EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss B Nee	**v**	**Haileybury Academy Trust**

Heard at: Watford **On**: 27 to 30 November 2017

Before: Employment Judge Tuck

Appearances

For the Claimant: Ms S Iyer, Counsel
For the Respondent: Ms A Rao, Counsel

JUDGMENT

The claimant's claims for unfair dismissal and wrongful dismissal fail and are dismissed.

REASONS

1. The claimant was employed as a teacher by the respondent from 1 September 2013 - latterly as the Head of History - until her summary dismissal on 24 June 2016. She commenced a period of early conciliation on 22 September 2016, which expired on 10 October 2016 and then presented an ET1 on 9 November 2016 claiming unfair and wrongful dismissal.

The Issues

2. The issues in this matter were set out following a case management discussion in front of employment Judge Bloch QC on 21 February 2017. In relation to the claim of unfair dismissal, there are five issues;

   2.1 What was the reason for dismissal? The respondent asserts that it was the reason related to conduct, which is a potentially fair reason pursuant to section 98(2) of the Employment Rights Act 1996. The respondent must prove that it had a genuine belief in the misconduct and that this was the reason for the dismissal. Her alleged misconduct related to A level history coursework of four students in April to May 2016.

2.2 Did the respondents hold that belief in the claimant's misconduct on reasonable grounds?

2.3 Was the decision to dismiss a fair sanction, that is was it in the range of reasonable responses for a reasonable employer?

2.4 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?

2.5 Further or in the alternative, does the respondent prove that if it had adopted a fair procedure, the claimant would have been fairly dismissed in any event and/or to what extent and when?

3. In relation to breach of contract, it is not in dispute that the respondent dismissed the claimant without notice, therefore the issues are;

3.1 Was the respondent entitled to dismiss the claimant without notice?

3.2 Was the respondent entitled to dismiss the claimant without notice because the claimant committed gross misconduct amounting to repudiatory breach of contract?

3.3 Did the respondent dismiss the claimant in response to the alleged breach of contract by her?

3.4 It is not in dispute that the claimant's contractual entitlement was two months notice.

Evidence

4. I have heard evidence on oath from the following witnesses for the respondent;

Helen Allingham, a teacher and moderator of the A level history homework;
Emma Morgan, formally Miss Emma Boughey, Head of Humanities;
Catharine Wensley, formerly Associate Principal and Leadership Consultant;
Mark Barrow, formerly Head Teacher of the respondent;
Joe Davies, a Governor of the respondent;
Russell Matcham, the Chair of Governors of the respondent

5. I heard evidence from the claimant and she also called Steffan Lindquist, a teacher of the respondent who accompanied her to her appeal hearing and Roger Burman, Head Teacher of the school at which the claimant currently works. I was provided with the bundle of documents, read all the pages to which I was referred either in the statements, or during the course of evidence and was provided with two chronologies – one from each party. In advance of closing submissions, I was handed the cases of A v B [2003] IRLR 405, Adesokan v Sainsbury's Supermarket [2017] IRLR 346 and Shrestha v Genesis Housing Association [2015] IRLR 399. Each counsel made closing

submissions for an hour at which time they guillotined. I permitted Ms Iyer an additional fifteen minutes in order to ensure that all the points Miss Nee wished to be made had been made.

Facts

6. The respondent is a secondary school with a sixth form. It was known as Turnford school until 1 September 2015, when it became the Haileybury Turnford Academy with Haileybury as its sponsor. In September 2013, the claimant commenced employment at Turnford school as an English Teacher and was issued with a contract of employment by the local authority.

7. From September 2014 the claimant, initially as maternity cover, took up the role of being Head of History; she was promoted to that post substantively from September 2015. In 2014/15 Helen Allingham taught the coursework element for A level history. There were fifteen candidates and they produced coursework on the topic of China. The claimant moderated those pieces of coursework and all the grades that were awarded and moderated by the school were upheld by the exam board. In 2015/16 the respondent changed to being an Academy. Mark Barrow was the acting Head Teacher at that time and Catharine Wensley was engaged on a one year interim basis to work with the Leadership Team. Ms Wensley told me, and I accept, that her interactions with the claimant, prior to being an investigating officer was such that she held the claimant in high regard. She said;

> "I observed her, I'm an English Teacher and she was interested in student writing. We worked together, I had no sense that she was anything other than a very upright and hard working member of staff."

8. The claimant taught the A level history coursework element for the first time in 2015/16. She had a cohort of just four students, who had to complete coursework. They initially chose a variety of subjects, but then it was settled that all four would prepare answers to the same two questions on the suffragette movement. At the beginning of the 2015/16 academic year, the claimant had the exam board instructions for conducting coursework, which were in the bundle before me, and she gave her own PowerPoint presentation to the students, which included the warnings set out in a communication from the exam board to students to ensure that the work that they submit for assessment must be their own and warning against plagiarism.

9. The claimant also had exam board guidance to centres, which included advice that exemplars from material produced by an awarding body should be used by teachers in accordance with the awarding bodies' instruction and a document produced to me at page 114a, which made it clear what was within and outwith the scope of acceptable assistance to student's. So for example, teachers may draw out the meaning of a question to elucidate qualities required of the general descriptors, but they must not supply specific wording or phrases, supply detailed questions, specific writing frames or structures, give detailed guidance on how to structure introductions or conclusions or tell students in precise detail how to improve their assignments. It is not

permissible for drafts of work to be taken in, commented upon, marked and returned to students for revision.

10. In addition to a 4000 word piece, the students when completing their coursework, had to complete a resource record or log setting out what books they had read and what their views of them were, and such records had to be signed by the supervising teacher, in which case was the claimant. They also had to include word counts in relation to each part of the assignment and then finally they had to complete an authentication certificate confirming that it was their own work.

11. On 18 April 2016 the claimant gave three scripts to Ms Allingham for moderation. The script of a fourth student was handed over on 22 April. These four scripts did not all have names on them from the students and they were not ready for submission to an examination board because they did not show word counts and they did not have resource records attached, nor had a certification been completed by the students. The claimant in her witness statement, which was some 44 pages in length, states on page 5 that she gave Ms Allingham the first four drafts, and that she

    "asked her to mark these final drafts as a trial run for the moderation process, so that we can come to an agreed understanding of the marking criteria, a normal practice at this and other schools."

    She goes on then to say that after that she then prepared a further four documents, which I will come back to.

12. On 20 April 2016 Ms Boughey as she was then known, sent an email to the acting Head setting out that a member of staff had raised a concern over a year 13 student in history about whether teachers are allowed to add sentences to their coursework. Ms Boughey had interviewed that student who told her that the claimant had taken in her first draft of her coursework, and returned it with comments on how it could be improved. Thereafter the student said that the claimant have further feedback "to add a few extra sentences"; she said "I asked for it back and Ms Nee said "no its ok I will add it in". Ms Boughey asked the claimant about this and the claimant said that she would not have the time, energy or inclination to add things for the students, Ms Boughey asked for advice as to next steps from Mr Barrow. It seems that nothing further happened on that, Mr Barrow as acting Head, being satisfied with the claimant's assertion that she had not added in anything for the students.

13. The claimant had stated that on 25 April she asked Ms Allingham why the scripts that she handed over on 18 and 22 April had not been marked and that she complained to Ms Boughey that Ms Allingham had not yet completed this task.

14. On 28 April the claimant handed over four scripts to Ms Allingham. Ms Allingham looked at them and asked where the resource logs were and on 29 April was given four resource logs. Some of the second set of papers had students names typed on the top by way of a file name, they all had word

counts. There is a dispute of fact as to what was said by the claimant to Ms Allingham on 28 and 29 April. Ms Allingham states that she was told that these were the final versions of the students work and that she asked therefore where the resource records were. Both Ms Allingham and the claimant agree that the latter handed over resource records on 29 April. Ms Allingham's account is that she was told that the script she previously been give were first drafts, which could now be discarded. She said that she was cross that she could have spent her weekend marking unnecessarily, she reports complaining about this to Ms Boughey. Ms Boughey confirms in her evidence (paragraph five of her statement) that Ms Allingham did complain to her in these terms. Ms Boughey was not challenged on that evidence when attending this tribunal.

15. The claimant's account is that she told Ms Allingham that the second version was not the student's work, and that whilst she might not have used the word or term "exemplar" she conveyed the meaning that this is what the second versions were. Ms Allingham moderated the second set of scripts over the bank holiday weekend and met the claimant on 4 May for a moderation session. The previous year an entire day had been timetabled to allow moderation to take place. Student scripts had been discussed and marked agreed. The claimant in cross-examination said that that was the ideal process to follow, but that the academy had not timetabled moderation day in 2015/16 academic year. However, both she and Ms Allingham did have a meeting with each other on 4 May and they did discuss scripts. Those moderated by Ms Allingham had been marked by the claimant in some detail, with various manuscript notes explaining why they had met various levels. It is by reference to achieving certain levels that grades for coursework are discerned. Only four scripts were discussed in this meeting.

16. On 5 May the claimant had offered a feedback session to the four A level students. Two of the four turned up. The claimant took them to Ms Allingham's classroom. The claimant's account in cross-examination was that Ms Allingham told the students that they had to be

> "really clear about the demands of the question because in part B they could have done a bit more on what the actual demands of the question were."

Until 4.35pm on the third day of this hearing, it had been understood to be the claimant's case that she knew that Ms Allingham had not marked the actual scripts of the students only the exemplars. Indeed it is apparent that as a matter of fact, Ms Allingham had never marked the first versions she had been given. When I asked the claimant how then Ms Allingham was giving feedback about whether the students had met the demands of the question, when she had not marked their work but only the exemplars, for the first time the claimant said that she had asked Ms Allingham on 4 May, after their moderation meeting, to mark the actual students' scripts overnight. I asked how she could begin a feedback session with Ms Allingham and the students without knowing what conclusions Ms Allingham had reached post-moderation and the claimant said, again for the first time, that she had left a series of messages for Ms Allingham on the morning of 5 May. It was not clear why the students and Ms Allingham on 5 May would have left the

classroom to go up to Ms Allingham's office to see their scripts if, as the claimant said in evidence, the session was supposed not to be feedback on their work, but rather simply a reminder to the students to produce their resource logs.

17. As to the fact that the drafts produced by the claimant did not have word counts, the claimant said that the students could count the typed words on the page by counting one line and multiplying that by the number of lines on the page. Why they would do this rather than simply sending in an electronic word count given that they were all typed documents, was unexplained.

18. Ms Allingham's account has consistently been that during the feedback she said to the students that whilst it was apparent that they had read widely as per their resource logs, that had not been reflected in the quotations that they had used, so they went to look at the actual papers. It is clear that Ms Allingham and the students went up to her office, on a different floor, whilst at that time the claimant went off to carry out some photocopying and make a call. I have had no evidence about what phone call was being made, whether or not it was urgent and why the claimant was leaving the feedback meeting with her students at a time when they had just been told that they had not met the demands of their coursework question.

19. Mr Burman in his evidence said, as did other teachers, that there are multiple uses which could be made of exemplar answers. It is clear from exam guidance and all the evidence, that what is impermissible is to provide exemplars to students on the question that they are currently answering, while that remains a live exercise. It is common to use work that has been produced in previous years. It is perfectly permissible to use entire pieces of student's work and I accept the claimant's evidence that it is permissible to amend student's work to make different exemplars. However, as Mr Burman said in his evidence, if a teacher were to construct an exemplar from a piece of work still subject to a live assessment, it would be absolutely key for it to be made crystal clear that a certain piece is an "exemplar". That seems self - evident.

20. The claimant confirmed in cross-examination that the written account she produced before the appeal hearing took place, sets out - as does her statement - the three main reasons for her preparing an exemplar documents:

    20.1 First of all she said for use in the moderation process, "so that there would be eight answers that Ms Allingham and I could mark and discuss as part of the moderation process." I note that the process took place on 4 May and involved discussion of only four scripts. In so far as the claimant has also said that a moderation process of exemplars would assist her and inform her marking ability. I note that of course this could not be achieved in circumstances where the claimant had already marked the students' final work before she produced the exemplars and that she handed over work, which she had already graded on 18 and 22 April, so the 4 May session would not inform her ability to mark this year at all.

20.2 The second reason she gave was that the exemplars included resource sheets and bibliographies that the students would be required to complete.
In oral evidence the claimant explained at some length how she would have held up the exemplar log that she had produced when speaking to her students, but she would have done that at a distance at which the students could not read the documents in order to demonstrate. This is in keeping with the account given to Ms Wensley on 18 May, when the claimant said that she would not have allowed the students to take the exemplars away.

20.3 Thirdly after the coursework was finalised and submitted, the claimant said that the exemplars could be used to show students who will be preparing for their exam on Nazi Germany. She said that the changes made in preparing the exemplars were improvements to the texts and were intended to provide each student concerned with models of clear expression to help with their revision and potentially achieve higher marks through the understanding in transfer of the required skills. They would only do this of course by taking away the exemplars and have them as a resource to use as part of their revision, so that is inconsistent with what she told Ms Wensley about not allowing them to take the exemplars away, indicating an alteration in her account as to whether these are exemplars to be used at a distance that children cannot read or otherwise before final submission or on the afterwards.

21. Ms Wensley who is not a historian commented in answer to a question that it appeared to her that the alterations to the students work to produce the exemplars appeared to have been designed to satisfy more of the assessment objectives. The claimant agreed that during her appeal in questioning Ms Allingham, she asked why she would possibly hand over work of a lower quality than that of the original work. The claimant confirmed that she was implying that the exemplars were worse – and designed to be worse than the originals. This clearly weighed heavily with Mr Davies in considering the appeal against dismissal. During cross-examination when pressed on the issue, the claimant became tearful and required a break. After 20 minutes she was still unable to satisfactorily answer this question, saying that certain paragraphs of the exemplars were designed to be an improvement, but if that students could have been asked to delete parts of exemplars to improve them and it was necessary to use exemplars of various qualities. She did not answer the question about the difference between her written account that the changes were made to affect improvements, which was also the impression of Ms Wensley and the implied basis of her questions to Ms Allingham, that the exemplars were of lower quality. Given that Ms Allingham had never marked the original work, she would of course have been unable to make a like for like comparison.

22. When the students went up to Ms Allingham's office on 5 May they were shown the exemplars and the resource sheets. They were confused and became upset indicating that it was not their work or certainly not entirely their work. They said their work had been altered. Ms Allingham called Ms

Boughey and told her that she had upset students. Ms Boughey went to find the claimant and asked the claimant whether the students were seeing their own work. The claimant said that yes it was certainly their own work that was being shown to the students.

23. It should have been absolutely obvious to the claimant on 5 May that there was at the very least scope for confusion. She had produced detailed exemplars which bore the students name and was in large part based on, or was the same as, the students own work. For the claimant to have told Ms Boughey twice, categorically, that the students were being shown their own work, is in my view inexplicable.

24. The claimant telephoned one of the students on the evening of 5 May and asked why she had been upset. That student emailed Ms Allingham the same evening and said in her email,

> "Miss Nee rang me earlier and said that the resources table she gave you, which was apparently mine was just an example and that the coursework we looked at today was a "language refined" version."

Ms Allingham passed this to Ms Boughey the next day, and Ms Boughey spoke to Mark Barrow. The claimant said that she knew from her phone call with the student on evening 5 May that there was a confusion between the two versions of the coursework.

25. On 6 May Ms Boughey emailed Mr Barrow setting out that having spoken to the claimant, the claimant was "adamant that the work was that of the students and that the example guidelines had been followed." The students were asked by Ms Allingham and Ms Boughey to email in to the school to them the original versions of the coursework that they had handed in. Later on in the morning of 6 May, Ms Boughey left in Mr Barrow's office a copy of one of the student's work as emailed to her that day.

26. Mr Barrow spoke to the claimant on Friday 6 May and told her that an issue had been raised that the coursework of the children had not been all written by them and that she had told a student on the phone to say that the work was hers and that just linguistic changes have been made. It records that the claimant told Mr Burrow that two piece of coursework had been pulled together for 'cogency and linguistic reasons' and that students would have made changes to the coursework post moderation (but seemingly prior to submission to the examination board). It records that the claimant had felt determined to assist students to get to their target grade and that she was committed to them. She confirmed that she had complied with exam board edicts. It states that she told Mr Barrow that she "feels in a dark place." The claimant in her evidence said that she did not say this, but she said that she was in the dark about the allegation. I reject the assertion that she was in the dark about the allegation because I accept Mr Barrow's evidence that he told her what the allegation was, that the children had been shown work that was not theirs and because in evidence before me the claimant has confirmed that she knew that was the issue from her phone call with a student the night before.

27. By 9 May a pack had been put together considering the two versions of the students work, (their original work and that amended by the claimant) and a letter had been prepared inviting the claimant to an investigatory meeting. This was handed to her. There is a dispute of fact as to whether she was also provided with a hard copy of the disciplinary policy or whether this was only provided at the disciplinary hearing. There is no record of the claimant requesting a copy of the policy at an earlier time and such documents in my experience tend to be freely available on intranets and internally within organisations. Furthermore the claimant has not described any disadvantage she suffered by not having a copy of the disciplinary policy from 9 May if that was the position.

28. The letter from Ms Wensley dated 9 May told the claimant that a formal investigation was going to be made into the allegation "that you made inappropriate adjustments to coursework." The claimant was asked not to discuss the matters that were to be investigated with anybody until that investigatory interview took place.

29. On 10 May the four students were asked by Ms Wensley to write down an account of what had happened in relation to their history coursework that year. Each of the four of them did so in their own handwriting and signed their accounts. The disciplinary policy states that an independent adult should be recorded as being present and should sign to confirm their presences. Whilst an independent adult was present she did not certify her presence. In closing submissions Ms Iyer said that she did not place any reliance upon those breaches. The school policy also says that the time, place and date of the statement should be recorded. The dates are recorded, that the interview takes place "in school", the time is not recorded and the students' names were not redacted (indeed in the bundle before me the students' names were still not redacted). They ought to have been.

30. It is not clear to me whether the pack provided to the claimant on 9 May, which contained the first versions of the courseworks were hard copies of the first versions she had marked and placed a sticky note with her grades on, and given on 18 and 22 April to Ms Allingham or whether they were versions that the students had emailed in and had subsequently been printed out. I do not however consider this to be a key issue. Ms Allingham has consistently said that she never read, marked or assessed the first versions given to her, whether she retained them or disposed of them, is not material.

31. As well as taking accounts from the four students on 10 May, Ms Wensley conducted interviews with Ms Allingham and Ms Boughey. In relation to Ms Boughey it suggested that the interview contained leading questions. I have read all of the questions on 175 and 176 of the bundle and I do not find that she was asked leading questions. They were of an open nature. The final question was 'how could this impact on the students? Could there be university places jeopardised?' Given that these were A level pieces of coursework, I do not find asking that question was leading, it was obvious that there was a potential for university offers to be in play, a matter of

consideration and it is not inappropriate to raise that when you are looking at the potential impact of an act of alleged misconduct.

31. On 18 May the claimant met with Ms Wensley. She explained that she had produced exemplars of how the work to show how higher marks could be achieved against the mark scheme. She said that she was going to go through the exemplars with the student after the moderation session and the purpose of the session was to reiterate the need for correct formatting prior to the submission of their final draft. She also said when put to her that she did not intend the exemplars to be submitted as the student's work to the exam board. However she accepted that if she showed students the exemplars before their work was finalised, it would breach exam board guidance as it would be giving the students too much help. She stated that she would not have allowed the students to take the exemplars away because they were too precise in detail. The claimant signed the minutes of that meeting as being accurate.

32. An investigation report was produced by Ms Wensley, it is dated 23 May but signed 6 June. I note that half term took place at the end of May and that may or may not have amounted for the gap between the date which appears at the top of the report and the date of it being signed. In any event it having been signed on 6 June, it was provided to the claimant under cover of letter of 7 June by Mr Barrow who invited the claimant to a disciplinary hearing to consider the allegation that she had made inappropriate adjustments to the coursework. I deal below with criticisms made of that report.

33. A disciplinary hearing took place on 24 June. The claimant has raised issues about the length of time she had to prepare, but she was accorded more time than is indicated as being required by the disciplinary policy. In advance of the hearing she prepared a five page document indicating what she had done in relation to the exemplars and why, which she used at the hearing. The hearing was chaired by Russell Matcham, who was at that time acting Chair of Governors and later became the Chair of Governors. He is an experienced teacher of over 30 years. The minutes of the disciplinary hearing record that at the outset it was stated that the purpose of the hearing was 'to consider whether a final written warning or dismissal was appropriate regarding the allegation of having made inappropriate adjustments to coursework'. If this was said it would be entirely inappropriate because the purpose of the disciplinary hearing was to consider whether the charge of making inappropriate comments to coursework was substantiated. Mr Matcham said that regardless of what the record states, he made it clear that their task was to consider whether or not the charge was investigated and that would seem to accord the questions asked throughout the course of that meeting, which lasted for about an hour and a half. I therefore accept his evidence that he was considering whether the charge had been made out and was not assuming guilt before the meeting started.

34. Neither Ms Allingham nor Ms Boughey were called to give live evidence at the disciplinary hearing. The claimant had anticipated that they would be. I

accept that Ms Boughey had been ill prior to this hearing and that cover had been arranged for her to attend the disciplinary hearing. It seems that Mr Barrow - with the support of HR - made the decision that they need not come. Ms Boughey because of her previous illness and Miss Allingham because she was quite stressed. Ms Boughey explains that when the cover for her teaching arrived, at the time in which she would have gone to the disciplinary hearing, she in fact went home. Mr Matcham accepted in cross-examination that with the benefit of hindsight it would have been better to have had certainly Ms Allingham give live evidence and given the claimant an opportunity to have questioned her. I return to that below.

34. Mr Matcham's evidence as to dismissal was that the panel had considered that on a balance of probabilities, the only possible conclusion was that the claimant had deliberately and inappropriately made considerable adjustments to the students' work to be submitted for the purpose of A level examinations. That goes further than the letter dated 24 June which states that the claimant was dismissed for "having made inappropriate adjustments to coursework".

35. The claimant prepared a letter of appeal dated 28 June and prepared a detailed document setting out her basis of appeal in preparation for a meeting on 13 September 2016. There is correspondence in the bundle before me, to which I have not been taken to, about whether there was sufficient time to prepare for the appeal and about the provision of personnel files and emails in good time, but no reliance has been placed before me on any failure in that regard.

36. Mr Davies, another experienced teacher and former head teacher, chaired the appeal panel. He was, as set out above, particularly concerned with the position as he understood it, that at least in one case the exemplar was of a lower quality than the students' original work. He was not convinced that this was an instance of the claimant intending to send the examplars to the examination board. He did however note that what were being described to him as exemplars had the students' names on them, and that the claimant had given various differing accounts as to why they had been created and to what use it was intended to put them. He found that the accounts given did not fit with the actions of a reasonable attempt to create exemplar materials. He concluded that the claimant's actions were at the very least negligent to an extent that it amounted to gross misconduct. A letter setting that out is dated 19 September 2016.

Law.

37. Section 98(2) sets out potentially fair reasons for dismissal. This includes conduct.

38. It is well established that the test first suggested in **BHS v Burchell** is appropriate in conduct dismissal cases. This asks whether the employer had a genuine belief in the misconduct; whether that belief was formed after such investigation as was reasonable, and whether it was within a range of reasonable responses to dismiss.

39. It is not for the tribunal to substitute its view as to misconduct, but to apply the test as set out above.

40. However, when it comes to assessing whether a claimant has contributed to their dismissal, and whether they have in fact breached their contract of employment such that the employer was entitled to dismiss without notice, it is a question of fact for the tribunal, on a balance of probabilities, as to whether the misconduct took place or not.

41. Finally, it is again well established that if there is any procedural unfairness in a dismissal, it is appropriate to consider whether a fair procedure would have made any difference, and if so what difference, applying **Polkey v AE Dayton.**

Conclusions on the issues

42. The **reason for dismissal** related to the claimant's conduct. The allegation put to the claimant in the letter of 9 May inviting her to the investigation meeting was of inappropriate adjustments to the coursework. This was the reason for dismissal set out in the letter of 24 June following the disciplinary hearing signed by Mr Matcham and in the letter dismissing the appeal dated 19 September signed by Mr Davies.

43. This is a potentially fair reason for dismissal. Both the disciplinary panel and appeal panel had a genuine belief in that misconduct.

44. In relation to the disciplinary panel - it seems that Mr Matcham considered the purpose of that misconduct was to attempt to send to the exam board 'enhanced' work. However, this was not the reason given in his dismissal letter, and in any event a genuine belief in more serious misconduct does not undermine his equally genuine belief in the lesser misconduct for which the claimant was dismissed.

45. As to the appeal panel, in oral evidence, Mr Davies said that two of his co-panellist thought the claimant had intended to be fraudulent in passing the exemplars off as the students work, but that he had doubts as to that motivation because of the evidence that the exemplars was of a lower standard in the work the students had done. Nevertheless he concurred that at the very least there was gross negligence.

46. I have considered carefully whether the different reasons have in effect been given by the disciplinary and appeal panels intending to alter work and to send that altered work to the exam board as opposed to be behaving in a negligent manner when attempting to create exemplars. However, the conduct about which both panels had a genuine belief was that the claimant had made "inappropriate adjustments" to coursework. Both rejected her contentions that her behaviour had been appropriate to create exemplars. I am satisfied that this genuine belief in the inappropriate adjustments of coursework was the reason for her dismissal.

47. **Did the respondent hold that belief on reasonable grounds?** I am satisfied that it did.

48. In closing submissions, I pressed Ms Iyer to list the material inadequacies alleged in relation to the investigation.

    a. She referred to the students' accounts not according with the respondent's disciplinary policy, but in so far as the student names were not redacted and that it had not recorded the presence of another adult, she expressly stated that did not go to fairness.
    b. She said the statements were general, but this indicated as Ms Wensley said in her evidence that she asked the students an open question to write down their account of their history coursework, that is in keeping with the policy's instruction to avoid leading questions.
    c. Ms Iyer then submitted that the students had spoken to Ms Boughey and Ms Allingham. However it was never alleged that either of those teachers had sought to inappropriately influence the students' accounts. Ms Iyer confirmed that she was not making such an allegation in her closing submission either.
    d. In her ET1 the claimant alleges that Ms Wensley restricted her investigation to considering one possible cause of the four students and Ms Allingham's confusion - namely that she had acted inappropriately. I do not accept that Ms Wensley was biased and accept her evidence that before this investigation her interactions had led her to form a positive view of the claimant.
    e. It was said that Ms Boughey was led by Ms Wensley in her investigation interview particularly when asked what she had understood by the student in her email of 6 May using the term "language refined". Ms Boughey's answer was that she understood it to mean that the wording, but not the content being altered. Ms Boughey was asked if it was appropriate for a teacher to do that to coursework and she confirmed it was not. It is impossible to envisage any other answer to this question and certainly the allegation in the ET1 is based on this exchange is misconceived.
    f. It was alleged that the disciplinary and appeal panels were guilty of applying an inappropriate standard of proof. Both panels considered whether the charge had been made out on the balance of probabilities. The claimant drew the attention of the appeal panel to the well known dicta of Lord Nicholls from the case In re H Minors 1996 (AC 563); that the more serious the allegation the less likely it is that the event occurred and therefore the stronger the evidence should be. This was and remains good law and good guidance. I do no accept that an inappropriate standard of proof was adopted and do not think that that has been evidenced on any of the matters before me.

49. I have looked carefully at the ET1 and the claimant's statement and noted the further inadequacies set out alleged therein. It is correct that some, although not all of Ms Boughey's evidence was hearsay, but it would be inappropriate for a school to have to apply a criminal standard of evidence

production. Ms Boughey raised the question with Mr Barrow, saw the students, spoke to the claimant, she was an entirely appropriate person to interview and the key questions on the key issues were open questions. The complaints that the final question to her was leading, I have dealt with above. I do not find that it was inappropriately leading. It was an obvious question and it is not improper to consider potential impact when it is obvious that many A level students will be working towards meeting offers of places at university.

50. It is correct to note that Ms Wensley did not put to Ms Allingham in the interview on 10 May that she might have confused exemplars and original scripts. However I can find no indication that the claimant had offered this explanation before 10 May. I set out above what is recorded and I accept what has been said by her to Mr Barrow on 6 and 9 May. It would have been impossible on 10 May for Ms Wensley to put this allegation to Ms Allingham, the explanation was first aired on 18 May.

51. This is a matter which could have been explored in the disciplinary hearing, but Mr Barrow's decision not to call Ms Allingham to give live evidence precluded it. Mr Matcham accepted that with the benefit of hindsight, it would have been better to have insisted that Ms Allingham gives live evidence, I agree. However, Ms Allingham did give live evidence to the appeal panel and said there - as she did in this hearing and indeed before any question of exemplars or potential misconduct had even arisen to Ms Boughey in mid-April - that she had been told she could discard the earlier versions of coursework that she had been handed. I find it significant that Ms Allingham made a complaint - not a formal one but rather a grumble - to Ms Boughey that she had almost "wasted her weekend" marking work which was not the final version. This exchange was not challenged on cross-examination. I have no doubt whatsoever that whether asked before the investigation report was finalised or in the disciplinary hearing, Ms Allingham would have answered as she has at all points since. That she had never been told that the work handed to her later was an exemplar or anything other than the student's work. There was nothing on the face of those documents which should have urged her to make such an enquiry either. It looked like the students own work. The allegation that there has been no evidence that the alleged wrong doing impacted on students was quite rightly not pursued in cross-examination. The students had to write new coursework essays in a very short period in May when they ought to have been concentrating on revision.

52. Specific evidence did not need to be called before me to accept that this would have caused stress and upset to the students and indeed to their parents.

53. It is said that the conclusion of the respondent that "fraudulent practice could have taken place if this had not been uncovered, begs the questions of what I am suppose to have actually done." This criticism is misconceived. The script amended by the claimant could have been sent to the examination board as Ms Allingham believed them to be the student's work. The fact that this did

not happen, does not detract from the wrong doing in question. The time period between the claimant receiving the investigation report and the disciplinary hearing taking place was compliant with the disciplinary policy.

54. Finally the difficulty faced by the claimant in accessing evidence in advance of the appeal hearing by the manner of its production electronically, was not alleged to have materially hindered the claimant, although it no doubt did cause frustration and some distress.

55. In conclusion I am satisfied that the investigation Ms Wensley carried out was within a range of reasonable investigations.

56. The disciplinary panel ought to have heard live evidence from Ms Allingham and given the claimant the opportunity to question her. I do not know if the same is true of Ms Boughey, whose evidence the claimant categorises as hearsay and cannot have been seen as central to the issues by the claimant. However, I do not consider this matter to have been so serious that it rendered the dismissal unfair. In any event, as set out below it was remedied on appeal. Although the claimant said that she felt inhibited from casting aspersions on the truthfulness of Ms Allingham during the appeal, she would have been much more at liberty to do that in the appeal than at any disciplinary hearing when she would no doubt have hoped to be returning to school to work again with Ms Allingham. In any event at the appeal hearing the did put key questions about whether Ms Allingham was told that the second set of material was exemplar material and she said quite clearly no, I have no doubt she would have said that at the disciplinary too.

57. **Was the decision to dismiss a fair sanction?** There is no doubt that the misconduct alleged is of a most serious nature, whether (i) fraudulently intending to pass off amended work as that of students to the exam board, or (ii) intending to show students detailed exemplars based upon their own work before submission in breach of exam regulations, or else (iii) negligently creating exemplars based on live work before the submission date to the exam board and thereby misleading a colleague.

58. In any of those three situations I consider the decision to dismiss is within a range of reasonable responses.

59. **Contribution.** I have to go on to consider whether there was culpable conduct on the part of the claimant. I have concluded that there was. Taking the claimant's case at its absolute highest, she gave Ms Allingham scripts on 18 and 22 April as set out in her witness statement. She asked Ms Allingham to mark these final drafts as a trial run for the moderation process and then prepared four further documents. These so called exemplars looked like the student's works, in some case it had their names on it, they were based on the students' work, they had individualised resources sheets. The claimant did not clearly indicate that these were exemplars on the face of the documents whether by printing them on coloured paper, putting exemplar at the top, putting a warning not to be shown to the individual students when handing them to Ms

Allingham, or by doing anything else. She simply said they had been "refined".

60. I accept the evidence of Mr Burman that if you are creating exemplars on live questions, the need for clear communication is very important. It would have been an obvious thing to have made it abundantly clear on the face of the document.

61. The claimant has not at any stage given clear evidence as to what words she used when handing over these marked documents to Ms Allingham. She had a moderation discussion meeting with Ms Allingham on 4 May discussing only the exemplars. She said for the first time in her evidence at the tribunal that she asked the real coursework to be marked overnight and that she thought it would take 15 minutes per script. I note that on the occasions Ms Allingham talked about coursework being marked, she has talked about it being a task that takes up a great amount of her weekend. The claimant then took two students into Ms Allingham's classroom to get feedback on 5 May when, on her account, she had not checked that Ms Allingham had been able to moderate the scripts overnight. She had no idea what grades Ms Allingham thought should be awarded to the original coursework. She then left a feedback meeting with her A level students to do photocopying and make a phone call, in circumstances where she has never been suggested there was some urgency. Even if all this were accepted and I do not accept that the claimant made it clear to Ms Allingham that the scripts handed over on 28 and 29 were not the works of students. Her conduct in creating exemplars which are not clearly marked on the face of the documents as such at this stage in the academic cycle, just a couple of weeks before work had to be submitted to the exam board was in my opinion grossly negligent. It was likely to lead to confusion. It did.

62. In light of my findings of fact however, that she did not tell Ms Allingham that the exemplars or the second set of documents were anything other than the students work, she did not say on 4 May in their moderation discussion this is not their actual work, but only exemplars and that further marking was required, did not ask Ms Allingham to do marking overnight and in light of the fact that I accept Ms Allingham's evidence that she was taking the students up to her office to show them the discrepancies between the resource records and the use of materials, I do consider the claimant to have been entirely responsible for the situation which ensured. I find that her contribution to her dismissal was one hundred percent.

63. **Polkey:** I consider it to be unfair not to have given the claimant the opportunity to question Ms Allingham at her disciplinary interview however, I do not think that the omissions were so grave as to render the dismissal unfair, but if I am wrong in this regard, I find that a fair procedure of calling Ms Allingham would have led to her giving the same evidence as she gave subsequently on appeal, such at the prospect of the outcome being the same was inevitable.

64. In relation to wrongful dismissal the reasons set out in relation to contribution I find that her conduct did amount to gross misconduct and the dismissal was in response to that misconduct, such that her claim of wrongful dismissal fails.

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Employment Judge Tuck

Date: …15/12/2017……

Sent to the parties on: ...20/12/2017...

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For the Tribunal Office