Case No: 2201614/2018

EMPLOYMENT TRIBUNALS

Claimant: **Dr. F. Carpos-Young**

Respondent: **Royal Academy of Music**

Heard at: **London Central**

On: 24,25,26,29 October;
in chambers 30,31 October

Before: **Employment Judge Goodman**
Ms. G. Gillman
Mr R. Lucking

Representation
Claimant: **Mr. M.Lee, counsel**
Respondent: **Mr. D. Leach, counsel**

RESERVED JUDGMENT

1. The claim of failure to be accompanied at a hearing succeeds. The claimant is awarded 2 weeks' pay.
2. The respondent did not discriminate against the claimant because of sex.
3. The claims of detriment and dismissal for making protected disclosures fails.
4. The respondent wrongfully dismissed the claimant without notice.
5. The respondent victimised the claimant by dismissing her.
6. Remedy will be assessed at a hearing on **7 January 2019.**

REASONS

1. The claimant, a part-time lecturer employed by the respondent to lecture in professional development, was dismissed for gross misconduct two months after starting, following student complaints about some lecture notes she had circulated.

2. She has presented claims to the tribunal for detriment and dismissal for making protected disclosures (whistleblowing), victimisation, sex discrimination, breach of contract and denial of the right to be accompanied at a disciplinary meeting. A list of issues was settled at a preliminary hearing, identifying the disclosures, protected acts and

detriments. The detriments for the public interest disclosure claims and victimisation claims were: not following any disciplinary procedure; not allowing her to be accompanied at the dismissal meeting, dismissing her; the public statement about her dismissal; no fair appeal process; discussing her position with Ian Partridge, so causing her removal as governor of the Royal Society of Musicians; lastly, inadequate response to her request under the Data Protections Act for subject access (SAR).

Evidence

3. To decide the claims we heard live evidence from:

Francesca Carpos-Young, the claimant
Tim Jones, Deputy Principal (Programmes and Research) who dismissed her
Neil Heyde, Head of Postgraduate Programmes, her line manager
Mark Racz, Deputy Principal and Dean, who heard the appeal against dismissal
Paul Riddell, Director of HR, about the subject access request
Safi Schlicht, Director of Communications and Marketing, who drafted a public statement about the dismissal for internal and external use.

4. There was a bundle of documents of nearly 800 pages. A staff list was introduced during the hearing to indicate the gender breakdown of managers.

5. At the conclusion of the evidence on day four, we read written submissions on the law and then heard oral submissions.

Findings of Fact

6. The respondent is an old and well-respected institution of higher education in music, with around 800 undergraduates and postgraduates, teaching music with an emphasis on excellence in performance (largely classical), conducting and composition. About half the students are from the UK, a quarter from other EU countries, and a quarter international. Two A levels (one in music) are required from UK students, but entry is principally by audition.

7. The claimant was one of two lecturers recruited in the summer of 2017 on an 18 hour week contract to develop and teach a course (“Pathway”) on professional development, to prepare students for the practicalities of a career in music. The job description specified a “dynamic animateur to prepare Academy students for the challenges of working in a rapidly changing music profession”. She is herself a bassoonist. She had also just completed a doctoral thesis entitled “The Prestige Economy of a London Orchestra” at UCL, based on seven years research.

8. She was twice interviewed, on 15 and 20 June, by a panel which included Tim Young and Neil Heyde. At the first interview there was some concern that she was overly focused on orchestral players, but these concerns were allayed at the second interview. We must resolve a factual dispute on the level of detail she conveyed in a presentation to

the panel on the content of a sample lecture. In the bundle were two handouts she gave the panel and on which they made notes – one sheet with an example of a possible course, the other sheet with the titles of six lectures in a series, with a one line description of each; we also had the panel's own annotated question sheets. Session 1 is entitled: "The Gatekeeper: the phone doesn't ring/snow blindness in the diary, and other terms of musical discourse". The claimant insisted she had delivered the text of the entire lecture, and that the panel had the full notes. The significance of this dispute is that the panel would then have heard the "terms of musical discourse" that later became controversial. In our finding the claimant did not deliver the entire lecture in the interview. The reasons for this finding are: (1) the slot allowed 7-10 minutes for the presentation. She could not have delivered the entire notes in that time; (2) the two witnesses present at the interview denied they had heard it before, especially the controversial terms, and as they were colourful they were probably memorable; (3) the panel members had annotated the two sheets from which we presume she spoke, but not any longer note of the entire text; (4) the panel notes show they had heard her speak about having to fit in to get work, but nothing of the detail. At best she may have given some detail in the lecture about life in orchestras, but not all the content. In our view she has not been deliberately untruthful, but in the shock and upset of dismissal she has read back into the interview the content she delivered later to students and colleagues.

9. In July and August she set about developing the Networking Pathway, with five lectures for the autumn term, for delivery from 12 October to 27 November, and she also listed her ideas for the second term, which included; "finding networking benefits in inequality: poverty, ethnicity, colour, disability, gender and sexuality".

10. She also sought funding for ongoing research, among Academy staff, into "the tension between excellence and inclusiveness in a premier institution like the Academy". The claimant was concerned, for example, at the high proportion of privately schooled students in the intake, and the low number of black students. This was refused, though following what may have been a confrontational meeting on 23 October with Tim Jones (he said in an email it had been good: " to clear the air"), at which some of this was discussed, a smaller amount was found for her, as seed funding to develop a smaller study. We accept this was for the reasons given by the Respondent – that she needed to focus on delivering a new course, that reflecting on what she was delivering was part of the job, that the college did not want an external researcher to join her in what was only a part-time contract – and not because the Academy wanted to prevent exposure of a discriminatory culture, though we know that in the course of the discussion Tim Jones did say she should get to know better what the Academy already did on access and inclusion before starting a research project. He noted her "blunt opinions"; he thought she should slow down.

11. Funding for higher education institutions through TEF system for assessing merit was, from 2018 to relate in part to an assessment of the "student experience", which included career advice and development. The professional development course was aimed at enriching that

experience, and the claimant was encouraged to promote her course. At the end of September, as discussed at a meeting, she emailed the course details to postgraduates. At a meeting on 4 October she noted she was to focus on all students, and to post on AIR (an intranet) the notes and slides on CV preparation, personal statement and cover letter. On 6 October all students, it is noted, were to attend the portfolio and logbook sessions. Her meeting notes say: “upload stuff onto AIR” and “send Pathway notes to all”. In practice it took some time to do this, as she was sent round the houses on who in the non-teaching staff could explain to her the practicalities of how to do this, and it was not until the end of October that she met two administrators who could give her the student emailing lists.

12. On 12 October the claimant delivered the first lecture in her series, entitled “An Economy of Prestige: What to say and what not to say”, billed as “networking and reputation building”. It is the notes for this lecture that caused controversy when circulated later. No one who attended the lecture complained, then or later; there was a lively debate and good feedback. About 30-40 attended, including some staff.

13. On three other dates in October she delivered undergraduate sessions on logbooks and portfolios of practical development of work experience.

14. On 18 October she emailed all tutors, copying in Neil Heyde and Tim Jones, promoting her professional development series, saying “those who attend are sent the notes and slides”. On the recent logbook (etc.) sessions she said she would: “email my notes to every undergraduate”. No one replied to say she should not be sending out lecture notes.

15. On 20 October she was asked to meet Safi Schlicht, Director of Communications and Marketing, and her boss, Kirsty McDonald, Deputy Principal, Campaigns and Advancement, to discuss her work. The claimant seems to have talked at length about the material she had just delivered about how to get on in a professional orchestra, as Ms Schlicht remembered she had been shocked at the use of the term “gypo” (apparently, orchestra banter for a violin player). Ms McDonald complained, not about discriminatory language, but that the claimant would not listen to anyone else – we conclude the Claimant must have interrupted and spoken over her in this meeting. Neil Heyde spoke to her about this. She acknowledged she needed to listen more to others and she emailed an apology on 23 October, though Ms. McDonald’s comment on receipt (“sheesh”) shows it was not graciously accepted.

16. There had been a recent talk by a successful former student entitled “What I wish I’d learned at the Academy” (not arranged by the claimant) – Ms McDonald and Ms Schlicht had asked the claimant at the meeting to remove the poster for this, as funders might object to the implication in the lecture title that the Academy was not teaching anything useful. She later emailed confirming she had removed the posters with the “potentially provocative text”.

17. On 28 October 2017 the claimant was awarded her PhD by UCL’s Institute of Education. Thereafter everything went wrong.

Monday 31 October: Circulation of Lecture Notes

18. On Monday 30 October the claimant, finally having got the email lists for the student body, sent an email out at 16:59, saying: “Hi, I hope that the following Professional Development notes are helpful. With very best wishes, Fran”. Attached were a set of powerpoints on how to write a CV (nine pages), the claimant’s notes on “the logbook and portfolio” (five pages), some powerpoints entitled: “Dealing Adaptively with Performance Anxiety” (ten pages), and what appears to have been the claimant’s handout for her 12 October lecture: “Networking Pathway ideas” (six pages).

19. It is the last which caused the trouble. It is not identical to the full note with its suggestions for further reading that the claimant says she tabled at her job interview, but it includes much of the same material. It begins with some quotes about how musicians describe those with good reputations, and notes that:

> “the implication is that building a reputation is about fitting in and be adaptable. Considering the way you look, the way you behave, a response to one another musically, what you say, and what you do not say. Everyone knows that having reputation is important. But how do you get one?”

There follows a long list of practical tips, such as being punctual, reliable, collegial, good company, not complaining, knowing how hierarchies work, and so on, and included:

> “become familiar with shared understanding of anecdote, caricature, stereotype and jokes. Google them and look them up on YouTube if this is not your culture. For example, you may hear terms like this..”,

followed by a list of 14 terms, such as “Plan Z= practice” and “heavy metal” – brass players”, and within the 14 are the three which caused offence, namely: “the boys = other orchestral musicians”, “Pond Life” (string players), and “gypos, short for gypsies = violinists specifically”. Then there is a list of recommended behaviour in 26 bullets, such as accepting criticism, not being precious about retuning, “keep a list of dressing room and wifi codes - everyone will love you”, dressing as smartly as the principal of the section, and so on, much of it sensible, practical, even rather obvious advice. In this list, three items were found objectionable: “look young, up-together and cool in rehearsals, and smart in concerts; this is a superficial and ageist world”, “go to the pub, golf, play bridge, join Facebook, LinkedIn, Twitter, and be clubbable” (the student who drafted the document posted on Facebook later that week suggested ‘clubbable’ meant ‘f*ckable’, though this did not make the final cut), and “joining in with the sectional humour. Brass is pubs and pond life is tea queues”. The final section covered how to network for those who are shy, followed by a section on what is seen as “prestige”, and how to build it, with more practical suggestions. None of these was found objectionable.

20. There must have been some buzz about this, because four hours later, at 20:56, David Gorton, senior postgraduate tutor, emailed Tim Jones and Neil Heyde: “Here is the email that went to all students”.

21. Late that evening (23:18) student SLP emailed David Gorton his thoughts on the claimant’s notes. He said that after starting well with “considering what you say, and what you do not say”, “Dr Carpos quickly descends into a list containing some absurd suggestions, shameful stereotyping, and most worryingly, descriptions of sexism and racism which are not acceptable under any circumstances.” He then gives as instances,(1) “gypos” as “categorically racist, not to mention that is a term which I'm pleased never to have encountered”, and (2) “boys” as “the idea that orchestras are only made up of males is not only damaging, especially with regard to the current global climate on issues of sexism, but blatantly false, and seemingly seeks to perpetuate a rapidly fading image”. The rest is criticised as outdated, poor stereotyping, and contradiction –such being told both to avoid overdrinking, and to bring a corkscrew on tour. He said several of his peers had assumed it must be a poorly thought out parody, rather than something genuinely deemed to be useful. He also objected to the quality of writing and presentation being questionable, “as are many of the professional development documents and posters that I have encountered this term”.

Tuesday 31 October - More Student Comment

22. Next morning, Tuesday 31 October, at 10:26, Neil Heyde asked the claimant for a 30 minute meeting in the next week:

> “to pick up a few issues that have come through the chain from students. (There have been a couple of complaint emails that I can talk you through that make it clear it will be important and useful useful to frame some of your advice differently)”.

They fixed a meeting next day, 1 November, at 12. The claimant asked what was unhelpful about her advice, and Neil Heyde said:

> “I think the ‘trigger’ for a couple of emails was the use of stereotypical language – gender and racial – in a document on orchestral networking and slang terms. This is probably a question of framing more than anything else as we know the language exists.”

23. There is more student comment from 31 October, as sent to Rachel O’Brien, student union president. Neil Heyde showed the claimant the text of two of the complaints when they met on 1 November. One said:

> “whilst reading through the document attached I was extremely shocked. I feel certain areas of this document are completely inappropriate and offensive and should never have been sent out. For example terminology of violins as gypos, look young, be clubbable… To highlight but a few!”

Another said that after speaking to others "most of them thought the advice was at least ridiculous, if not outright insensitive". It perpetuated the worst stereotypes about professional orchestras, and:

> "maybe some of this might even be true, I do not want to be advised on keeping my head down, be told brass players got drunk (but god forbid they are over "overdrinking") and string players are bores who can be found drinking tea (and probably playing bridge. But wait, doesn't that mean they don't appear "young, up together and cool"? But maybe they are still "clubbable", whatever that is supposed to mean)".

The student was shocked string players were "gypos", saying, "and I can't even imagine how actual violinists who happen to be Sinti or Roma feel about it", and after listing his or her objections to the practical advice concluded:

> "this list is a manual for how to behave like an arsehole. I expect Francesca to apologise for sending this out. I'm enormously tired of people who think this sort of RIDICULOUS CRAP is okay. He or she then concluded: "sorry for the rant".

Wednesday 1 November: Framing, and the Claimant's Explainer

24. Neil Heyde had also prepared a summary of his brief meeting with Rachel O'Brien, noting issues, and "a general feeling communicated of being perplexed by the document as well as insulted/angry/upset." There was an underlying element of:

> "a lack of aspirational perspective that would make the information useful. It seems clear that some of the language etcetera could be useful for provoking discussion, as it did not seem coherent or useful in note form. We noted that nobody who talked to Rachel had actually attended the class. I think this is important in the light of the final issue above".

25. Neil Heyde commented to the claimant at their meeting, as he showed her what was being said that some of the students needed to get thicker skins, but they did need to know where her material came from and what is was for. After the meeting he emailed Tim Young about the discussion with the Claimant, describing it as:

> "a very positive and direct conversation and she will send something round to all of the students to put the immediate issues to bed… I made it clear that we don't want to hide anything from students but that we need to frame material in an aspirational and progressive manner".

26. The claimant sent this email to all students at 18:15 that day. She said it had been brought to her attention that some of her discussion point notes had offended some of them. Those who attended the networking pathway presentation would know that it consisted of 3 parts, and the material for the first part came from a five-year PhD study conducted at UCL, covering more than 100 professional orchestral musicians and the

London Symphony Orchestra, and more than 40 fixers (people who book players). The study concerned itself with issues of equality; or rather, inequality. The colloquial terms that were listed in the network pathway notes were current, and "are used by those musicians". She went on to say that the lecture had opened a great deal of discussion with lively and positive feedback. Many had talked about the provocative terms to their one-to-one teachers, and how to deal with things that people say in professional life, as used by "the person who may be in a position to hire or fire you". She could see how they might have been perceived as offensive, but she had not intended to offend and was here to help. Anyone who wanted to discuss issues on a one-to-one basis was free to get in touch.

27. She copied this to Neil Heyde, who replied: "thank you very much for sending me this Fran, and for telling me so promptly".

28. However, next morning, Thursday 2 November, he told colleagues that her email had not been run past him. It did do some of the things they had discussed, but it was not "framed as I would have proposed and I feel it is obviously defensive which I counselled against". He did suggest that the complaining student should talk to some of those who had actually attended the class.

29. David Gorton then to the complaining student that: "class notes from a specific educational context were sent round to a wider group of students without adequate framing or explanation of the content, and a follow-up email, while attempting to provide that context was not framed in a manner that addressed the original complaint". He reassured the student that "the Academy absolutely does not condone the use of misogynistic, racist language within the orchestral world".

Thursday 2 November: "Our Response" goes on Facebook

30. It was not over. During Thursday 2 November a first year student called DS put together an open letter to the student body, which in the course of the day was revised to read as a letter from the student body to the Academy, saying it was: "Our Response" to the "letter" that the claimant had sent out earlier that week. It was said that her "letter" was "unacceptable", and her follow-up email, that attempted to address student concerns was "entirely inadequate". Not only was the initial letter unprofessional in tone, formatting and written style, and not only did it encourage harmful social behaviours, but it violated the Academy's equality and diversity policy by encouraging the development of a toxic educational and working environment in which musicians are complicit in harassment of and discrimination against colleagues on the basis of race, ethnicity, gender, age and physical appearance. It was in explicit contradiction of the Academy's policy that staff should "create a positive inclusive ethos that challenges inequality and inappropriate behavior", and "ensure all Academy policies and activity are sensitive to equality issues". It listed "some of the most egregious statements from the letter". Those chosen included: "boys = other orchestral musicians", as maintaining "an environment in which anyone who is not a man is automatically an outsider"; "gypos – short for gypsies, equals violinists specifically", as "it is shocking that such racist language would be

accepted or implicitly encouraged by an official document sent out by the Academy"; and the "look young… This is a superficial and ageist world" comment as accepting, rather than challenging, superficiality and ageism. An instruction to pick a deputy "who is almost as good as you", "encourages a toxic competitive environment". The comment on "brass is pubs and pondlife is tea queues" was stereotyping musicians. It was suggested that telling players to accept criticism was failing to draw attention to the line where criticism crossed over to harassment and abuse. A comment on fitting in - "nonconformity is frowned upon nowadays"- is said to explicitly "discourage diversity in perspective and attitudes". The writer conceded that in the light of the email about her research "there is no denying the fact that this research is likely an accurate portrayal of behaviours that will help advance one's career", but the only appropriate context for that would have been a workshop treating the behaviours as a problem for which professional and personal support could be obtained, and to work towards changing the broader culture. "Otherwise they are an active encouragement of racist, sexist and exclusive behaviours and actively discourage musicians from speaking up about injustices by creating fear around reporting".

31. The writer then moved on from criticising the claimant's notes to criticising the respondent, saying:

> "we are all current students at RAM, and many of us have witnessed and/or been subject to other discriminatory behaviours perpetrated by both students and staff."

The claimant's letter was:

> "a symptom of a much broader and deeper failure to live up to institutional aims regarding equality and diversity".

The respondent was called on to establish student led working groups on equality and diversity, to devise a response to "both the letter and the broader climate to which it speaks". Specifically they were to consider avenues for reporting discriminatory behaviour, staff and student training, collaboration with the Musicians Union on recommendations on how to handle discriminatory behaviour in a professional context, and a response from the respondent "to demonstrate its commitment to ensuring a healthy and respectful educational and working environment for all musicians".

32. This document was circulated to students, with a questionnaire at the end inviting them to respond with details of discrimination they had suffered. We were told that it was signed by 58 of the student body of 800. Detail of any discrimination alleged to have been experienced, whether by the writer or by other signatories, is not available.

33. The claimant was tipped off by a friend that the document was on Facebook and email, and at 19:47 she forwarded it to Tim Jones and Neil Heyde. Tim Jones's response was to ask her to a meeting next morning, set at 20:16 that evening for 11:15 next day in his room. He added: "given what's happened in the last 48 hours there'll need to be a colleague from HR present too". There was no other indication of what

the meeting was about.

34. Some students had emailed Rachel O'Brien to disagree with the "Our Response" letter. One who was present at the lecture where the notes were used said the claimant had acknowledged at the lecture that the terms were unfortunate; she thought the reaction was knee-jerk, and she (the claimant) was not be blamed for reporting facts on the orchestral culture, and "I hope they don't attempt to vilify Francesca for this; she gives excellent lectures which are clear, well-organised and concise, and she certainly wasn't encouraging or advocating the language in question" . Another student emailed that night saying she or he had regular orchestral experience and there was "nothing presented as fact that I don't believe to be factual". He or she had not attended the lecture, but reading her notes: "it really does strike me that all Fran is aiming to do is prevent decent players from developing bad reputations for inane reasons. I say let her do her job."

35. At some point on 2 November the claimant had asked Rachel O'Brien if she could be coopted onto the Equality and Diversity Committee.

36. The DS "Our Response" document was picked up by Norman Lebrecht, the music critic and commentator, who posted it on his blog, "Slipped Disc". Tim Jones was told of this too.

The Dismissal

37. On Friday 3 November the claimant met Tim Jones as asked. It was at this meeting that she was dismissed without notice. On his evidence, that was not his intention, which was only "to find grounds for an agreement to restore student confidence on her". He was aware from Paul Riddell, the HR director, that depending on what she said, there might be grounds for a disciplinary charge, and that was why an HR adviser was present to make a note.

38. The notes se made are shorter than would be expected of a meeting lasting over an hour, but the handwritten notes were said to have been destroyed after it was typed. This is a pity, as there is a dispute of fact on what the claimant said at this meeting, and another dispute on whether she was handed a copy of the disciplinary policy at it.

39. The claimant believed the purpose of the meeting was to discuss the DS document that was now on Facebook and Slipped Disc. She took with her to the meeting a timeline of events she had prepared, pasting in the various emails. At the end of the text of the DS document, after the section inviting student responses on discrimination experienced, she had typed:

> "I believe that D - S - has on purpose taken my notes out of context to use it for his own political campaign against the Academy. In my mind this is an issue of defamation of character".

This suggests the claimant came to the meeting upset and angry that she had been misrepresented. Tim Jones did not notice this comment.

He was concerned that student unrest was stopping them working.

40. Working from the notes we do have, the meeting started with Tim Jones explaining that senior staff had spent a lot of time trying to convince the student body that something had gone wrong which wasn't representative of the views of the Academy. The claimant agreed that something had gone wrong. Ideas had been taken out of context. She agreed it was a mistake to send it out to students who did not have the context of her seminar. Tim Jones explained that students were spending a lot of time talking about it, instead of playing (their instruments) in their lessons: "This is a serious reputational issue. Is there anything you would like to add?" In reply the claimant referred to the Facebook post about students having experienced discrimination at the Academy. She asked if this was referring to something in the past that she did not know about. Tim Jones identified that there were two things – the objectionable lecture notes, and the complaints about discrimination at the Academy, and he said: "if there are students with the belief that institutionally we are discriminatory we need to take radical action and start building student confidence". The claimant repeated that she took equality seriously, she had asked to be co-opted onto the diversity committee, and her notes were necessary because when students went into the outside world and experienced in such terms, they would need to know how to handle it. Tim Jones said this was not an issue of academic freedom (a point the claimant raised) it was about "the consequences of it". Some students were sensationalist, but others had read the document as meaning there was no point to being idealistic or having higher standards.

41. Tim Jones then asked for a 10 minute break. But before they did, the claimant asked whether the student who had "started an untrue rumour" (we understand DS) could be disciplined. He said it was possible, and that a student forum on diversity would be a good idea.

42. During the break Tim Jones asked the HR adviser if he had the power to dismiss the claimant, who was still in a probationary period. After the break he returned and explained how he saw the situation: she had academic freedom of speech to teach the Pathway as she saw it; she had then emailed the paperwork to all students which meant it became an Academy document. Some students had issues with those documents, had talked to others, and built up a head of steam. She had sent an email to reassure students that she did not have discriminatory views, but that had inflamed the situation further. Complaining students were now being directed to the complaints procedure, but "at the moment the students don't appear to trust you". There were two issues, one a lack of confidence as to how could she do the job with this around, the issue was not going away, and the other was bringing the Academy into disrepute with the students. He did not see how she could retrieve this. Then he said:

> "sending the document to all students without context and bringing the Academy into serious disrepute is gross misconduct and I will have to terminate your employment with immediate effect".

She would get a letter; she was not entitled to notice; he offered her a

copy of the disciplinary policy (a disputed point), and they discussed handover.

43. Tim Jones's evidence was that the claimant was not dismissed for the terms used in the notes, nor did the Academy think she was discriminating, nor was she dismissed for circulating a note without authority. She was dismissed because he did not believe he could work with the claimant to restore student confidence:

> "I hoped for a plan… I didn't see how we could agree a plan".

He believed students were about to boycott classes, and wanted to get them back to their studies.

44. As we must make findings about the respondent's reasons for dismissing, we studied the flow of discussion in the meeting with care, so as to identify the point at which Tim Jones, who had not initially contemplated dismissal as an outcome of the meeting, decided to dismiss. We noted that when he asked about the reputational issue, she switched to asking if there was any substance to the student complaints of discrimination at the Academy, and then to defending herself being quoted out of context, and academic free speech being in jeopardy. It was soon after that he asked to break, and sought advice whether he had power to dismiss, so we concluded it is these remarks which occasioned dismissal.

45. The claimant says that omitted from this note are other things she said in the meeting about the context of the remarks to which students had taken objection, namely that both of them knew colleagues at the Academy used the objectionable terms, that Neil Heyde had said students needed thicker skins, that other Academy employees at an orchestra she had recently played in used them, that her husband had recently heard the term "gypos" on the lips of a visiting lecturer at the Academy, and that her colleague Jo Cole had talked of discrimination in the real world in a professional development lecture she had given that term as if it happened somewhere else, that most of the Academy staff were also practising musicians and themselves responsible for some of the behaviour she had been talking about. These were not mentioned in the ET1 grounds of claim, nor did the claimant object at the appeal hearing that they had been omitted from the note of 3 November meeting, though she did object to the note saying she had been offered the disciplinary policy. They first appear in the list of issues prepared for a preliminary hearing for case management on the 20 September 2018, when they were allowed by Employment Judge Segal QC to stand as an amendment of claim, by adding them as a protected act for the victimisation claim. In our finding, on the balance of probability, the claimant did not say these things at that meeting. She may have said them on other occasions. She may well have been thinking them, then or later, and come to think now that that is what she must have said. If she had said them at the dismissal meeting, we would have expected at least some of them to have been noted, even if the notes are not complete, and we would have expected the claimant to have objected much earlier to their omission, as they concerned participation by Academy staff in a discriminatory culture, and were not merely a

statement that she was right to raise awareness of a discriminatory culture in the professional world *outside* the Academy.

46. Later that day the HR adviser wrote to the claimant confirm the outcome of the meeting. The respondent did not suggest the documents were intended to cause deliberate offence, or that the terms used were representative of her own views, but "the perception of the students concerned and the student union are of paramount importance… Sending the documentation in question to all students, without sufficient and relevant context, has resulted in numerous student complaints and caused significant damage to the relationship between the student body and the Academy. Regretfully, this has resulted in the loss of confidence and trust between student body and you within your first months of employment". This amounted to gross misconduct "due to a breach of trust and confidence and having brought the Academy into disrepute within your probationary period." (The letter is not explicit there was a loss of trust and confidence of the Academy in her). She was asked not to discuss the situation with the press, and advised of the right of appeal.

Public Statement

47. While the meeting with Tim Jones was going on, the communications team was drafting internal and external statements, which were finalized after Tim Jones told them the claimant had been dismissed. The internal statement circulated later that day said:

> "you may be aware that a new member of staff circulated an unauthorised document and follow-up email all students earlier this week. It contained one individual's observations on professional practice which do not represent the views of the Royal Academy of music. The contents of these communications were unacceptable and the member of staff has been dismissed from post with immediate effect".

The Tribunal notes that although the claimant was told her colleagues did not believe she held these unacceptable views herself, a reader of this document might not know that. The statement went on to say that the Academy was setting up two student-led groups to advise on equality and diversity, and: "these steps will allow us to shape professional practice within our field rather than just respond to the outdated inequalities which we know still exist".

48. A similar statement was made to the press. The Telegraph, whose reporter asked about the dismissal, was told: "we went through normal HR procedures which led to the dismissal of this member of staff."

49. It was put to the claimant in the Tribunal hearing that she had done nothing to assist students with how to handle the discriminatory culture they would meet outside the Academy. She responded she was seeking to raise awareness.

50. The claimant did not go to the press, though she did tell Norman Lebrecht that she was the dismissed lecturer. She did appeal.

Appeal against Dismissal

51. In a long letter, drafted with the help of her trade union (UCU), the claimant set out that her communications had amounted to whistleblowing on discriminatory practices in the industry, and that the Academy condoned such behavior, and was trying to cover up for whistleblowing. She also complained about the lack of process in dismissing her, as she had been ambushed, and of a disproportionate penalty. In giving a lecture and distributing the notes she was doing what was asked of her. Her very public sacking had compromised her teaching, and was taking a toll on her health.

52. The appeal was managed by Mark Racz, who, like Tim Jones, is a Deputy Principal. He decided it should be a rehearing. On 16 November Paul Riddell sent him a summary of student reaction as communicated to the student union. It was only given to the claimant at the appeal hearing on 21 November, when she said she would read it later as she did not wish to muddy her head. The hearing lasted an hour and a half. The claimant was represented by a trade union official. She stated: "as a direct result of reporting these behaviours in the classical music profession and simply because students became offended, **I** was dismissed". She had been sacked because of the media storm, and only 12 hours after sending Tim Jones the student document seen on Facebook. She had been unfairly blamed by the press statement, and she now had a reputation as a racist.

53. Mark Racz made a note to investigate four things: the accuracy of the notes, and whether they had been tampered with, that she had presented the same networking notes at interview in June as she had circulated on 30th October, whether she had been expressly instructed to send the notes out to all students, and that she was not told not to apologise for sending the notes to all students.

54. On 28 November he then interviewed Tim Jones and Neil Heyde. Tim Jones said the minutes were accurate, he had not told her to circulate the notes, she had not presented the notes at interview, and she had shown lack of judgement. Neil Heyde said she had made no mention of whistleblowing to him, and she had been told to send out a list of events, not lecture notes.

55. That same day, 28 November, the senior management team (the Principal, and three Deputy Principals) minuted that the appeal had been decided and the dismissal not overturned. Two days later, Paul Riddell interviewed Anthony Gritton, Gwen Tietze and Gemma Davies, five minutes each, on behalf of Mark Racz. Mr Gritton that she had not presented the notes at job interview, Gwen Tietze said she been told to circulate a list but not notes, and Gemma Davies, asked simply: "can you confirm whether yourself or TJ deliberately tampered with the notes?" (but not in what respect the notes might have been tampered with), denied they had.

56. On 6 December Mark Racz wrote telling the claimant her appeal was not successful. Her decision to circulate the notes, without an

accompanying explanation that she was seeking to highlight outdated practices and inequalities experienced by orchestral musicians, demonstrated a grave error in professional judgement. As a lecturer, it was incumbent on her to consider how her communication would be interpreted and to ensure that it there was a risk of offense or misunderstanding, the proper context was applied. As a result, he shared the view that the Academy and many of its students had lost confidence in her. She was not dismissed to silence her. She was dismissed because of the ill-advised circulation of the notes had damaged the Academy's reputation. Students had read the notes without context and that was the catalyst for the student reaction. "Regretfully this has resulted in the loss of trust and confidence of a significant proportion of the student body and has damaged the reputation of the institution; particularly due to the attention it had attracted on social media and from press. After dealing with details points he moved to the question of a lesser penalty – even if she had not been dismissed, a question would still have remained as to suitability for permanent employment. There was a concession on process, that she should be paid salary until the appeal hearing date.

Royal Society of Musicians

57. One consequence of the publicity of her summary dismissal was that the Royal Society of Musicians, a charity distributing grants to musicians in need, where the claimant was a governor, became concerned about her suitability. When her bid for reinstatement did not succeed, she was asked to resign. Ian Partridge, a trustee of the charity who is also a voice coach at the Academy, approached Tim Jones to find out the position. The emails show that Tim Jones stonewalled his enquiries.

Relevant Law

58. Because the claimant had been employed less than 2 years, she cannot bring a claim for unfair dismissal. We comment that on these facts, many might consider that the process of dismissal was unfair, but the tribunal can only consider the claim of wrongful dismissal, meaning, should the claimant have been dismissed with notice, or whether the dismissal was an act of victimisation under the Equality Act, or whether she was dismissed because of her sex, or whether it was automatically unfair if the sole or principal reason that she had made a protected disclosure (whistleblowing).

59. These are far more restricted claims, looking not at whether the dismissal was unfair, but at what the respondent's reason for it was. The Tribunal is required to make a careful evaluation of the respondent's reason or reasons for dismissing her - or subjecting her to other detriment. This is in essence a finding of fact, and inferences to be drawn from facts, as a reason is a set of facts and beliefs known to the respondent - **Abernethy v Mott, Hay and Anderson 1974 ICR 323 CA**, and **Kuzel v Roche Products Ltd (2008) IRLR 530, CA.** The real reason may not be the label attached to it by the employer, nor the reason advanced by ether party. It is for the Tribunal to make a finding – **Blackbay Ventures Ltd v Gahir (2014) ICR 747.**

60. In finding the reason, we have to decide whether any protected act (for the victimisation claim) or protected disclosure (whistleblowing claim) , or any difference in sex (for the sex discrimination claim) was the reason why the respondent acted as it did. In doing this we must be careful to avoid "but for" causation: see for example the discussion in **Chief Constable of Manchester v Bailey (2017) EWCA Civ 425** (a victimisation claim). However, it is not necessary to show that the employer acted through conscious motivation – just that, in a victimisation claim, a protected act (and in a sex discrimination claim, the difference in sex) was the reason for the dismissal – **Nagarajan v London Regional Transport (1999) ITLR 574.**

Protected Disclosures

61. Section 43B of the Employment Rights Act 1996 provides that for a disclosure to qualify for protection, it must disclose "information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following…(b) that a person.. is likely to fail to comply with any legal obligation to which he is subject", and the claimant identifies breaches of legal obligation to avoid age-related, racial and sexual harassment and discrimination.

62. There must be a disclosure of information, rather than a bare allegation, it need not identify the breach of obligation by name, provided it is clear from context what is meant. Breach of legal obligation means more than something being immoral or wrong**- Kilraine v Wandsworth LB (2018) IRLR 846, Korshunova v Eiger Securities LLP (2017) IRLR 115.** Reasonable belief is subjective (the worker must actually believe it) and objective (the belief must be reasonable). It must be believed to be in the public interest, not just in the worker's interest, but it can be about a section of the public – **Chesterton Global Ltd v Nurmohammed (2018) ICR 731**.

63. To qualify for protection, the claimant must make the disclosure to her employer; otherwise it is protected only in restricted circumstances, including those set out in section 43G (the section relevant in this case).

Were the Claimant's Disclosures Protected?

64. The first disclosure on which claimant replies is "the views and comment of other musicians recorded in the notes circulated on 30th of October 2017", mentioning "the boys", "gypos",and "superficial and ageist world". We agree that this is a disclosure of information, and that the claimant held a reasonable (based on her research) belief that it tended to show that orchestral musicians and sometimes fixers, ("a person") in their workplaces (where such behavior is prohibited), did or were likely to discriminate or harass in relation to protected characteristics of race, sex and age. It was made in the public interest, and expressly in the interest of the students who planned to work in professional orchestras, who are a significant section of the public, quite apart from the general public interest in the protection of those with particular characteristics from discrimination and harassment at work or in finding work.

65. The second disclosure relied on consists of the disputed remarks made by the claimant at the meeting on 3 November. Counsel for the claimant was clear that the claimant relied on the remarks as pleaded, and did not say that they were examples and that there might be other remarks of a similar character but not the same. In our finding these remarks were not made at that meeting, and the claimant has not established that these disclosures of information was made.

66. The disclosure must be made to the right person. By section 43C(1)(a) it is protected if made to the employer. In our finding it was not. It was made to the students, and her employer later became aware of it.

67. Failing a disclosure to the employer, under section 43G, the worker must show the information was true, that he did not make it for the purpose of personal gain, and that he made it *either* in the belief that he would be subjected to detriment if he made it to his employer, *or* that he had previously made a disclosure of substantially the same information to his employer. Finally, it must be reasonable for him to make disclosure in all the circumstances of the case.

68. The claimant satisfies the test of belief in its truth and no personal gain, but there was no previous disclosure to the employer. She relies on the presentation she made at interview, but in our finding, while she explained that establishing prestige, and that social interaction with fixers and other musicians, were at least as important for getting bookings as excellent playing, her interview presentation did not get near the level of detail to suggest to her interviewers that orchestral musicians and fixers tended to discriminate by reference to age, race or sex.

69. We considered whether the presence of staff at the lecture on 12 October made that lecture a disclosure. The claimant does not identify which staff or how many. We learned that the Academy has a very large number of hourly paid staff, largely for instrumental teaching. There is no evidence that any staff at a management level were present and the presence of some staff at the lecture did not make the lecture a disclosure to the employer.

70. It follows that the claimant has not established that she made a protected disclosure which qualifies for protection from dismissal and detriment.

Victimisation

71. Under the Equality Act 2010, workers are protected not just from discrimination and harassment because of a protected characteristic, but also from detriment if they complain of discrimination of themselves or others or assist in complaints procedures. Section 27 prohibits victimisation by A of B because –

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

72. The acts protected that are relevant in this case are, section 27(2):

(c) doing any other thing for the purposes of or in connection with this act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

62. The Claimant relies (1.1) on the circulation of the lecture notes on 30 October, (1.2) remarks made during the dismissal meeting on 3rd of November, or (2) on the respondent believing that she had done or might do a protected act. Our finding of fact removes (1.2), leaving the circulation of lecture notes and the respondent's belief that she had or might do a protected act.

63. We consider whether either of these is protected. The notes of 30 October do not openly complain of a discriminatory culture in orchestras. They indicate that it exists. In the explanatory email of 1 November, she says the discussion in the seminar was about inequality. The students drew that conclusion, even those who said the claimant did nothing wrong. We note **Aziz v Trinity Street Taxis Ltd (1988) ICR 534,** which held that a secret recording made in the hope of obtaining evidence to prove a suspicion of discriminatory treatment was capable of being a protected act. The question to ask is in **Durrani v L.B. Ealing UKEAT/0560/2012**, "there must be something to show it is a complaint to which at least potentially the Act applies". In any case, she can bring herself within section 27(2)(c), in that she did "some other thing" for the purpose of or in connection with the Equality Act, namely, she drew to the students' attention to some discriminatory terms that existed and which they might face in the music industry, so that they would be better able to deal with it. She did not explicitly, in the notes, give advice on how to handle discrimination, and on the face of it the thrust of the notes is about how to behave to get work, and the respondent argues that there must be something in the protected material to show that she did it in connection with the Act. Nevertheless, she said so in her email of 1 November, and the students read it as raising it (their criticism being, when they conceded that she might not hold these views herself) that she did not appear explicitly to denounce it). Raising consciousness of such behaviour is an important first step in challenging discrimination. Further, her use of the term "ageist" tends to show she was referring to age discrimination. We consider that it was a protected act.

64. There must be discussion of whether she was dismissed or suffered detriment because she circulated information about a discriminatory culture in orchestras, as distinct from student protest about what they thought was her attitude to discrimination. Before doing so, we consider the other protected acts.

65. On whether the respondent believed she had done or might do a protected act, having found that she did not make the comments in the 3 November meeting that she said she did, we considered whether what she did say in that meeting- asking sharply whether there was something hidden in the past she did not know about - led the respondent (here, Tim Jones) to believe that she was going to agree with the students that there was discrimination within the academy, not

just in orchestras, and state there was discrimination in the academy. The fact that in the research funding discussion she had raised social and racial inequality of access may have made him think her capable of it, and he remembered her "blunt opinions". It was put to Tim Jones in cross examination that her raising additional elements of discriminatory treatment was what led him to dismiss, and he indicated that he was not concerned with her raising of other discriminatory issues, he just wanted the students back to work first. This point was argued briefly in oral submissions, and there was no explicit reply by the respondent on this point. We concluded there was such a protected act: she wanted to talk about whether there had been discrimination as the students suggested, he was aware from past form (her comments on access) she might raise discrimination within the Academy, and so believed she might do a protected act by doing so. Again, we must consider what part this played in the decision to dismiss.

66. She then relies on two further protected acts:

(3) the circulation of DS's document on or around 2 November 2017, and/or its publication on Norman Lebrecht's blog, which: (i) referred to the sexist and racist language in the notes and alleged that they encouraged discrimination (ii) suggested that students had been subject to discriminatory behaviour by staff and students (iii) or for a working group on equality and diversity(iv) asked students for information about discrimination they had suffered

(4) the respondent believed that DS or Mr Lebrecht or another student or journalist had done or might do a protected act.

67. Neither of these was made by the claimant. On a plain reading of the Act she could not show she was victimised by the Respondent because of *her* protected act ("B does a protected act"), and she is cannot claim protection. The claimant argues that the statute should be read so as to conform with the European Directive, as the UK is obliged by the EU Treaty it has made to give effect to Directives in national law. The Equality Directive, 2000/78/EC, in the section on remedies and enforcement provides in article 11:

> Victimisation:
> "member states shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal and adverse treatment by the employer *as a reaction to a complaint within the undertaking* or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment". (emphasis added).

This is broader than the UK legislation, as it does not have to be the victim's complaint, but "a complaint within the undertaking".

68. The Tribunal has been referred to **Coleman v Attridge Law LLP (2008) IRLR 722 (ECJ)** and **(2010) IRLR 722 (EAT),** in turn setting out the principles established in **Ghaidan v Godin Mendoza (2004) 2AC 557** (which is about the ECHR, rather than EU derived law but the same principles apply), and to **Rowstock Ltd v Jessemey (2014) IRLR 722** for the discussions on reading UK statute in the light of EU directives;

finally **Thompson v The London Bus Company Limited (ET 2300125/14, and (2016) IRLR 9** as showing another employment tribunal considering it could be read to comply with the EU Directive in a victimisation case, and that point was not appealed to the EAT.

69. A court or tribunal must interpret domestic legislation "so far as *possible*…in the light of the wording and the underlying intention of the Directive" to give effect to the state's obligations under EU law - **Marleasing** (1990) ECR I – 4135 (emphasis added).

70. The limits of what is *possible* were set out in the principles in **Ghaidan**: even without ambiguity in drafting, it was possible to add words or interpret legislation to conform to underlying EU law, provided it did not conflict with underlying intention of Parliament, that is, it went "with the grain of the legislation". "If the court implies words that are consistent with the scheme of the legislation necessary to make it compatible with the Convention rights, it is simply performing the duty which Parliament has imposed on it and on others". A court or tribunal must consider whether there is anything *im*possible about interpreting the statute in a way which is compatible with the underlying thrust of the legislation, and not inconsistent with the scheme of the legislation. Doing this, it may want to consider whether, when enacting the legislation, there was a deliberate policy judgement to depart from the Directive, where it could otherwise be presumed the general legislative intent was to give effect to the EU law. In that case, it must not read the statute other than as plain text meaning what it says.

71. The respondent argues that these cases are not authority for redrafting section 27 to include complaints made by others. In **Coleman**, the ECJ had given a preliminary ruling that the words "on grounds of disability" was not limited to disability of the worker, and there is none here. Unlike **Rowstock,** where there was a complicated evolution of the legislation under consideration, it cannot be considered that the draftsman has accidentally left out complaints by others. Extending the protection to the complaints of others will require an ECJ ruling. Victims of such factual matrices are protected by being able to claim direct discrimination, based on the protected characteristic featured in the act of the third person, and so it is not necessary to extend the protection of victimisation.

72. The Tribunal does not accept that the claimant is protected by bringing a discrimination claim based on the sex or race or age of another. In **CHEZ v Komisia (2016) 1 CMLR 14**, an ECJ decision, a non-Roma could succeed on indirect discrimination where the disadvantageous treatment was aimed at Roma. It is hard to see how the claimant is protected if, when disadvantaged because someone else had complained of discrimination, she has to argue she was less favourably treated because of sex, race or age, the protected characteristics raised in the complaint. The latter may be very remote and hard to argue. She does appear to lack the protection required by the Directive if her treatment was "a reaction to" a complaint within the undertaking. We are also encouraged, when considering the respondent's suggestion that widening the floodgates cannot have been intended, that often the real issue is not whether the act is protected but whether the disadvantage

was because of the protected act. If the connection between the claimant and the protected act is tenuous, as may be the case where it relates to someone else's complaint, proving causation is likely to be the restriction on the flood.

73. Applying the principles set out in **Ghaidan** and **Coleman**, the section is not ambiguous, but it can to be amended to conform to the Dircective, by adding: "or a complaint (etc) of C where C is within the undertaking". It can be presumed that the Equality Act was enacted to give effect to the EU Equality Directive. The tribunal has not been directed to any material suggesting that the restriction of protection to B's own complaint (or B being thought to be making one) was a deliberate limit on the protection and a matter of policy. On that basis, we consider (3) and (4) are capable of being protected acts.

74. As regards DS's document, (or fears of similar documents) we must consider what is meant by "within the undertaking". An undertaking is defined elsewhere in EU derived legislation (TUPE) as an "organised grouping of resources", which can include not just employees and workers, but tools, premises, contracts with customers, goodwill and so on. It seemed to us that in an institution of higher education the students are so integrated into its everyday activity, and so integral to its purpose (which is to educate them), that they are "within the undertaking". They are, in the business model of higher education, customers who can choose where to take their fees and custom, and where the "student experience" can be measured and marketed just as "customer experience" is in retail, but they are more closely integrated than customers, and a better business analogy might be with the raw materials being processed in manufacturing. They are admitted by the institution to become part of it, they remain there for three years (for undergraduates) and at least a year for postgraduates. A complaint by a student of the institution about the institution or about its staff is, in our view, a complaint within the undertaking, and so capable of being a protected act.

75. We must also consider the publication of the text on the blog. The blog was not within the undertaking, but the writer did not purport to do more than advertise the complaint. The fact that the student response document promoted by DS was being publicised widely, and outside, concerned the respondent, but it was not a complaint outside the undertaking, just publicity of one within the undertaking. That must be discussed when looking at causation, and why the respondent acted as it did.

Gross Misconduct

76. Before we move on to the respondent's reasons to dismiss and their relation to protected acts, and other detriments, we consider the wrongful dismissal claim. Gross misconduct means misconduct so serious that it breaches the contract of employment in such a way as to relieve the other party to the contract of being bound by it. Most such terms are implied. A classic formulation of the implied term of confidence and trust between employer and employee was set out in **Woods v PWM Car Services (Peterborough) Ltd 1981 IRLR 347**, as approved

in **Malik v BCCI (1997) IRLR 468,** cases dealing with employer's conduct, as that a party to the contract must not "without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

77. Dishonesty and making a secret profit fatally undermine the relationship- **Neary v Dean of Westminster (1999) IRLR 288.** So does a failure to stop a subordinate undermining an important policy with staff – **Adesokan v Sainsbury's Supermarkets Ltd (2017) ICR 590**. In that case the employee knew or ought to have known that what was being done by the subordinate was a breach of part of its operating process, and "people got sacked for offending it and he knew that". It was a serious dereliction of his duty.

78. The test of whether misconduct was gross is an objective one, for the Tribunal to decide. It is not, as in unfair dismissal claims, about whether a reasonable (but mistaken) employer would consider it gross misconduct and decide to dismiss.

79. There was nothing in the claimant's conduct that showed disobedience: the Tribunal does not accept that she was instructed *not* to send the notes. She was not rebuked for sending other notes out. At worst she had misunderstood what she was supposed to do. In any case the respondent is clear she was not dismissed for disobeying any instruction, and she was not dismissed for sending out any these or any other lecture notes. She was compliant when asked to send a framing email. It was considered inadequate in the circumstances, and perhaps it was, but the discussion had been very brief, it was not defiant, it tried to do what was asked, and if the respondent feared she had not fully understood what was wrong with the "framing" of the lecture material, it would not have been difficult, in the circumstances (excitable students, new and inexperienced lecturer) to ask her to discuss the draft before it was sent out.

80. The respondent spoke of a "serious error of judgement", which is about whether she should have considered and anticipated that the text might cause outrage. We suspect that the use of the term "gypo", though explicitly referred to as a term they might hear, not one she used or even endorsed, inflamed all other reaction. In our finding, when it was suggested in some student response that she had discriminated, she was quoted out of context. More than that, the student response, in our view, and in that of some students, both those who had been at the lecture and those who had not, actually misrepresented what her notes said. Then, with some partial recognition by students that she did not hold these views herself, it was suggested she should have challenged these views. It may have been an error on the claimant's part to circulate notes to the entire student body, not just those on the course, without explanatory framing, but she did so in the understanding that the professional pathway was to be widely advertised to attract interest in the new focus on preparation for professional life after the Academy. We cannot see it as a serious error that she failed to predict a manufactured anger that she had raised the subject without indicating how it should be handled. We cannot see it as any error at all that she failed to predict

that students would add to this complaint that they themselves had been victims of discrimination within the Academy. It had not come to the claimant's attention in her student contact. There is no evidence of what the discrimination was that they complained of, so it is not shown how the claimant should have known that there was any background to be careful of. It was not reasonably foreseeable that students should complain of discrimination experienced within the Academy when complaining that the Academy seemed to condone - was not preparing them for - discriminatory attitudes in professional orchestras. **Adesokan** can be distinguished on the facts.

81. As for not being able to work with her to put together a plan to calm the students, as Tim Jones said he had hoped for but perceived to be hopeless, we did not conclude that on an objective view of what she said they could not have confidence in her: he had not said to her in terms he wanted her to help him devise a plan to get the students back to work, or that he lacked confidence in her, further, he had not picked up that she was upset by the public attack on her, which might preoccupy and distract her from understanding what he wanted. He complained she talked over him and wanted to talk of other things, or about getting the student disciplined, but this was a product of those particular circumstances, not a general problem, and on past form, once she understood what was wanted she would have done what she could to assist. The respondent did not say they had lost confidence in her, they said the students (or some of them) had lost confidence in her. This was a breach in the relationship with students that the respondent could, and did, repair by setting up diversity groups and (where discrimination within the Academy was alleged) inviting students to use the complaint procedure. It was not shown to us that dismissing the claimant was a necessary step in this process. We did not conclude that the mistake she made was so serious as to fatally damage confidence and trust in her. She may have been naive; she was certainly unlucky. If dismissed at all, it should have been on notice.

82. Some of this claim has been met by extending her pay to the appeal date, but there is a shortfall on the one month's notice to which she was by contract entitled in the first 12 months of employment.

Was Dismissal an act of Victimisation?

83. The Equality Act, at section 136, deals with burden of proof in claims under the Act: "if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred", unless "A shows that A did not contravene the provision".

84. In examining reasons in victimisation cases, we must heed the guidance already discussed on avoiding 'but for' causation, and also the cases that assist in victimisation and public interest disclosure cases particularly, where although the dismissal (or detriment) was closely associated with a protected act or disclosure, the employer's reason I argued to be something else. In **Martin v Devonshires (2001) ICR 352** the reason was not that discrimination was alleged but that the claimant by reason of mental illness did not understand that the allegations were

unfounded, or that she should desist from frequent repetition of them, and that was the reason for dismissing, not that she alleged discrimination. However Tribunals should be careful not to deprive claimants of protection for, say, "intemperate language or making inaccurate statements". In **Panayiotou v Chief Constable of Hampshire Police (2014) IRLR 500** initial complaints were taken seriously, and eventually resulted in action, but the claimant kept complaining: dismissing him was not because he made disclosures, but because he continued to wage a campaign long after the respondents had noted what he said. Other cases distinguishing the reasons for dismissal or detriment from the protected act or disclosure are **Aziz**, where although the secret recording hoping to get evidence of discrimination was a protected act, it was held that the respondent's objection to covert recording of fellow members of the association, not any suggestion they had discriminated, was the reason for detriment. In **Bolton School v Evans (2007) IRLR 140**, it was possible to distinguish misconduct (hacking to prove a point) from the disclosure, but "a tribunal should look with care at arguments to say the disclosure was because of acts related to the disclosure rather than because of the disclosure itself". Tribunals have also been warned, when employers seek to distinguish how complaints are made from the making of a complaint, of the "slippery slope" of failing to recognise that people do complain in sometimes unreasonable terms – though a case need not be "exceptional" to take claimants out of the protection of statute – **Woodhouse v West North West Homes (Leeds) Ltd (2013) IRLR 773**.

85. With this guidance, we turned to examine what part the various protected acts played in the respondent's reasons to dismiss and not to overturn the decision on appeal.

86. The first protected act is the notes as distributed to the student body. We did not think the reason for the claimant's dismissal was this distribution, though of course if she had done it, none of this would have happened. Their first response was to ask her to "frame" the notes and explain the source of her material. Neil Heyde recognised the students' sense of outrage was not merited (the "thicker skins" remark); it was just a question of entering a discussion. The explainer email was not all they had hoped, but at the start of 2 November, they were looking to get students to speak to those who had been at the lecture – David Gorton's proposal. It is not clear that the respondent thought the failure to explain required disciplinary action. It may have been considered, but even at the start of the meeting on 3 November, at most what they contemplated was a possible investigation into whether disciplinary action was merited. Although damage to reputation was the reason given, it is not clear that distributing the notes, so drawing attention to discrimination in professional orchestras, was the real reason why she was dismissed. Had it been, it might have been expected she would have been told earlier that this was to be a disciplinary meeting, or even a disciplinary investigation.

87. The game changer was the "Our Response" document (the third protected act). The meeting was set at a time when the draft had been circulated among students, they were all talking about it, and not getting

any practice done, and the fact that it was on Facebook (and possibly too on "Slipped Disc") was certainly known by the time the claimant was told on the evening of 2 November that a member of HR was to be present at the meeting, so that disciplinary action was being considered as a possible outcome, though not, in Tim Jones's evidence, on 3 November.

88. What was it about that document that concerned the respondent? The section dealing with the claimant's notes concluded by denouncing them as "active encouragement of racist, sexist and exclusive behaviours", discouraging musicians from speaking up. This was a view which mature and objective academic staff must have recognised as rant and hyperbole, deliberately or excitedly missing the claimant's irony about what was needed to get on in an orchestra. The way to deal with this was to encourage discussion, as they did, or to add to the series a lecture on how to handle discrimination (as may anyway have been planned for the second term, judging by the claimant's list). We could not see that this would lead to such concern about reputation as to lead to dismissal. To our mind, the real concern was the second part of that document, which moved on to speak of discrimination within the Academy. That was far more serious, a potential "Me Too" moment, where stories of sexual harassment or racially discriminatory remarks would emerge *en masse*, and the Academy would be overwhelmed with adverse publicity, which had only just begun. Even if every complaint that emerged was unfounded, harm would be done. Tim Jones's work with students to encourage them to use existing complaints procedures for anything that emerged indicates that managers' concern had changed focus. The Academy could live down lecture notes about life in the real world as a matter of education and discussion, but complaint that Academy staff discriminated was much more difficult.

89. As already noted, the turning point in the dismissal meeting came when the claimant started questioning whether the allegations of discrimination had any foundation in past events. The respondent's case is that this indicated the claimant did not appreciate she needed to be part of a plan to calm the students and get them back to work; it comes across as a moment of exasperation. The Tribunal view is that it was here that the claimant touched a nerve - that the Academy was being said by at least one student to have discriminated, a student who was publicly encouraging others to come forward - and she wanted to talk about that. Her dismissal was because of the student switch to talk of discrimination within the Academy, not because of the language of the lecture notes, or lack of judgment in circulating them. Without the student "Our Response" document, she would not have been dismissed, and this document was so closely associated with the dismissal, that it cannot be separated from it. It is not a case of "but for", but reason why.

90. The second protected act found was that the respondent believed she might do a protected act – when she started to question whether there was in fact discrimination within the Academy. Whether this was the reason why she was dismissed (if we are wrong in finding that the "Our Response" document is not in fact protected) must be viewed in the context where the students had turned the allegations towards discrimination by Academy staff – it is unlikely to have led to dismissal

on its own. Nevertheless, the context is such that where, far from supporting senior management trying to calm the student body, she appeared to be joining the students in making accusations, that too was a reason why she was dismissed when that had not otherwise been intended.

91. We comment that with more reflection, and a meeting where each side better appreciated the upset of the other, this may not have happened. But we did conclude that the claimant was dismissed because of the third protected act, and because of the second protected act made, as it was, in the context of the student allegations of discrimination. The respondent sought to argue she was being dismissed for poor judgment – that she had caused the mess – and that this should be distinguished from what she had or had not said about discrimination. We did not agree that it was about her poor judgement in circulating the notes. She was dismissed because allegations were being made that Academy staff had discriminated.

92. An appeal is an opportunity to reconsider a decision, this time with proper discussion and time for reflection, especially where an initial decision has been made in haste and without process. Unfortunately, this appeal was not treated as an opportunity to make the decision afresh. The investigation – say, into what was normal practice in distributing notes – was scant. Some of it was token, being done after the decision to turn down the appeal had been made. It focused on particular points, rather than being a rehearing. It did not consider to what extent the students were justified in complaining about her, or whether an institution of higher education should see it as an opportunity to teach critical thinking, or to defend the expression of views contrary to received opinion. The reason for dismissal remained the view taken by Tim Jones, and was not altered by the process of appeal.

Other Detriments as Victimisation

93. It is alleged that failing to follow a disciplinary procedure (and there was one for staff still on probation) was because of a protected act. In our view this is established for the same reasons as we found dismissal an act of victimisation. The procedure was not followed (notably in failing to tell her dismissal was contemplated and might be an outcome) because dismissal was not intended, and so when dismissed without procedure, it was because of the protected acts. For the same reason, she was denied the right to be accompanied at a disciplinary meeting. Both were to her detriment because with calm and preparation on both sides, dismissal may have been avoided. We were surprised that the Telegraph was told she had been dismissed “following normal HR procedures”, when the procedures departed so much from normal process. We add to that the appeal decision. In our view the absence of any serious reconsideration means that the appeal failed for substantially the same reason as the dismissal.

94. The public statement was detrimental because while the Academy did not think the claimant held the discriminatory views to which objection had been taken (and said so in the dismissal letter), it held out that “the contents of these communications were unacceptable”, which without

further explanation would lead an uninformed reader to think she had herself espoused objectionable views. It was therefore damaging to her reputation. It was drafted by someone who perhaps did not like the claimant very much and thought her overbearing, but it was approved by managers immediately after the dismissal, and in the same context, that students were complaining of the claimant's documents and of discrimination within the Academy in the same breath, as it were, and in our finding it was because of the second protected act.

95. The next two detriments are about discussing the appeal with Ian Partridge and Ian Partridge telling the Royal Society of Musicians that he had done so. The respondent did not in our finding tell Ian Partridge more than he had picked up on the grapevine. If the claimant suffered detriment as a consequence of the dismissal and failure of the appeal – by being asked to resign as a governor – it is likely to have been as a consequence of the dismissal and the public statement, and something to be considered when assessing compensation for injury to feelings. It did not occur directly because of protected acts.

96. Finally, the subject access request (SAR). The claimant made the request on 7 December 2017. She was told on 15 January (and we note the intervention of the Christmas vacation) that it was ready for collection. This amounted to over 1,500 pages. The claimant said on 5 February some items were missing. A search was made, and she was told on 19 February there was additional material to collect. On 26 February she was told 3 pages of handwritten notes had been found and could be collected. A query about search terms was answered on 9 March, and a complaint on 23 March, and another on 13 April, and another on 30 April. The letters are courteous and full. The claimant referred her complaint about the adequacy of disclosure of data to the Information Commissioner, who declared on 4 July 2018 that all data had been supplied in accordance with the Act. One (hard copy) letter of support for the claimant from an outsider was later found among the Principal's papers and was sent to her. We could not see from this that the respondent had delayed or restricted its searches, or that the claimant had been subjected to detriment in their handling of her SAR, let alone because of protected acts.

Sex Discrimination

97. Section 13 of the Equality Act prohibits direct discrimination where "A treats B less favourably because of a protected characteristic", in this case, the difference in sex. The claimant argues in the alternative that all the detriments to which she was subject were because she was a woman. She points in particular to conflict with Tim Jones over funding, and then the dismissal, and to the fact that the three academics on the senior management team (the two non-academics are women), and both those who decided to dismiss her and her appeal, are men. Applying the reverse burden of proof in section 136 we considered what had been proved and whether she had established a prima facie case requiring explanation. We accept as a general proposition and based on experience that gender socialisation means that some men can better tolerate assertive behavior from a male subordinate than they would of a female. We see that all the decision makers – including her line

manager – were men. We lack any information on how any actual male colleague has been treated. We have to construct a hypothetical male who behaved as she did and was dismissed without process, and so on. We do know that the claimant was particularly assertive, so much so that her behavior had attracted a complaint, not from men, but from two women colleagues, after the 20 October meeting. If a man had behaved as she did in this meeting, the two women are likely to have complained of that too. This suggests that the way she behaved could be regarded as out of order by women as well as men. In the absence of other factors suggesting the difference of sex was material, the claimant's assertive behavior did not receive less favourable treatment because of any gender stereotyping; or that this perception of her behavior was a reason for dismissal. In the light of this we concluded the claimant had not established facts from which we can make an inference establishing a prima facie case requiring explanation from the respondent. She was not dismissed summarily because she was a woman.

Failure to be Accompanied

98. Section 10 of the Employment Act 1999 provides that where a worker is invited by his employer to attend a disciplinary or grievance hearing, and he reasonably requests to be accompanied the hearing, that request should be accommodated. The ACAS Code on Discipline and Grievance goes further (paragraphs 9 and10), providing that if there is a disciplinary case to answer, the employee should be notified in writing, and "the notification should also advise the employee of the right be accompanied at the meeting".

99. The respondent argues that the claimant made no request to be accompanied, so she was not refused a companion, and there is no breach.

100. On the facts, the claimant was wholly unaware this was to be a disciplinary meeting. Telling her late at night that HR might be present next day does not tell her it is a disciplinary meeting – it might be an investigation. Indeed, according to Mr.Jones, he did not set it up as disciplinary meeting, intending only to investigate, and it only became one after the break. It cannot be right that a worker can be deprived of the right to be accompanied at a disciplinary hearing simply by not telling him it is a disciplinary meeting, so he does not know to bring a companion. It was open to the Respondent to adjourn and tell the claimant they were considering disciplinary action and why, so she would know or find out that she had a right to a companion, even of they did not also heed the ACAS Code and tell her she had the right to be accompanied.

101. The complaint is well founded, and we award two week's pay. This is the maximum, and is awarded because this was not a technical breach, or a dispute over whether either side acted reasonably in the making of arrangements. It was a wholesale overriding of the statutory right. Had she known, she is likely to have arranged a companion, as she did at the appeal hearing when she took a trade union representative, and at the very least the parties would probably not have been so much at cross purposes in the discussion.

Contribution

102. By **Way v Crouch (2005) IRLR 603**, a reduction to awards for contributory negligence can be made in equality cases as in common law claims for damages: "the award of compensation in a sex discrimination case (and by analogy in other discrimination claims) is subject to the Law Reform (Contributory Negligence) Act 1945 which allows for reduction in compensation in tortious claims where the claimant's conduct itself amounts to negligence or breach of a legal duty and contributed to the damage".

103. The claimant did not intend the consequences of distributing her notes. They were ironic in tone, intended to covey the real world in which instrumentalists and singers would have to find work and build a career, and how to behave to get on in precarious world of sessional booking (an original gig economy). It was suggested that she had disobeyed orders, but we think distributing notes widely was unobjectionable in itself, and is practice followed at other institutions – Neil Heyde said he had not seen it done in his 25 years at the Academy, but the development of electronic communication has radically altered practice in 25 years; the claimant had at UCL received all sorts of unrelated lecture notes by email – science subjects for example. She was compliant with her managers' requests. At the appeal stage she said she had been forced against her better judgment to distribute them, but we think this is revision with hindsight, and that she gave the matter no thought at the time, and was concerned only to generate take-up of the Professional Development Pathway, as encouraged by the respondent's managers. The respondent has always criticised her decision to send them out without "framing", to explain their purpose. Although the respondent dissociated itself from the content in the public statement, they appeared to agree she accurately represents the life of (some) orchestras. At most the claimant can be accused of foolishness in failing to anticipate how a superficial readership might wrench some of the terms out of context and manufacture a sense of outrage that was entirely disproportionate (on a plain reading of her notes and email) to the document's plain intent. The good feedback from the lecture as delivered, seen to have been stimulating, may have lulled her into thinking it would be read as intended. Some (a very small proportion) of the content was provocative, an old pedagogical technique to stimulate interest. On the other hand, she was a woman of mature judgment, who had been in education in London, at least part-time, for some years, and so familiar with the culture of protest and activism in which isolated terms can be seized on and misrepresented by a minority as condoning or encouraging the behavior it describes, all magnified in influence by social media. To that extent only - that she should have considered more carefully how her words might read if taken without introduction to the lecture material and out of context, and should have edited them with that in mind– was she in any way negligent in her duties as a lecturer and so at fault in contributing to what occurred.

104. After anxious debate, and reflecting that she was new and

inexperienced as a lecturer, we concluded that there should be a reduction to reflect some foolish want of judgment in failing to anticipate how her notes might be read by a younger generation, but that it was not more than 10%.

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Employment Judge Goodman

Date 13 November 2018

JUDGMENT SENT TO THE PARTIES ON

14 November 2018

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FOR THE TRIBUNAL OFFICE