



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Robertson  
**Respondent:** University of Cumbria  
**Heard at:** Carlisle                      **On:** 18, 19 and 20 March and 8 April, 2019  
**Before:** Employment Judge Nicol

## Representation

**Claimant:** appeared in person  
**Respondent:** Mr J Crosfill, Counsel

# JUDGMENT

After hearing the parties, the judgment of the Tribunal is that the claimant's complaint that he was unfairly dismissed is not well founded and is dismissed

# RESERVED REASONS

1 At the end of the hearing, the Tribunal gave its Judgment but reserved its Reasons for the Judgment. These Reasons set out the Tribunal's findings in support of its Judgment.

2 This is a complaint by Maxwell Robertson, the claimant, against University of Cumbria, the respondent, arising out of his employment by the respondent as a senior lecturer. The claimant alleges that he was unfairly dismissed by the respondent, which the respondent denies. The claimant's employment with the respondent commenced on 13 September, 1999, and the effective date of termination was 10 January, 2018, when the claimant had been in continuous employment for eighteen years.

3 Having read the claimant's claim form, at the start of the hearing the claimant was asked to confirm whether he was intending to pursue a complaint under the Equality Act, 2010, and he confirmed that he was not. Accordingly, the Tribunal was conducted and the Tribunal's deliberations proceeded on that basis.

4 From the outset of the hearing, the Tribunal was aware that the respondent's representative would have problems if the hearing could not be completed before the end of April, 2019. However, this did not affect the manner in which the Tribunal approached the hearing and neither party raise any complaint that they were being placed under undue time pressures.

5 The issues for the Tribunal to decide were set out in a preliminary note prepared by the respondent and which was accepted by the claimant. Briefly, both parties accepted that, at the relevant times, the claimant had been an employee of the respondent. The respondent admits that the claimant was dismissed and contends that this was on the ground of capability. In the alternative, the respondent contends that the dismissal was for some other substantial reason, the breakdown in the working relationships between the claimant and his junior colleagues. The Tribunal must decide whether this was the ground for dismissal and whether the dismissal was unfair. If the claimant was unfairly dismissed, the Tribunal must consider whether the claimant caused and/or contributed to the dismissal or whether there are any other factors that might affect the remedy to which the claimant might otherwise be entitled and the appropriate remedy, if any.

6 The Tribunal heard evidence from the claimant and from Dr Signy Henderson, Dean, Professor Patricia Livsey, former deputy vice chancellor, Michael Mitchell, principal lecturer, David Chesser, chief operating officer, on behalf of the respondent. The witnesses gave their evidence in chief by submitting written statements that were read by the Tribunal before the hearing and confirmed on oath/affirmation and, as permitted by the Tribunal, answering supplemental questions. All witnesses were cross-examined. The Tribunal had before it a bundle of documents in three volumes, marked 'Exhibit R1'. Both parties made oral closing submissions by reference to skeleton arguments. From the evidence that it heard and from the documents that it saw, the Tribunal finds the following facts.

7 The bundle is in excess of 1300 pages, it is not necessary or practicable to set out details of all documents in these Reasons but they were taken into account throughout the hearing and during the Tribunal's deliberations.

8 The respondent is a relatively small university. It considers itself to be in a competitive market where it is in competition with similar institutions to attract students. It sees providing student satisfaction to be a key aim because there are publicly accessible ratings that compare the satisfaction provided to students and which will influence potential students in their selection processes. It therefore seeks to avoid, so far as is practicable situations that might have an adverse effect on its ratings. For example, student dissatisfaction with the performance of a lecturer could result in the university receiving a low student satisfaction rating.

9 Within the university teaching employees there is a management hierarchy. Lecturers are divided between various teams, each of which has a particular specialism. These are responsible for designing courses within their areas of expertise, developing marking systems and delivering courses. It is important that each team works together to produce consistent results across the team and meets the necessary deadlines.

10 The respondent has a performance improvement policy which is used if it is considered that an employee is not performing to the desired standard. If the employee fails to show the necessary level of improvement, he/she will proceed through three stages designed to encourage and develop appropriate improvement. The procedure can be stopped at any stage, if the employee shows the necessary improvement, but, if that is not achieved by the end of stage three, dismissal is an option.

11 The bundle before the Tribunal also included the respondent's academic procedures and processes, the external examiners handbook and the human resources managers guide disciplinary policy.

12 To understand the manner in which this matter developed, it is necessary to deal with some of the previous issues that had affected the claimant. The claimant was employed as a senior lecturer. Prior to the events referred to below, the claimant appears to have had a good reputation as a lecturer and as a developer and presenter of courses. However, there were occasional problems in respect of his personal relationships with colleagues and students. These included allegations that he was disinterested during class sessions and that he had fallen asleep during one.

13 In 2015, the claimant commenced a relationship with one of his mature students. He reported this to his then head of department and his principal lecturer. The claimant was not told to terminate the relationship but he was asked to keep the relationship separate from his work and not to tell anyone else at the university, whether employees or students. Despite this, the claimant made his relationship a matter of public knowledge at the university. The claimant also discussed aspects of his sex life with colleagues in a manner which made them feel uncomfortable. All of this led to Mr Mitchell writing a letter to the claimant dated 26 October, 2015. Although this was not intended to form part of disciplinary action, it contained a strong warning to the claimant if he failed to comply with the instructions that he had been given.

14 The claimant had been under considerable pressure at work and the respondent agreed to engage two part-time lecturers to support him. These were Graham Glease and Katy Little. Although Ms Little had some previous senior experience, both were junior to the claimant and he was their course leader. As such, he was expected to lead course development, set work timing for matters such as marking and allocate tasks, such as marking.

15 The claimant telephoned and visited Ms Little at home and was said to have engaged in inappropriate conversations with her. The claimant accepted that he had acted inappropriately and was offered support through the employee assistance scheme.

16 Mr Glease raised issues about course marking and the attempts made by the claimant to improve grades of a small group of students, which included the student with whom he had had the relationship. Among other things, the claimant was seeking to involve an external examiner in a way which was not permitted.

17 The complaints about the claimant led to him facing disciplinary action. Ruth Harrison-Palmer, head of department, conducted an investigation. She reduced six initial allegations to two. The disciplinary hearing was conducted by Jessica Robinson, director of academic quality and development, and the outcome is set out in a letter dated 20 September, 2016. Two allegations were considered in relation to the claimant coaching the student with whom the claimant had had the relationship and the marking of students' work. In respect of these the claimant received a written warning. It was also recommended that the claimant be removed from programme leadership for a year and that he participate in a performance improvement programme.

18 It was clear that the claimant had problems in his relationships with Mr Glease and Ms Little and that these problems were not assisting with their working relationship.

19 As a result of the disciplinary action the claimant was suspended from being a course leader for a year and his role was given to Ms Little. Also the claimant was allowed time out from working in the respondent's premises. It was also decided that the claimant should participate in a performance improvement programme. The claimant did not appeal against the outcomes and did not suffer financially from being relieved of the position of programme leader.

20 By this time, the claimant's relationship with the student had ended. However, the student had resumed a relationship with a former boyfriend who was a student in the year below her and taking a course in which the claimant was involved. This further complicated the situation for the claimant. He was not expected to lecture to their two years, although he was permitted to lead special projects involving them so long as he did not grade their work. Effectively, this left him with only the students in one year to whom he could lecture.

21 Dr Henderson took responsibility for the claimant's performance improvement programme because of perceived problems in his relationship with Roddy Hunter, director of the Institute of the Arts. Dr Henderson was the line manager of the heads of the Institute of Arts and the department of Business, Law, Policing and Social Sciences within the respondent, which include the claimant and his team. She had not met the claimant before she became involved in the claimant's performance improvement programme. She had not been involved in the disciplinary process although she had had some involvement in the areas of concern about the claimant's conduct.

22 The first meeting between Dr Henderson and the claimant in respect of the performance improvement programme took place on 29 September, 2016, and 4 October, 2016. The claimant received notice of the meeting in a letter dated 21 September, 2016, and took place over two days. In advance of the meeting, Dr Henderson had read relevant documents. The main areas that were addressed were the claimant's understanding of the respondent's assessment regulations and their operation and his relationships with staff, especially those in his team. At the meeting, the claimant was accompanied by his trade union representative, Ashley Tiffin. Dr Henderson was accompanied by Margaret Johnston, HR business partner, and Shell Lemm, assistant HR business partner, acted as note taker.

23 There is a lengthy process for assessing the work of students which was explained in the evidence and did not appear to be in dispute. The process leads to marks being confirmed by the module assessment board. The claimant had been noted to have told the programme administration team that some marks from the board were wrong and needed to be changed. However, these marks can only be changed after a formal process with the chair of the board signing off the changes. The claimant did not follow the correct procedure and raised far more queries than would normally be expected. He attributed the errors to the original marking being carried out late at night under considerable pressure. This had resulted from poor time management and/or preparation by the claimant resulting in the pressure on him and Mr Glease.

24 During the meeting, the claimant attempted to explain how he had arrived in the situation that he was in and the pressure that he had been under. However, he could not adequately explain why he had not been able to plan ahead, knowing when assignments had to be completed and the team resources that were available to assist him. To a large extent, the claimant sought to deflect blame away from himself and to move the discussion away from the issues that were of concern.

25 It became apparent during the discussion that the claimant was using an unofficial website for work related purposes and that some of the information on it was confidential and should have only been available through the respondent's official website, if it was to be available at all. Dr Henderson understood that this was the subject of separate discussions and that the claimant had been instructed to migrate his website to the official one. This became a continuing problem which was not resolved for a considerable time because the claimant found excuses for not doing as instructed. Eventually, he took his website down in an afternoon, working at home because he said that the respondent's facilities were not adequate.

26 Dr Henderson identified that the claimant's office was in a classroom used in connection with his courses. She considered that a different office would be more appropriate to assist with building relationships and to allow higher confidentiality. The claimant and his representative appeared to be agreeable to this.

27 The meeting discussed Dr Henderson's proposed improvement plan.

28 The first part of the plan concerned the assessment regulations. In due course, the claimant satisfied Dr Henderson that he had improved sufficiently under this heading.

29 The second part was concerned with collegial relations. Dr Henderson saw Mr Glease and Ms Little to understand why they had made their complaint about the claimant. Matters covered included lack of forward planning, inappropriate contact and discussion of personal matters. Partly as a result, Dr Henderson wanted to see that the claimant respected personal boundaries. She also wanted to see the claimant effectively teaching the year that was available to him. Further, Dr Henderson wanted the claimant to play a significant part in the redevelopment of courses.

30 The next area was for the claimant to participate and, where appropriate lead, effective communication within the team which needed to collaborate in a major validation for a degree course. The deadline was approaching and the claimant had not involved his other team members.

31 The final area was the need for effective and constructive relationships with managers. This particularly related to Mr Mitchell and Mr Hunter. It was because the claimant's relationship with Mr Hunter had broken down that Dr Henderson was involved in the performance improvement programme.

32 Dr Henderson confirmed the outcome of her meetings with the claimant in a letter dated 14 October, 2016.

33 Review meetings were arranged fortnightly. The claimant was always allowed to have his trade union representative with him, if he so wished. Dr Henderson found

these meetings difficult because the discussions tended to be circular with the claimant wanted to look back at past events. Although the claimant could cite instances of saying 'hello' to colleagues, he was unable to show that he was actually repairing relationships. The claimant was unable to accept negative feedback or to show that he was developing.

34 During the programme, Dr Henderson held a facilitation meeting with the claimant and Mr Mitchell. When Mr Mitchell set out some interactions that he felt showed a lack of judgment or non-compliance from the claimant, the claimant sought to justify himself rather than see how things might be improved. The claimant was not very active during the meeting and said that he did not have a problem with Mr Mitchell.

35 They tried to discuss returning the claimant to a bigger workload but he wanted to look backwards rather than towards the future.

36 A mediation meeting was arranged between the claimant, Mr Glease and Ms Little, with Peter Horrocks as mediator. It was not possible for an agreement to be reached at the end of the mediation. The parties intended that the mediation would be confidential to those present but the claimant tried to break confidentiality in some of his meetings with Dr Henderson.

37 Dr Henderson held discussions with the claimant, Mr Glease and Ms Little that resulted in an expectations agreement that was agreed by all of them. This was intended to assist all of them in their relationships and to set boundaries for their communication with each other.

38 Subsequently, the claimant has claimed that he fulfilled his part of the agreement but that others did not. In particular he said that Ms Little did not hold team meetings in the manner intended. However, he never complained about this during the regular meetings.

39 The stage 2 review meeting was held on 18 January, 2017, following an invitation contained in a letter dated 20 December, 2016. The claimant attended with his trade union representative, Iain Owens.

40 The claimant was not prepared to discuss his relationships with his managers because he had raised a grievance concerning Mr Hunter. This related to comments made by Mr Hunter during the course of being interviewed during the disciplinary process involving the claimant. He suggested that the claimant was incompetent. Mr Hunter accepted that his choice of words was inappropriate but considered that the claimant's behaviour had fallen below the expected standard. Following the grievance, Dr Henderson conducted a facilitation meeting between them when they agreed to act collegially. Both of them appeared satisfied with the outcome.

41 With regard to the first part of the plan, Dr Henderson considered that the claimant was prone to put up barriers. He had failed to attend or book workshops because he was unsure as to his future diary commitments, although they could have been booked and cancelled, if necessary, without penalty to him.

42 In respect of part two, the expectation agreement was discussed. The claimant also raised an issue concerning keys. His office had been moved and he had been issued with a set of master keys to allow him to get access. He had now been asked to return them. The claimant regarded this as suspicious and that it had been instigated by Dr Henderson. He had not approached Dr Henderson about this. The action had not been initiated by Dr Henderson. The claimant was assured that it was normal not to have master keys issued and that he could simply request copies of the keys that he actually needed.

43 There was also discussion on team relationships. Whilst the claimant appeared to accept that Mr Glease had faced problems, he then blamed Mr Mitchell for lack of support and suggested that late marking was the norm so that Mr Glease did not have cause for complaint.

44 With regard to the third part, the claimant seemed reluctant to make decisions for himself. He had delayed providing feedback to students without any real reason. It was taking a long time to agree a teaching timetable with the claimant. The claimant was looking at minor details without giving proper consideration to the main issues.

45 Dr Henderson decided to extend the review period for a further four weeks. This was confirmed to the claimant in a letter of 20 January, 2017. She also arranged for a mentor for the claimant although this was not set up very quickly.

46 On 27 January, 2017, Mr Owens requested further details of the reasons to extend the review period and these were provided the same day.

47 A further meeting between the claimant and Dr Henderson took place on 3 February, 2017. The claimant attended without his trade union representative but was willing for the discussion to take place.

48 A range of issues were discussed. These included a problem raised by Ms Little. She said that the claimant had told her that Dr Henderson had instructed them to socialise more. This was a misinterpretation of guidance from Dr Henderson that the claimant should engage more productively with his team.

49 A performance review meeting was held on 15 February, 2017. The claimant attended with Mr Owens. Dr Henderson was accompanied by Ms Johnston and Debbie Hurst, assistant HR business partner, took notes. The main issues that Dr Henderson found were that

- 49.1 The claimant was passive in his approach to picking up responsibilities, even though he had a limited teaching load
- 49.2 The false assumption made by the claimant about the keys without taking any steps to sort the matter out
- 49.3 The ongoing issue of the unauthorised website
- 49.4 The claimant's issues with Mr Hunter, despite the resolution of the grievance, and Mr Mitchell.

50 Dr Henderson formed the view that the claimant had not made sufficient progress and that stage 3 of the performance improvement programme should be invoked. This was confirmed in a letter dated 22 February, 2017.

51 The claimant appealed against this decision but the appeal was delayed because the claimant commenced an extended period of sickness absence due to stress. It was eventually heard on 22 June, 2017 and 3 July, 2017, by Professor Robin Talbot, the then institutional strategic lead for health and wellbeing, accompanied by Ms Johnston, who also acted as note taker. The claimant was accompanied by Mr Owens. Between the sessions, Professor Tobin conducted further enquiries.

52 The claimant raised a series of challenges to Dr Henderson's findings and she was able to provide responses to each of them. Professor Talbot dismissed the appeal whilst partially upholding some of the grounds of appeal.

53 This left the claimant with a final written warning and the need for stage 3 of the performance improvement programme to be commenced. Although stage 3 would normally take place over four weeks, Professor Talbot recommended that this period be extended to two months having regard to the claimant's then state of health.

54 Mr Mitchell was responsible for managing the claimant's absence and his return to work. They met several times during the absence.

55 A problem arose because the claimant's general practitioner considered that he was fit enough to return to work but the occupational health adviser did not. At a meeting held on 27 September, 2017, the occupational health adviser, Dr Muir, expressed concerns about the work situation that the claimant would return to and the need to resolve outstanding problems with the view that, if they could not be resolved, termination of employment might become an option.

56 Mr Mitchell considered that the claimant was treating himself as a victim and was not addressing the issues that had ended with him being in his current position.

57 It was subsequently agreed that there would be a phased return to work despite the views of occupational health. It was during this phased return that the facilitation meeting with Mr Hunter took place.

58 As part of his return to work, the claimant was asked to attend a welcome meeting for new students. The claimant did attend but did not engage with either students or staff.

59 Mr Mitchell was asked to work with the claimant on stage 3 of the performance improvement programme and to undertake the review. It was agreed that the programme would not be invoked during the four weeks of the phased return. However, Mr Mitchell did have regular meetings with the claimant during this period to discuss his progress. He also arranged for the claimant to be moved to an office nearer to his own to improve contact between them.

60 As a result of discussions between Mr Mitchell and Ms Johnston, it was decided to keep to the normal period of four weeks for stage 3 of the performance improvement



programme because it was felt that this was sufficient time and the delay in resolving matters was not assisting the department.

61 On 21 November, 2017, Mr Mitchell held a meeting between himself, the claimant, Mr Glease and Ms Little to try to improve their relationships. Before the meeting, Mr Mitchell suggested to the claimant that he should apologise for the problems that he had caused the others. Even though Mr Glease and Ms Little described the problems they had had during the meeting, the claimant did not apologise but attempted to suggest that what he had done was for their benefit to prepare them for future leadership.

62 One successful outcome of the meeting was that the claimant would take responsibility for a teaching project. This was to be with students who had previously complained about the claimant and who did not want to work with him. They suggested that he had his lunch instead of giving them a lecture. Mr Mitchell met the students and persuaded them that they should give the claimant another chance to demonstrate his expertise.

63 The areas requiring improvement in stage 3 of the performance improvement programme were

- 63.1 Maintaining collegial relations with team members to underpin effective teaching and curriculum development
- 63.2 Participating in and where the context requires, leading (such as module leadership) effective communication in the teaching team
- 63.3 Effective and constructive relationships with managers in the Institute of Arts.

64 On 15 December, 2017, a student reported that the claimant had fallen asleep during a presentation that was of importance for marking purposes. The student was one of those who had objected to the claimant teaching them. This was not the first time that a complaint of this nature had been made about the claimant.

65 Mr Mitchell took the matter up with the claimant and was disappointed with his reaction. Initially, the claimant denied that the incident had occurred. He was more interested in himself and did not show any concern about the student or the impact that the incident may have had on him.

66 In another incident, the claimant was reported to have been seen by students sitting on the floor in a corridor. The claimant said that he was going to a meeting with Mr Glease and Ms Little but they had not been at the meeting location so he just sat in the corridor to wait. The claimant did not see anything wrong with this but it was unexpected behaviour that caused comment among students.

67 In a further incident, the claimant entered Mr Glease's class without invitation. This is considered unprofessional, unless it is done with very good cause, such as an emergency. It was especially bad because of the need for the claimant to improve his relationship with Mr Glease.

68 At a meeting on 30 November, 2017, the claimant expressed the view that he was not wanted in their office by Mr Glease and Ms Little. Mr Mitchell explained that there was a difference between not wanting to share an office with him and not wanting him to enter their office.

69 The claimant did engage in an activity that Mr Mitchell asked him to pursue within Media Arts.

70 Professor Livsey was asked to conduct the stage 3 review meeting and received comments from Mr Mitchell which included references to the matters referred to above.

71 Professor Livsey has considerable experience in nursing and lecturing. Until she conducted the stage three hearing, she had not been involved in the performance improvement programme in respect of the claimant. She considered that her role was to review the stage three of the performance improvement programme and to consider the extent of any improvements that had been made during that stage.

72 The review meeting was arranged for 3 January, 2018, but was moved to 4 January, 2018. The claimant was accompanied by Iain Owens and Professor Livsey was advised by Ms Johnston. Ms Hurst acted as note taker.

73 The main areas of discussion were the maintaining of collegial relations with team members to underpin effective teaching and curriculum development and the claimant's participation in and leading effective communication within the teaching team.

74 Mr Mitchell attended and provided his account of what had happened during stage three. Professor Livsey was satisfied that Mr Mitchell presented a reasonable account that did not show any bias towards the dismissal of the claimant. Mr Mitchell considered that there had not been sufficient time after the claimant's return to work to assess his involvement in teaching and curriculum development. Professor Livsey was concerned about the claimant's collegial relations and the extent of effective communication within the team.

75 With regard to the allegation that the claimant had fallen asleep during a presentation, Professor Livsey formed the view that the claimant wished to challenge this rather than show any concern for the student in question. He then raised two possible medical reasons as to why he might have fallen asleep, if he did.

76 Professor Livsey noted that when discussing a team meeting, the claimant did not appear to recognise how the way in which he had conducted himself both during the meeting and previously had impacted on the team. The mediation process did not seem to have achieved much progress in respect of their relationships and the claimant did not demonstrate much empathy for his junior colleague's feelings. The claimant was not always acknowledging his colleagues when they passed in the workplace.

77 The claimant did not give the impression that he understood why him sitting in the corridor should be a cause for concern. The claimant thought that it was alright for him to do this whilst waiting for colleagues without realising the impression this created and the effect it might have on students.

78 Similarly, the claimant did not appear to understand why walking into another lecturer's class was a problem, particularly when his relationship with that lecturer was poor in any event. When they had shared facilities, this was sometimes necessary but that had a procedure that worked at that time. However, the situation had now changed.

79 On a brighter note, Professor Livsey accepted that the claimant's relations with managers showed positive indications of a professional working relationship.

80 Professor Livsey adjourned the meeting to consider her decision. She accepted that individually many of the matters complained about would not be sufficiently serious to warrant dismissal. However, taken together they showed that the relationship between the claimant and his team was broken and that the claimant was a disruptive influence who did not realise the need to engage in professional behaviour to ensure that students had confidence in him. She also decided that the claimant was unable to accept responsibility for his actions. She did not consider that allowing the claimant more time to improve would result in an actual improvement. She therefore came to the conclusion that the termination of the claimant's employment was the appropriate course of action.

81 A meeting to inform the claimant of the decision was held on 10 January, 2018. This was confirmed in a letter dated the same date and in which Professor Livsey set out her conclusions in some detail. The decision was that the claimant would be dismissed with immediate effect and paid in lieu of notice.

82 By an email dated 16 January, 2018, Mr Owens lodged an appeal on behalf of the claimant. The grounds were given as

- 82.1 The claimant had been suffering from depression and was a disabled person for the purposes of the Equality Act, 2010. A side effect of his medication was tiredness and drowsiness. Although raised at the hearing, Professor Livsey had not taken this into account.
- 82.2 There was delay in informing the claimant about the sleeping incident and he had not been given the student's details so that he could apologise.
- 82.3 Inappropriate regard was given to comments by students
- 82.4 Attempts made by the claimant to improve relations with his colleagues were ignored
- 82.5 Too much importance was attached to the claimant sitting in the corridor, especially as he had sat on the stairs outside Mr Mitchell's office without comment
- 82.6 No account was given to the claimant's unblemished length of service
- 82.7 The dismissal was unfair.

83 The claimant's appeal against dismissal was dealt with by Mr Chesser. He was the most senior person who had been directly involved in the performance improvement procedure and had not previously been involved in it. He approached the

appeal as being against the decision to dismiss and not against the earlier decisions that had been taken although he did consider it necessary to understand the background.

84 The appeal hearing took place on 7 and 19 March, 2018. The claimant was accompanied by Mr Owens and Ms Johnston accompanied Mr Chesser. Ms Hurst was note taker. The claimant and his representative were allowed to raise all of the points that they wished. Mr Chesser considered that there was confusion over the matters that had been dealt with at the dismissal hearing. However, Mr Chesser noted that the claimant appeared to want to argue the facts but did not seem to realise the effects that his conduct may have had.

85 Mr Chesser adjourned the hearing so that he could make further enquiries. Mr Chesser sent some written questions to Mr Mitchell, who replied in writing. Mr Chesser then met with Mr Mitchell to discuss the matter further. Copies of the questions and answers and the note of the meeting were given to the claimant before the resumed hearing.

86 The hearing was reconvened on 19 March, 2018, with Mr Mitchell present. Mr Owens was allowed to put questions to him.

87 Mr Chesser formed the view that Mr Mitchell was a thoughtful and professional manager who had understood the implications of the procedure and the possibility of the claimant being dismissed.

88 Mr Chesser took into account the importance of the relationship between the respondent and students and the adverse effect of the university if its reputation suffered because of the dissatisfaction of students with their experience with the respondent. He considered that the claimant had not improved his behaviour sufficiently during the performance improvement programme and that he had conducted himself in a way that was potentially damaging to the respondent. He therefore dismissed the claimant's appeal and this was confirmed in a lengthy letter dated 5 February, 2018, which deals with all of the points raised on behalf of the claimant.

89 The claimant contends that he was unfairly dismissed by the respondent because his performance was not as bad as the respondent suggested and he had improved. The respondent contends that it followed a proper procedure and that it reached decisions that it was entitled to make.

90 Section 98(1) of the Employment Rights Act, 1996, as amended ('the Act) states that:

In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show

- (a) the reason (or, if more than one, the principal reason) for the dismissal and

- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”

Capability and conduct are two of the potentially fair reasons set out in subsection (2).

91 Where the reason for dismissal has been established, then the task for the Tribunal is set out at section 98(4) of the Act. That provides:

... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

- (a) depends on whether in the circumstances (including the size and the administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

92 The Tribunal had regard to the authorities referred to by the parties.

93 It is well-established law in a case of alleged unfair dismissal that the Tribunal is not entitled to ask itself what it would have done in the circumstances: it is only entitled to ask whether the employer acted reasonably or unreasonably. Also, unless it is considering contributory conduct and/or a procedurally unfair dismissal, the Tribunal is not required to decide whether the claimant did what he is alleged to have done. It is only required to decide whether, after an appropriate investigation, the respondent reached a conclusion that it was entitled to reach on the basis of the facts before it and whether the sanction applied was within the band of reasonable responses open to the respondent in the circumstances of the case.

94 The Tribunal finds that the claimant was dismissed for the principal reason of capability. He was given clear guidance on the matters that required his attention but, whilst improving on some, he failed to satisfy the respondent that he had achieved the required standards or that he had improved sufficiently to demonstrate that he would achieve those standards.

95 It is arguable that the claimant's conduct was the reason for his dismissal and this may have been a contributory reason but it was not the principal reason. If, which is not admitted, the Tribunal should have found that conduct was the principal reason, then the Tribunal would have found that this was a labelling issue and not a significant fault on the part on the part of the respondent. The facts relied upon are the same and the claimant was made fully aware of them and had the opportunity to respond to them.

96 With regard to the alternative suggested by the respondent, that the dismissal was for some other substantial reason, the breakdown in the working relationships between the claimant and his junior colleagues, the Tribunal finds that this may have

been a contributing factor but that the respondent's complaints against the claimant went beyond that to such an extent that it could not have been the principle reason.

97 The Tribunal was satisfied that the decision makers in the performance improvement process were able to act independently and reached their own decisions without being influenced by anyone else involved in the process. There was no evidence to suggest that their decisions were the result of collusion or any evidence of undue influence being brought to bear on them.

98 The procedure followed by the respondent was adequate and appropriate. At all stages, the claimant was given notice of what would be happening and what was expected of him. He was given notice of meetings and was allowed to be accompanied. At some of the interim meetings, he was not accompanied but this was with his agreement. The Tribunal was satisfied that the ACAS Code of Conduct had been complied with.

99 The Tribunal was satisfied that at each stage of the performance improvement programme, the claimant had been supervised by persons who were trying to work with him and wanted to see him improve. The claimant was given every opportunity to improve but failed to persuade the assessors that he had achieved satisfactory standards. The Tribunal was also satisfied that each stage of the performance improvement programme was a separate activity so that the process did not need to be considered as a whole at the stage 3 review and appeal hearings. However, there was nothing to suggest that any stage had been dealt with in a way that suggested it should not be treated as having been conducted without bias

100 It is unfortunate, that the claimant entered into a personal relationship, as to which the Tribunal does not make any comment, with a student that led to him making errors of judgment that brought his standards of behaviour into question. The claimant may have been a difficult person to deal with but there did not seem to be any criticism of his ability whilst he was working alone. When he was given assistance, he appears to have failed to understand how his relationships with his team should work. He failed to accept the criticism that was levelled at him but rather attempted to justify himself. If the criticism was unjustified, which the Tribunal did not accept, he should have been able to show that he was actually working as required when under supervision. He failed to do this. His relationships with those he saw as his peers or of a higher grade were generally good, except in respect of Mr Hunter.

101 The Tribunal was satisfied that at stage 3 of the process, the decision makers made decisions that were available to them on the basis of the information available to them. They formed genuine beliefs about the claimant's failures that were based on information that was adequate and properly put before them. Further, the decisions that they made were within the band of reasonable responses open to them. Even if the Tribunal had any criticism of Professor Livsey, which it did not, Mr Chesser conducted the appeal in a way which would have corrected any earlier errors.

102 With regard to the sanction of dismissal, the Tribunal was satisfied that the claimant had been given ample opportunity to demonstrate that he could achieve the required standards but failed to do so. There was nothing which suggested that given more time the claimant would have performed at the required level. The respondent had its reputation and its standing with its students to consider. In all of the

circumstances, the decision to dismiss was within the band of reasonable responses open to the respondent.

103 The only question concerning the procedure followed by the respondent concerns whether it was appropriate to override Professor Tobin's recommendation that stage 3 should be conducted over two months. The Tribunal was satisfied that this was not a matter that would have made any difference. The claimant had the period of his phased return to work to start improving, whether supervised or not, but he did not take advantage of this. When stage 3 did formally commence, his standards were still too low. The Tribunal was satisfied that the length of the stage 3 process would not have made any difference to the eventual outcome.

104 Even if the Tribunal had found that the procedure followed by the respondent was not fair, the Tribunal would have found that it was satisfied that if a fair procedure had been followed the outcome would have been the same. The claimant knew what was expected of him and he was being supervised by people who wanted to help him. Despite all of this he failed to achieve the standards required of him and seemed to fail to accept responsibility for his own actions or to understand the consequences for himself and others.

105 Further, if the Tribunal had found that the claimant had been unfairly dismissed, the Tribunal would have held that the claimant contributed significantly, possibly one hundred per cent, to his dismissal.

106 Having regard to the above and to equity and the substantial merits of the case, the Tribunal finds that the claimant was not unfairly dismissed and his complaint that he was should be dismissed.

---

Employment Judge Nicol

Date 14 May, 2019

JUDGMENT SENT TO THE PARTIES ON

28 May 2019

FOR THE TRIBUNAL

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.