around the time apparent when she would have been undertaking the work for this, her first assessed mark of 68% for the 2017/2018 academic year was above the student average.

[58] A student starting from a baseline of greater mental tranquillity, or with more general fortitude, would not have reacted in the manner of the pursuer. But in determining

what the operative cause was of her ceasing her studies, one must take proper account of the effect of her mental condition from which her entitlement to reasonable adjustments arose.

[59] It is apparent from the pursuer's repeated attempts to pursue her studies that she is a driven and committed individual. I am satisfied that she would not have dropped out of the defenders' course unless she was experiencing substantial distress and saw no real way to continue. She would inevitably have experienced feelings of frustration and disappointment as well as anxiety about her ambition being delayed or entirely frustrated.

[60] When the right circumstances align, she is capable of working at considerable intensity. During the first two years of her part-time degree, for instance, she was working full time hours at a call centre. That having been said, I have already noted the way that her health condition has varied, once resulting in the abandonment of an earlier college course. A subsequent attempt to complete a traditional psychology course at another institution since ceasing study with the defenders has also been unsuccessful. Parties were at odds as to the precise reasons for the lack of success, the pursuer alleging that this other institution had also failed in its duties towards disabled students. I do not think I have sufficient material to make any finding on the exact cause. But even if the lack of success there was attributable to the health or disposition of the pursuer rather than failings by the institution, I do not think that tells us anything more than what is apparent otherwise from the pursuer's history and how she has described the effects of her condition. Her health is variable, her needs are particular, and at times this will cause her considerable difficulties.

[61] There is evidence that the pursuer's capability to work closely with others is limited. She mentioned in her disability support form of August 2015 that she found group activities difficult and in an e-mail to Dr Frowley of 8 October 2017 she said that even "small chat" about her studies could be taxing. Concerns over group study was a major issue of concern

between her and the staff of the institution at her subsequent degree. On the other hand, her work at a call centre must have consisted almost entirely of social communication in a fairly intense environment. My assessment is that the pursuer is vulnerable to the challenges of working as part of a team affecting her health but that she is not fundamentally incapable of working in that manner.

[62] The pursuer's progress on the first part of the defenders' psychology degree and her ability to sustain full-time work at the same time lead me to conclude that her ambitions to complete undergraduate and post-graduate qualifications and become a forensic psychologist are not entirely fanciful. I consider though that competition with other candidates, together with her variable health, and aspects of daily life she finds more difficult (eg corresponding with multiple individuals or being in group settings) that achieving this is improbable. Dr Craig noted in his report that obtaining entry to a Doctorate in Clinical Psychology course was a "challenging process" and that this could not be guaranteed for the pursuer even if she did not have *bulimia nervosa*. The same must be true, to some extent, of the other routes to qualification as a forensic psychologist. It might well be also that not all of those qualified to become forensic psychologists are able to secure employment as such.

[63] I conclude that the pursuer has more than a *de minimis* prospect of obtaining employment as a forensic psychologist, albeit this is improbable, and that the departure from the defenders' degree occasioned by their breach of their duty to make reasonable adjustments has delayed and/or diminished the prospect of her completing a degree course and obtaining employment following on from that. Even if she never would have obtained employment as a forensic psychologist, there is a real rather than fanciful prospect that she could have pursued an alternative career as a psychologist or in some other occupation

where a completed degree from the defenders would have been a benefit, and her prospects of both when she can obtain graduate employment and the quality of that have been adversely affected.

**Conclusions on liability**

[64] Accordingly, I am satisfied that the defenders owe the pursuer a duty under the Equality Act 2010 as a disabled person to make reasonable adjustments, that the provision or practice of not providing recordings of live video tutorials to the pursuer put her at a substantial disadvantage and that they have failed to take reasonable steps to avoid that disadvantage, causing her hurt feelings and other loss.

[65] As the defenders in the course of the 2017/2018 academic year moved to a blanket ban on provision of recordings of live tutorials, the identification of a provision or practice is fairly straightforward at least from that point. How one characterises the incomplete provision of live recordings before then is less straightforward but, as I am satisfied the pursuer would not have continued her course once a complete ban was implemented, that is academic.

[66] On one view, though, the defenders' position on recording provision could also be characterised as, perhaps more appropriately, engaging the requirement to provide auxiliary services or other aids where, without that aid, the disabled person would be at a substantial disadvantage (2010 Act, s20(5)). That was not how the pursuer's case was pleaded nor how it was put in submissions, though it is not apparent to me what substantive difference that could make to the analysis or the outcome.

**Compensation**

[67] The defenders did not suggest some remedy other than compensation would be sufficient redress for any breach of their duty. Other than declarator, the pursuer does not seek any other remedy, such as an order for specific performance to allow her to resume her studies with live video recordings provided. Nor was any such remedy suggested by the defenders *in lieu* of damages, or in mitigation of her loss that would otherwise be compensable. Thus having first considered other disposals and found parties to be proceeding on the basis that other disposals would be inadequate or inappropriate, I move on to consider damages.

[68] The pursuer had pleaded a case reflecting living costs whilst studying an alternative degree of £32,000; anticipated total wage loss of £48,000 due to being unable to work whilst accommodating study at a traditional university psychology course (*ie* not distance learning); associated lost tax credits of £23,000, and a delay in beginning her career of four years resulting in net loss of graduate earnings of £70,000, resulting in an award for monetary loss of £173,000. In addition, she seeks a middle-band award of £20,000 for hurt feelings (see *Vento* v *Chief Constable of West Yorkshire* [2002] EWCA Civ 1871, [2003] ICR 318, para 65).

[69] The pursuer's pleaded case is rendered somewhat artificial or out of date by her efforts to study at a traditional psychology course having been unsuccessful. There is a sense in which the pursuer's approach to calculating her post-graduate losses might both be an overestimate and underestimate. It assumes that but for the defenders' failures she would obtain and maintain graduate employment despite her ill-health. It also assumes that the defenders' failures have resulted merely in a delay to achieving graduate employment rather than possibly making this impossible.

[70] Albeit that the pursuer refers enigmatically in her affidavit to a decision to "discontinue/postpone" in May 2021 at the alternative traditional degree course, given the lack of any material development since then it would seem there is no real prospect of the pursuer returning there, especially as its traditional format does not suit the pursuer's requirements. I will not make any award for the costs of studying at an alternative institution, or for the loss of earnings or tax credits entailed from pursuing a traditional course, as I am not satisfied there is any real prospect this will occur.

[71] But it follows from her lack of success at a traditional degree attempted after her studies with the defenders and the lack of any evidence of there being some other *undergraduate* psychology course other than that of the defenders capable of being completed by distance learning, that the pursuer's prospects of ever completing an undergraduate course are low. In that respect, the pursuer should be entitled to recover compensation not simply for the affront, indignation and inconvenience immediately following from the failure to take reasonable adjustments but also the lack of a congenial opportunity to pursue a degree in her field of interest, and of pursuing her chances, albeit limited, of achieving her ambition. Whether the pursuer's hopes are ultimately dashed or instead just set back and frustrated for several years, the emotional harm appears substantial.

[72] Accordingly, having regard to these broader, longer-term emotional harms, I adjudge an award at the threshold between the middle and upper bands to be appropriate for injury to feelings.

[73] The Presidents of the Employment Tribunals issue guidance from time to time as to the current value of lower, middle and upper band awards having regard to the wider trends in compensation awards and changes in the value of money. They are expressed as applying according to when the claim was presented. I shall follow that guidance. For

claims presented after 6 April 2018 (but before 6 April 2019), the guidance of 23 March 2018 states the middle/upper threshold to be £25,700.

[74] There is no particular provision in court rules for the payment of interest in claims under the Equality Act 2010. The law and practice, in substance, for employment tribunals in such claims is that interest for hurt feelings runs from the date of contravention at the full rate, and for all other sums runs at half that rate (Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, regs 4 and 6). If I am to take a consistent approach here, I require to fix a date of contravention. I consider the most appropriate date would be when the blanket policy was announced to all students (21 March 2018). That postdates some of the pursuer's difficulties with recording provision though predates when she completely abandoned her studies with the defenders and thus does broad justice in terms of assessing when she sustained her injury to feelings and began to sustain her other losses.

[75] That would result in an award for injury to feelings inclusive of interest to the date of decree of around £38,000. Had I made an award for injury to feelings according to the current Employment Tribunal Presidential guidance which reflects about four years of inflation since the events in question (24 March 2023), I would have fixed the award at £33,700 but then I would have fixed interest to run from the date of decree, given that judicial interest is partly intended to compensate for the cost of inflation.

[76] Awards for future wage loss are typically made on a multiplier/multiplicand basis, the multiplicand being the annual loss and the multiplier reflecting how many years' loss is expected. But I understood both counsel to accept that in the event that such a refined calculation was artificial or had to be based on certain premises which were too uncertain, then a lump sum could be awarded, using my best judgement as to what seemed

appropriate. That is the approach most recently followed by the Court of Appeal of England & Wales in *Irani* v *Duchon* [2019] EWCA Civ 1846, [2020] PIQR P4, following a line first commended in *Blamire* v *South Cumbria Health Authority* [1993] PIQR Q1, which has also been consistently followed in the Outer House of the Court of Session (Lord Clark, *D* v *Bishops' Conference of Scotland* [2022] CSOH 46; Lord Bannatyne, *Wilson* v *North Star Shipping (Aberdeen) Ltd* [2014] CSOH 156; Lord McEwan, *Brand* v *Transocean North Sea Ltd* [2011] CSOH 57). The approach in *Blamire* was noted without disapproval by the Inner House in *Robertson's Curator Bonis* v *Anderson* 1996 SC 217 at 224F.

[77] Whilst I think it probable that the pursuer would have completed her undergraduate degree but for the lack of provision of live tutorial recordings, the matter is far from certain. Far more difficult to ascertain is the prospect of her securing entry on and completing an appropriate postgraduate course, then finding and maintaining graduate employment. As a whole, this all appears to involve too many imponderables to make anything approaching an exact calculation or even rough estimate by means of a multiplier, multiplicand and discount for uncertainty. It would entail a spurious appearance of precision. All I think I can say is that the pursuer's prospects had her studies not been brought to an end over the concern over tutorial recordings would have been substantially limited but not *de minimis* and that those modest prospects have been materially diminished. Taking a very broad axe, the sum of £5,000 does not appear to overvalue or undervalue that damage.

**Some technical inconsequential points**

[78] The pursuer had pled an action for breach of contract, essentially mirroring her claims under the 2010 Act. But counsel for the pursuer advised that there was no scenario where the pursuer's statutory claims might fail yet her contractual claims succeed.

Accordingly I have repelled the relevant pleas, and refused the relevant crave, as not insisted in or as academic, without arriving at a view as to whether the defenders were also in breach of contract.

[79] The pursuer sought a declarator that she was a disabled person for the purposes of the Equality Act 2010 at the material times, and a further declarator that the defenders had unlawfully discriminated against the pursuer in terms of the 2010 Act in twelve particular instances. A declarator is not to be granted for academic purposes, but rather provides a conclusive determination of matters that might be relied on in future, or in certain atypical types of proceeding where no other remedy might be granted. In this instance, no purpose would be served in pronouncing the declarators sought. It would not be an adequate alternative to damages. An award of damages, particularly where it follows from formal written findings in fact and law as to her discriminatory treatment, is a sufficient vindication of the pursuer's rights without the need for declarators.