Appeal No. UKEAT/0255/18/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 2 September 2019
Judgment handed down on 2 October 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

DR J DRONSFIELD — APPELLANT

THE UNIVERSITY OF READING — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BRUCE CARR (One of Her Majesty's Counsel) Instructed by: Doyle Clayton Solicitors Ltd One Crown Court Cheapside London EC2V 6LR
For the Respondent	MR SIMON CHEETHAM (One of Her Majesty's Counsel) Instructed by: Blake Morgan LLP New Kings Court Tollgate Chandlers Ford Eastleigh Hampshire SO53 3LG

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

UNFAIR DISMISSAL – Procedural fairness

The Claimant is an academic. Following a complaint arising from his having had a sexual relationship with a student, he was the subject of a disciplinary process which resulted in his dismissal. The decision of an Employment Tribunal that the Claimant was fairly dismissed was overturned by the EAT and the matter remitted for a fresh hearing. The second Employment Tribunal held that the Claimant was fairly dismissed. The Claimant appealed that decision.

The Respondent had issued detailed guidance on relationships between staff and students which the Claimant was expected to follow. However, he could only be dismissed for conduct of an "immoral, scandalous or disgraceful nature incompatible with the duties of the office or employment." (For short: "immoral, etc., conduct.")

The disciplinary process went through the following stages: investigation and report and recommendations to the Vice-Chancellor; disciplinary charges and hearing; decision to dismiss by Vice-Chancellor on recommendation of the disciplinary panel; appeal to an external barrister. The disciplinary panel found the Claimant guilty of (1) failing to report the relationship, which had created a potential conflict; (2) abuse of power to influence a vulnerable student; and (3) breach of his duty of care to her. It found this amounted to immoral, etc. conduct. The appeal officer upheld (1) and (3) and also considered that such conduct amounted to immoral, etc., conduct.

The principal ground of appeal concerned the Tribunal's approach to the evidence that material in a draft of the investigation report was removed from the final report, in particular a statement

that there was no evidence that the Claimant's conduct amounted to immoral etc., conduct and other conclusions favourable to his case.

As to this, the Tribunal's decision, read as a whole, addressed the questions which the EAT in the first appeal had said should be considered. It found that the report had been amended on the advice of a solicitor that it should not set out evaluative conclusions on whether the Claimant's admitted factual conduct amounted to an abuse of power, a breach of duty or immoral etc., conduct. Those judgments should be left to any Disciplinary Tribunal that was subsequently appointed. The Tribunal properly concluded that adopting that approach was not unfair.

Nor had the Tribunal erred in referring in one particular passage to the Claimant having admitted breaches of the "rules" because he had admitted to having had a sexual relationship with a student which he had not reported. The Tribunal was clearly referring there to the Respondent's guidance and to the factual conduct which had indeed been admitted, and underpinned all of the disciplinary charges. It was plainly aware of all three charges.

The Tribunal's decision, read as a whole, sufficiently addressed the case that had been advanced for the Claimant, that, for various reasons, the removal from the final investigators' report, of the conclusions that were included in a previous draft had irredeemably tainted the subsequent process with unfairness. Its overall decision was **Meek** compliant.

The appeal was therefore dismissed.

HIS HONOUR JUDGE AUERBACH

Introduction

1. I shall refer to the parties as they were in the Employment Tribunal, as Claimant and Respondent. This is the Claimant's appeal against the reserved Judgment of the Employment Tribunal sitting at Watford (Employment Judge Smail), arising from a hearing on 12 – 15 March 2018, by which it dismissed his claim for unfair dismissal. Before the Employment Tribunal the parties were represented, respectively, by Mr Carr QC and Mr Cheetham QC, as they were again before me.

2. The hearing before EJ Smail was in fact a complete re-hearing of the unfair dismissal claim, following a successful appeal against the earlier decision of a different Tribunal, which had also found the dismissal not unfair. That appeal was heard by His Honour Judge David Richardson. His Decision is reported at [2016] ICR 1107. While the hearing before EJ Smail was a complete rehearing, I shall need to refer later to what HHJ Richardson had to say about the approach that the Tribunal should take, upon fresh consideration of the complaint.

3. For completeness I should note that the first Employment Tribunal had also considered, and dismissed, a claim of sex discrimination. That decision was not appealed.

The Employment Tribunal's Decision

4. In the opening paragraphs of its Reasons the Employment Tribunal recorded the findings of the Respondent's Vice-Chancellor, who took the decision to dismiss the Claimant, regarding his conduct, and the outcome of his appeal against dismissal. As I will describe, it set these out in more detail later. It also referred to the previous decision of the first Employment Tribunal having been overturned by HHJ Richardson.

5. The Employment Tribunal set out the law in a manner which is, rightly, not criticised on this appeal, as such. It referred to the provisions of section 98 **Employment Rights Act 1996**, and correctly summarised the guidance emerging from **British Home Stores Ltd v Burchell** [1980] ICR 303, **Sainsbury's Supermarkets v Hitt** [2003] ICR 111, **Iceland Frozen Food v Jones** [1983] ICR 17 and **Salford Royal NHS Foundation Trust v Roldan** [2010] ICR 1457.

6. So far as material to this appeal, the Employment Tribunal then found as follows.

7. The Respondent's Statute XXXIII concerns, among other things, the dismissal of academic staff. Clause 2 provides:

> **"2. No provision in Part II or Part III shall enable the body or person having the duty to reach a decision under the relevant Part to dismiss any member of the academic staff unless the reason for his dismissal may in the circumstances (including the size and administrative resources of the University) reasonably be treated as a sufficient reason for dismissing him."**

8. Clause 5(1) provides, as relevant:

> **"5. (1) For the purposes of this Statute 'good cause' in relation to the dismissal or removal from office or place of a member of the academic staff being in any case a reason which is related to conduct or to capability or qualifications for performing work of the kind which the member of the academic staff concerned was appointed or employed to do means:**
>
> **…**
>
> **(b) conduct of an immoral scandalous or disgraceful nature incompatible with the duties of the office or employment;**
>
> **…"**

9. The Statute provides that where there is an allegation of conduct by an academic that might constitute good cause for dismissal, the Vice-Chancellor may institute such investigations or enquiries (if any) as appear to him to be necessary. Following any such investigation, the Vice-Chancellor may direct that charges be laid before a Disciplinary Tribunal. Any recommendation by that body to dismiss would fall to be considered, and the decision taken, by the Vice-Chancellor, having considered the Disciplinary Tribunal's report.

10. The Respondent has published "Guidance provided to University of Reading Staff in relation to Staff/student personal relationships". At paragraph 7 of its Reasons the Employment Tribunal cited passages from the Guidance, including the following:

> **"7.**
>
> **…..**
>
> **The University does not seek to interfere in relationships between consenting adults. However, the University has a duty of care to its students. This duty of care is owed to students by all University staff but owed in especially important ways by Tutors. [Quoting from a letter from the then Vice Chancellor to all heads of department dated 19 May 1994:] 'Staff have a professional and ethical responsibility to protect the interests of students, and to accept the constraints and obligations which are inherent in that. They should be aware that maintaining the boundaries between professional and personal life is difficult; and that if they form a relationship with a student there may be risks and difficulties, and other students and their own colleagues may be affected. A member of staff who is in a relationship with a student must not be directly professionally involved with assessing or examining that student, and in general this would apply also to teaching. The head of department, or the appropriate Dean, must therefore be informed so that the necessary arrangements can be made; these will of course seek to ensure that the student is neither advantaged or disadvantaged. A declaration of this kind will be treated in complete confidence.' [And continuing:] "experience shows that it is quite easy, quite inadvertently, to overlook or misjudge boundaries. Members of staff are therefore strongly discouraged from making personal relationships with students."**
>
> **An imbalance of power may also arise: -**
>
> **"when a member of staff has a personal relationship with a student as well as a professional one…"**
>
> **"when a member of staff teaches, assesses or examines a student but has, or may have, developing interest in a personal relationship with that student, or vice versa. This should be declared as above so appropriate arrangements can be made to avoid any possibility of advantage or disadvantage for the student."**
>
> **"when a student is more vulnerable than normal…" Examples include: -**
>
> **"when a student has mental or emotional problems which leave them temporarily over needy for close emotional support or the sense of being valued, such as the aftermath of bereavement or a marriage break up."**

11. The Claimant is an academic who was employed by the Respondent. His contract provided that it would not be terminated by the Respondent except pursuant to Statute XXXIII.

12. The disciplinary charges which led to the Claimant's eventual dismissal arose from what had happened between him and a student of his at the time, referred to as A. In June 2013 (by which time A was an ex-student) her ex-boyfriend made a complaint to the Respondent. A statement was taken from him. The Tribunal set this out in some detail in paragraph 8 of its

A Decision. It included allegations of evening meetings with students involving drink, and that A and the Claimant had had sex, and allegations regarding his behaviour at her Degree Show after-party. The complainant had told A he was going to raise these matters with the Respondent. He said that she had indicated that she absolutely would not be involved.

B

13. Professor Susan Clausen, who the Tribunal described as the Claimant's line manager, also made allegations. She wrote an account of how the Claimant had conducted himself at the

C Degree Show after-party. Again, the Tribunal set out this out fairly fully, in paragraph 9. The overall gist was that the Claimant had spent the evening exclusively with a small group of female students. She gave an account of why one of them appeared to her to be particularly

D vulnerable, and the embarrassment which had been caused to colleagues by his behaviour; and of allegations reported to her by students, of the Claimant having had an affair with a student.

E 14. Professor Stuart Green was appointed to carry out an investigation, supported by Ms Claire Rolstone of HR. Written allegations were formulated for that investigation, and tabled to the Claimant. These were recorded by the Tribunal (paragraph 10) as being of the Claimant:

> **"10**
>
> F **…..**
>
> **(1). Having a sexual relationship with a student without reporting it, creating a potential conflict of interest;**
>
> **(2). Abusing a position of power to influence a vulnerable student to enter into a personal relationship;**
>
> **(3). Acting in breach of duty of care responsibilities towards students; and**
>
> G **(4). Holding late-night meetings with female students involving alcohol."**

15. The Claimant provided a written response. The Tribunal set out passages at paragraph

H 11. This included an admission that he had had sex with A "but I would not call it a relationship, not if that implies something ongoing." He gave accounts of some four incidents

between July and October 2011, each instigated, he said, by her, and met variously, either with a degree of response by him, before putting a stop to the encounter, or outright rebuff by him; but on none of those occasions was the contact, as he put it "consummated". However, he then described a further incident in November 2011 in which consensual sex took place.

16. The Claimant's statement gave three reasons for not having reported the matter:

> **"1. I was vulnerable and isolated due to actions of Departmental colleagues about which I had lodged a formal complaint to the University;**
>
> **2. I had no faith in the Institution due to its response to my complaint;**
>
> **3. At no point did I believe there was anything "on-going" about the contact with the student."**

17. The Claimant also accepted that he had subsequently marked A's dissertation, arriving at a similar mark to two co-markers, and was involved in her academic supervision in the academic year 2011/2012. He also "stated that he was under personal difficulties in that his wife was outside the country, indeed experiencing immigration difficulties to get back in."

18. It was decided not to interview A and to accept the Claimant's account as accurate.

19. The Tribunal also records that the Claimant had raised concerns about his treatment in his department, leading to a mediation meeting in October 2011; and that in 2012 he had made allegations of bullying against Professor Clausen.

20. There is then a section of the Reasons headed: "Differences between drafts and the final investigation report." At paragraph 17 the Tribunal recorded that the investigation report went through some seven drafts. The differences between the penultimate draft and the final report "and the role of the Respondent's internal solicitor in this regard generate a crucial part of the Claimant's case in this claim." The Tribunal then cited the following passage from a draft:

"17.

…..

In essence, there is no evidence to suggest that the conduct of Dronsfield constituted conduct of an immoral, scandalous or disgraceful nature. He did have a sexual relationship with a student; we are confident that both parties entered into this relationship as consenting adults. However, we are confident that Dr Dronsfield was in direct contradiction of university guidance in the reporting of personal relationships with students to the University. We do not believe that his dysfunctional relationship with his head of department overrides this responsibility. If he felt unable to discuss the situation with Prof Clausen, he could easily have made an appointment to see the head of school, Prof Jonathan Bicknell or even the Dean of the faculty. We therefore find there is no substantive evidence to support the contention that Dr Dronsfield engaged in any malicious or predatory behaviour in respect of female students. We do however believe that his failure to report the relationship constituted a severe error of judgment as being in direct contradiction of university guidance."

21. At paragraphs 18 to 22 the Tribunal continued:

"18. The investigators were persuaded by the respondent's internal employment solicitor, Julie Rowe, to change the report so as to focus on whether there was prima facie evidence in support of the allegations which could then be evaluated by a disciplinary tribunal against the standard of 'immoral, scandalous or disgraceful.' This was late on in the process after the 7th version of the report on about 23 January 2014. The investigators were persuaded to omit the conclusion in the draft summary of findings above. Allegation 4 was rejected on the evidence. Allegations 1 to 3 went forward with the following phrases I conclusion:

<u>Allegation 1</u>

'In conclusion, we consider that the existence of a dysfunctional relationship with the Head of Department does not override the responsibility to report a relationship with a student to the University. We therefore find that there is evidence to support the first allegation.'

<u>Allegation 2</u>

'In conclusion, there is no evidence of predatory intent in JD's relationship with the student. Whether or not his conduct in the circumstances described above amounted to an abuse of power is a question to be determined by any subsequent panel.'

<u>Allegation 3</u>

'In conclusion, whether or not JD's conduct in the circumstances described above amounted to a breach of his duty of care towards the student is a question to be determined by any subsequent disciplinary panel.'

The investigators were thus persuaded to leave the final determination of breach of duty of care, abuse of power and immoral, scandalous or disgraceful behaviour to the Disciplinary Tribunal.

19. The claimant's lawyers have submitted a table of substantive alterations made between the draft reports and the final version. There are 21 alterations including the omission of the crucial sentence 'there is no evidence to suggest that the conduct of Dr Dronsfield constituted conduct of an immoral, scandalous or disgraceful kind.' I find, and it was not seriously disputed before me that the respondent's internal solicitor, Julie Rowe, was responsible for suggesting certainly the most important alterations. Her name arose frequently in the emails that were produced as a result of the Claimant's FOI request. Without the crucial alteration mentioned just above, there would be no prima facie case against the Claimant whereby he might be dismissed. He would still be vulnerable to having been disciplined short of dismissal.

20. One of the arguments put forward by the respondent in support of these changes was that it was important to distinguish between fact and evaluation. This argument does not work because there remained plenty of evaluation in the final investigation report.

> **21. I find that the report did nonetheless set out the investigators' position. They accepted the advice and changed their provisional conclusions. They were entitled to change their position. That does not mean a false or incomplete position was contained in the report.**
>
> **22. The Claimant's account was fully set out in the report. The appendices to the Investigation Report included 2 written submissions from the Claimant and notes of an investigation meeting held with him on 6 December 2013."**

22. A Disciplinary Tribunal was appointed to consider the three allegations emerging from the investigation report, chaired by Dr Paul Preston. A hearing took place on 25 March 2014. The panel upheld all three allegations. As to the first, it rejected the Claimant's arguments that he had not had a "relationship" with A, and that he was unable to report the matter. He had accepted that there was a potential conflict of interest. As to the second, they found, for reasons the Tribunal recorded, that there was a clear abuse of a position of trust in relation to a vulnerable young woman. As to the third, they found that, by his overall course of conduct, and failing to report the matter, the Claimant had acted in breach of his duty of care to student A.

23. The Employment Tribunal's description of the panel's overall conclusion was this:

> **"27. The [Disciplinary] tribunal found the conduct amounted to [conduct of] an immoral, scandalous or disgraceful … nature incompatible with the duties of his employment and amounted to gross misconduct. They rejected the mitigation he had put forward that the conduct could be explained by reference to the difficulties he had experienced in the department. On the contrary, they found that this position showed that the claimant did not fully take responsibility for what had happened. They found that the claimant had no self-awareness regarding his behaviour, nor any understanding of the vulnerability of the student. There was no genuine contrition for his conduct. His disregard for the student suggested the relationship was of little consequence to him. They found he demonstrated little insight and it appeared to them that he had not properly reflected on his behaviour and considered what steps he personally would take to ensure such a situation never arose again. Indeed, he had given them no cause to believe that he would not behave in the same way again. In all those circumstances a warning was not suitable, they recommended to the Vice Chancellor that he be dismissed."**

24. The Disciplinary Tribunal's report and recommendation were considered by the Vice Chancellor, who agreed with their view that the Claimant's conduct was of an immoral, scandalous or disgraceful nature, incompatible with the duties of employment. He considered dismissal to be the appropriate sanction and dismissed the Claimant.

25. The Claimant appealed, and an external barrister, Laura Prince, was appointed to hear the appeal. She considered the matter afresh. There was a hearing at which Mr Carr QC represented the Claimant, and the Vice-Chancellor represented the Respondent.

26. In her provisional decision Ms Prince upheld findings of guilt on allegations 1 and 3, but not 2 (abuse of power). The Tribunal described her reasoning. She considered that the sexual relationship and failure to report it was sufficient on its own to justify the dismissal. She did not accept that there was good reason or sufficient mitigation for the failure to report. She found that the student was vulnerable because of the imbalance of power, but did not find that the Claimant had abused that power in order to bring about a relationship – she accepted that A had pursued him. She did not find allegation 2 proved. She upheld allegation 3. The Claimant was in a duty of care relationship, not least because of his involvement in assessing or examining A's dissertation. She concluded that dismissal was the only appropriate sanction.

27. Ms Prince's report was provisional because the Claimant had put in an FOI request. The Tribunal continued:

> **"37. On 17 October 2014 Ms Prince issued a supplementary decision on the appeal following submissions received in the light of the FOI request. The FOI request obtained documents showing that in the course of the investigation the investigators' conclusions had changed. This argument has figured largely before me in this Employment Tribunal hearing and I have set out above the most important differences. To Ms Prince a response was sent from Claire Rolstone, the HR officer and one of the investigators. She maintained that it was normal for an investigation report to go through a number of iterations and for emphasis to change during discussions. In her view it was not appropriate for the investigation to draw conclusions based on the actual findings of the investigation. That was the role of the Disciplinary Tribunal. Investigators should report their factual findings. Whether the evidence collated amounted to gross misconduct or not was for a disciplinary tribunal to determine. She denied that there had been a cover-up and that Prof Green and herself were placed under pressure to change findings.**
>
> **38. Ms Prince, having compared the versions of the reports, concluded that the explanations put forward by Ms Rolstone were reasonable and that they explained the differences between the reports. She did not accept Mr Carr's submission that there had been a changed report in order to make the claimant's dismissal more likely, nor did she find that the investigators were pressured by anyone to change the report."**

Further emails relating to relationships in the art department did not persuade Ms Prince that there was any mitigation for the Claimant's failure to report the relationship (paragraph 39).

28. The next section of the Employment Tribunal's decision, headed "Discussion and Conclusions", begins as follows:

> **"40. The central part of the Claimant's case before me, put in various different ways, has been to argue that role of Julie Rowe the Solicitor was unfair. She was not appointed an investigator but she had a significant influence on the drafting of the investigation report, in particular as to how the issue of immoral, scandalous or disgraceful behaviour should be handled. The investigators had formed the provisional view that the Claimant's behaviour whilst blameworthy was not immoral, scandalous or disgraceful. Julie Rowe persuaded them that this issue should be left to the Disciplinary Tribunal; the issue for the investigators was whether the Claimant had committed prima facie breaches of the rules.**
>
> **41. It was objectively fair and reasonable in this case, I find, for the University to have a solicitor advising investigators. Matters such as this are complicated, with the scope for legal error. It was sensible to have a solicitor to advise.**
>
> **42. The position agreed by the investigators following the advice that was plainly given was itself reasonable. The Claimant had admitted conduct amounting to breaching the rules: having a sexual relationship with a student without reporting it. The issue as to whether that involved immoral, scandalous or disgraceful behaviour was reasonably one left for the Disciplinary Tribunal. The issue for the investigators was whether there was a case to answer in terms of breaches of the rules. By his own admissions, the Claimant was in breach of the rules.**
>
> **43. I find that the report did nonetheless fairly set out the investigators' position. They accepted the advice and changed their provisional conclusions. They were entitled to change their position as to how the issue of immoral, scandalous or disgraceful behaviour should have been considered, namely by the Disciplinary Tribunal. That does not mean a false or incomplete position was contained in the report.**
>
> **44. Given that the disciplinary process proceeded on the basis of the Claimant's admitted conduct, there was not much to do by way of investigation to establish the prima facie facts over and above the admission.**
>
> **45. It was reasonable for the Disciplinary Tribunal to conclude that there had been immoral, scandalous or disgraceful behaviour incompatible with the office. The guidance is that a lecturer should not have a relationship with a student he assesses. This is to avoid issues of conflict of interest and breach of duty of care. He is to report it if nonetheless a relationship develops. This is so handling of the relationship can be managed in terms of its implications for the student, the lecturer and the university. In terms of contemporary University standards for lecturers, the behaviour was reasonably regarded as immoral, scandalous or disgraceful. It was reasonable for the Disciplinary Tribunal to point to additional aspects of the matter which pointed to immoral, scandalous or disgraceful behaviour, namely the Claimant's position mentioned in the proceedings before the Disciplinary Tribunal that he agreed to have sex with the student to bring the intimate relationship to an end. That was reasonably described as callous. The Claimant's prior attempt to deny that the contact amounted to a "relationship" because of its casual nature was also reasonably rejected. In evidence, Dr Preston pointed to the fact that the Claimant was married as adding an element of immorality, scandal or disgrace. It was reasonable for him to have done so, although that factor was additional and not central. Central was the teacher/assessor – student relationship and associated obligations."**

29. The Tribunal went on to find (paragraph 46) that the sanction of dismissal, and its recommendation, were reasonable. "The issue whether to dismiss did not turn on a risk of re-offending. The nature and extent of the breach was itself sufficient to justify dismissal. That said, the lack of remorse and insight did not encourage the Disciplinary Tribunal and Ms Prince to find that there was no risk of re-offending here." The Tribunal found (paragraphs 47 and 48) that it was reasonable for the Vice-Chancellor to accept the Disciplinary Tribunal's report, and to dismiss the Claimant, and for Ms Prince to uphold that decision on a varied basis. Misconduct was the reason for dismissal. There were reasonable grounds for the belief after a reasonable investigation. There had been a fair procedure, taking account of the Tribunal's finding "that it was reasonable for the University to have a solicitor advising the investigators." Dismissal was a reasonable sanction. The dismissal was not unfair.

30. In case it was thought wrong in that conclusion, the Tribunal considered contributory fault, in respect of which it would have made a 75% reduction. It would not have made an additional **Polkey** reduction, as that would risk double discounting. (Paragraphs 49 and 50).

The Previous Decision of the EAT

31. It is convenient at this point to say something more about HH Judge Richardson's decision. He found that the Tribunal which first heard this claim had erred in two respects.

32. First, the Claimant's contract entitled him to be judged by the specific test of whether his conduct was "of an immoral, scandalous or disgraceful nature incompatible with the duties of the office or employment." The first Tribunal had regarded that as no different from the general modern concept of gross misconduct. That was an error. That said, the meaning of this phrase was to be judged against contemporary standards of what is immoral, scandalous or

disgraceful. The Respondent would also not be entitled to dismiss for conduct which was a departure from those standards unless it was also found incompatible with the duties of the office or employment. The Tribunal should have considered, and made a specific finding, about whether the Claimant's conduct had been found to have infringed that standard, and, if so, whether that was a conclusion which it was reasonably open to the Respondent to reach.

33. I interpose that the grounds of appeal before me do not accuse the second Employment Tribunal, with whose decision I am concerned, of making the same mistake in relation to the need to consider, specifically, the application of the conduct standard set out in the Statute.

34. I need to set out more fully what HH Judge Richardson said about the second ground on which he allowed the appeal from the first decision. This was as follows.

> **"43. This brings me to the question whether the Employment Tribunal applied section 98(4) correctly in the context of investigation. As its Reasons show, it was plainly concerned about the way in which certain apparently important passages in Professor Green's draft report came to be excluded from the final version. These passages were to a significant extent exculpatory, especially on the question whether the conduct met the test in clause 5(1)(b) of the statute.**
>
> **44. The Employment Tribunal found - and there is no reason to doubt - that the final version represented Professor Green's genuine conclusions after receiving honest and unbiased advice. The problem however lies not so much in the conclusions which the report expressed as in those which were excised. In particular there is nothing to suggest that Professor Green changed his opinion on the question whether the Claimant's conduct was immoral, scandalous or disgraceful: his opinion on the subject was simply excised. Questions for the Employment Tribunal would appear to be whether Professor Green had changed his opinion on this question, or simply omitted it and if so why. If Professor Green omitted significant opinions which he held from his final report the question for the Employment Tribunal would appear to be whether it was reasonable for the Respondent to dismiss in circumstances where there had been excised from the investigation report important conclusions, favourable to the Claimant, about the charges in question, including whether they met the test in clause 5(1)(b).**
>
> **45. The Employment Tribunal did not directly address this question in its Reasons. It did not, for example, find why Professor Green omitted some of his conclusions, although its citation of Ms Rolstone's misgivings about his approach may point to an answer. The difficulty about this part of the Employment Tribunal's reasoning is that it appears to have treated its findings about the honesty and integrity of Professor Green and Ms Rolstone as conclusive. The Employment Tribunal did not, in its concluding paragraphs, return to the question whether the Respondent had acted reasonably in this respect. It relied on its earlier findings with no further explanation. I accept Mr Carr's submission that the test was not subjective integrity but objective fairness.**
>
> **46. On this issue also therefore the appeal must be allowed and the matter remitted. Again it is not possible for the Employment Appeal Tribunal to say that only one conclusion is possible. The Employment Tribunal's task in this respect will be to see whether Professor Green fully expressed his conclusions in his final report; if he did not, why not; and whether in the light of its findings it was reasonable to dismiss having regard to that which was omitted in the final version of the report."**

The Grounds of Appeal

35. I turn to the grounds of appeal against the decision of EJ Smail, with which I am concerned. In the Notice of Appeal these are initially set out in short form as follows:

> **"Ground 1 – the Tribunal failed to address the substantial grounds advanced by the Appellant as to why his dismissal was unfair;**
>
> **Ground 2 – the Tribunal devised its own explanation for the purpose of the investigation into the Appellant's conduct, which explanation had not been advanced even by the Respondent, and then used that explanation as a basis of absolving the Respondent from the effects of its defective investigation process;**
>
> **Ground 3 – in so far as the Tribunal in fact dealt with the arguments advanced by the Appellant, it failed to provide adequate (or indeed any) reasons as to why those arguments were rejected."**

36. The Grounds are then developed in considerable detail. I append the full text at the end of this decision. It will be noted that the Grounds refer to conduct of an immoral, scandalous or disgraceful nature, incompatible with the Claimant's duties, as "ISD". I will do the same.

37. As to Ground 1, it seems to me that, at a headline level, the contentions or arguments with which the Employment Tribunal is said to have failed, or failed sufficiently, to grapple, were of three kinds:

(a) That, unfairly, the Claimant was denied the benefit of the full findings and outcome of the investigation process, which was supposed to inform the decision of the Vice-Chancellor as to whether there was a prima facie case, both on each charge, and specifically of ISD conduct, that should go to a Disciplinary Tribunal at all;

(b) That the changes resulted from the interventions of the solicitor, Ms Rowe, and that the reasons for her intervention were not properly explained (in part because the Respondent had in evidence advanced a false explanation), and in any event were the result of bad advice, badly executed. Specifically, her role could not be explained by reference to a decision to leave the question of ISD to any Disciplinary Tribunal;

(c) That the changes resulted in charges 2 and 3 going forward in a vague and unparticularised form, which itself materially affected the fairness of the later stages of the process, enabling the Disciplinary Tribunal to create its own disciplinary construct.

38. HHJ Eady QC was doubtful, on considering the grounds of appeal on paper, that they raised any arguable question of law; but she could see that the points raised at paragraphs (b) (ix) and (x), and particularly (viii), of Ground 1 might, "albeit it is not entirely clear to me where this would go in terms of the ET's approach to the question of fairness". So, she directed a Preliminary Hearing. That came before Soole J. He considered that the central issue was whether the Tribunal failed to grapple with whether there was unfairness in the "excising" of the conclusion from the draft investigation report, that there was no evidence of ISD. It was submitted that the specific need to grapple with that issue had been identified in the decision of HHJ Richardson. On that basis, he allowed all the Grounds to proceed to a full hearing.

39. An Answer submitted that the Tribunal plainly had in mind the issue concerning the changes to the investigation report, and that its reasoning addressed the question of how this aspect affected the fairness of the dismissal. It was also clear from its decision as a whole that it understood the overall purpose of the investigation. It had provided adequate reasons.

The Arguments

40. I had the benefit of written skeleton arguments, and hearing oral argument on both sides. I have considered all the points raised. I highlight what appear to me to have been the main points, which developed what was in the Notice of Appeal and Answer.

41. Mr Carr submitted that the Tribunal had concluded (paragraphs 18, 42) that the investigators could leave the ISD question to "the" Disciplinary Tribunal, completely overlooking the fact that no decision had yet been made by the Vice-Chancellor as to whether to refer the matter to a Disciplinary Tribunal. Despite recognising that, had the key excised passages remained in the report, there would be no prima facie case for dismissal (paragraph 19), the Tribunal had failed to follow through on that point.

42. The Tribunal had accepted that it was reasonable for the investigators to get legal advice, but had not engaged with Mr Carr's arguments about whether that advice "ultimately produced a fair process."

43. It did not apply its mind to all of the questions raised by HH Judge Richardson.

44. The Tribunal wrongly proceeded on the basis that the task of the investigators was simply to consider whether there was a prima facie breach of the rules relating to sexual relationships (paragraphs 40 and 42). In the process it overlooked that findings in the draft report, favourable to the Claimant, in relation to whether there was evidence of abuse of power and/or breach of the duty of care, were also excised from the final report; and that it was the task of the investigators to consider whether there was a prima facie case of ISD conduct.

45. Mr Carr also submitted that "had the ET approached matters correctly, it would have been driven to conclude that the dismissal was unfair given the way in which the investigation process was so substantially tainted." So, I could, and should, substitute a finding that the dismissal was unfair. Alternatively, I should remit the matter to a fresh Tribunal.

46. Mr Cheetham submitted that the Employment Tribunal had the EAT's previous decision before it and both counsel had referred to it, as did the Employment Tribunal itself in its Decision (paragraph 2). There could be no doubt that it had it in mind.

47. As to Ground 1 the Tribunal made findings that the investigators were persuaded by Ms Rowe to amend the report, as to *why* the investigators were persuaded to do that (paragraphs 18, 19), that they were entitled to change their position, and that this did not mean a false or incomplete position was contained in the final report (paragraph 21). These findings supported its conclusions at paragraphs 42 and 43.

48. The investigators' conclusions in the drafts were no more than provisional, drafts would not normally be provided to decision makers, and in any event the Employment Tribunal clearly addressed the significance of the conclusions having been altered. The Tribunal did not have to address every detail of the Claimant's arguments in its decision. It plainly grasped the central argument, and it sufficiently addressed it.

49. The Employment Tribunal plainly knew that the investigators' report went to the Vice-Chancellor, who then took the decision that disciplinary charges should be preferred. Whether or not the same conduct was described in three different ways by the three sub-elements of the charge, the Claimant was properly found fairly dismissed on account of it.

50. The Tribunal, in referring to breaching the rules by having a sexual relationship with a student without reporting it, was merely referring to the admitted factual conduct, which formed the basis for all the charges.

51. Ground 2 fell into the trap of not reading the judgment as a whole and was a paradigm failure to heed the warning given by the Court of Appeal in **Brent LBC v Fuller** [2011] ICR 806, not to read a Tribunal decision in a fussy, pernickety way, focussing on close analysis of particular passages, rather than reading it in the round.

52. I refer to further aspects of the arguments in the next section of this decision.

Discussion and Conclusions

53. I turn first to Ground 1.

54. The first two questions which HHJ Richardson said the Tribunal ought to address were whether, between the previous and final drafts of the investigation report, Professor Green had changed his opinion on the ISD question, and, if he had not, why he omitted it from the final report. The third was whether, if the Tribunal did consider that Professor Green had omitted important opinions favourable to the Claimant, on which he had not in fact changed his mind, it was reasonable for the Respondent to dismiss in those circumstances.

55. Ground 1 casts the net of questions 1 and 2 wider (or perhaps it uses a net of finer mesh), in as much as it is argued that EJ Smail's decision also failed to engage with the fact that the final version of the report also removed findings that there was "no evidence" of abuse of power and that it was "difficult to conclude" that there was any breach of the duty of care.

56. My conclusions on the first two questions are as follows. First, I think it is clear from his reasons, that EJ Smail found that it was the advice of the solicitor, Ms Rowe, that was instrumental in persuading the investigators to make the material alterations. That is clear from paragraphs 18, 19, 21, and 40. In particular, the use of the word "persuaded" signifies both that

she advised them to make the changes, and that they did so because they accepted that advice; and paragraph 21 contains the finding, in terms, that they "accepted the advice."

57. Secondly, the Judge clearly found that they were persuaded by that advice, in relation to the removal of their view on whether the Claimant's conduct amounted to "ISD" conduct – see paragraph 18 in the first sentence, and paragraphs 19, 40 and 43. But the Judge also found that she persuaded them to make changes in relation to "final determination of breach of duty of care" and "abuse of power" – see the concluding lines of paragraph 18. More generally, the Judge had before him a table showing 21 alterations (a copy was also in my bundle), to which he specifically referred in paragraph 19, and he found there that Ms Rowe was responsible for suggesting the "crucial" change regarding ISD *and* "certainly the most important alterations."

58. What, if anything, did the Judge find about *why* the investigators made those changes? In paragraph 18 he said that they were persuaded to focus on whether there was prima facie evidence, which could then be evaluated against the ISD standard; and at paragraph 40 that Ms Rowe had persuaded them that the issue for them was whether the Claimant had committed "prima facie breaches of the rules" (by which, both counsel agreed, as do I, he obviously meant the Respondent's published Guidance on personal relationships with students).

59. However, Mr Carr pointed to paragraph 20, in which the Judge, he said, rejected the argument that these changes were made because it was "important to distinguish between fact and evaluation." One point discussed in the course of oral argument was whether the last sentence of paragraph 20 referred merely to a submission for the Claimant, or to the Judge's own acceptance of it. I conclude (with Mr Carr) that it was the latter, in particular because of the Judge's use, in the next sentence (the first in paragraph 21), of the word "nonetheless".

60. However, Mr Cheetham submitted that, even if the Judge did conclude (correctly) that not *all* expressions of opinion or value judgment were removed, it was still clear, reading the decision as a whole, that the Judge considered that the investigators had been persuaded to take the approach that the specific questions of whether the Claimant acted in breach of duty of care, whether he abused his power, and whether his conduct amount to ISD conduct, were all evaluative *conclusions*, on the individual charges, or the overriding test, rather than foundational facts, and, for that reason, should be left to any Disciplinary Tribunal.

61. I agree that, standing back, that is indeed what emerges from reading the relevant passages in the Tribunal's decision, taken together as a whole. That, it seems to me, is reflected in the Tribunal's use of the word "conclusion" in paragraph 18 (opening lines), and the expressions "final determination" in the same paragraph (closing lines) and "provisional conclusions" in paragraphs 21 and 43.

62. It is also consistent with the Tribunal's findings about how matters stood, at the end of the investigation process, in relation to each of the four charges. As to charge 1, the Claimant had admitted he had had sex with A, which he did not report. As to charge 4, he had denied the factual allegation, and the investigators found no evidence to support a prima facie case that the alleged conduct had factually occurred. As to charges 2 and 3, the Claimant denied that his conduct in relation to A amounted to an abuse of power or a breach of the duty of care, and the investigators decided that what conclusions to draw on those questions should be left to any Disciplinary Tribunal.

63. Consistently with that, the Judge did not anywhere find that Professor Green's own thinking on these questions had changed. Rather, the change was in relation to his approach to

the scope of which matters the report should address and which not (paragraphs 21 and 43). That indeed, I am inclined to think, is why the Judge spoke, in these paragraphs, of the investigators' "position" having changed (rather than, say, their findings, views or opinions on the underlying issues having changed) and why he concludes that they were entitled to change their "position" and that the (final) report did not contain a false or incomplete "position".

64. The third question postulated by HHJ Richardson for the fresh Tribunal was, if it concluded that significant opinions or important conclusions were omitted from the report (though Professor Green still adhered to them), whether it was reasonable for the Respondent, in those circumstances, to dismiss. It is important, I think, to note that, whilst indicating that this was a question that the Tribunal would need specifically to address, HHJ Richardson did not say anything at all about the particular circumstances in which such a scenario might be thought to point to the decision to dismiss being unfair.

65. Once again, though HHJ Richardson's focus was on the ISD issue, the net of Ground 1 also embraces the charges of abuse of power and breach of duty.

66. As to that, Mr Carr submitted that the Tribunal's conclusions, at paragraphs 41 to 44, failed to grapple at all with the detailed arguments identified in the Notice of Appeal, all of which had been set out in his written closing submission to the Tribunal (copies of these, on both sides, were in my bundle). Paragraph 41 of the Tribunal's Reasons merely asserted that it was not unreasonable to get a solicitor's advice, as such; paragraphs 42 – 44 wrongly focussed solely on the factual admission in relation to charge 1, and the ISD question, failing to address the impact of the other findings, in relation to charges 2 and 3, having been removed. In this respect, Mr Carr acknowledged, Ground 2 effectively informed and developed ground 1.

67. As I have noted, he submitted that the Judge had not addressed his argument that it was the purpose of the investigation to consider whether there was a prima facie case that could lead to dismissal, so Professor Green's view on that question should *not* have been withheld from the Vice-Chancellor. Even though the Vice-Chancellor would not have been bound to agree with it, there was a real likelihood that he would have been guided by it, had he been told it.

68. Further, Mr Carr's case before the Tribunal had been that, had the Vice-Chancellor had the benefit of seeing the unamended report, even if charge 1 might possibly still have been referred to a Disciplinary Tribunal, charges 2 and 3 would or should, as he put it, have been "killed off at birth", like charge 4. This was having regard to the fact that the unamended report stated that there was "no evidence" of abuse of power, and that it was "difficult to conclude" that there was a breach of the duty of care, and to other passages pertinent to these charges having been excised or watered down.

69. Mr Carr's argument to the Employment Tribunal had, further, been that the effect of all three charges going forward, and of the whole body of changes which, overwhelmingly, removed or softened content supportive of the Claimant's case, had a significantly prejudicial effect on the whole process thereafter. As Professor Green had in fact been of the view that the evidence did not support a prima facie case in relation to either of charges two or three, these charges were left vague and unparticularised. What particular factual aspects of the Claimant's admitted conduct were said to arguably amount to an abuse of power and/or a breach of the duty of care were not identified, so he could not fairly defend himself; and there was a general prejudicial effect on the overall picture presented to the Disciplinary Tribunal.

70. Mr Carr said that his case had been that this so tainted the whole process following the delivery of the amended investigators' report, that it could not be said to have been remedied by the appeal decision having not upheld the charge of abuse of power, nor by the fact that, before giving her final decision, Ms Prince did have tabled to her the evidence of the changes to the report, and arguments about their significance. He had submitted to the Employment Tribunal that she had not properly grappled with this aspect. His case had been that the Disciplinary Tribunal (and the Vice-Chancellor) had still upheld a charge of breach of duty that should not have been before them, and their approach to the first charge, of non-reporting, was bound in any event to have been tainted by the unfairness.

71. Mr Carr acknowledged that the authorities establish that a Tribunal is not bound to address in its decision every single detailed argument or submission advanced to it. But here, he said, there was a major failure by the Employment Tribunal to address at all, in its decision, a substantial part of the case advanced to it, as to why the impact of the changes to the investigation report rendered the dismissal unfair.

72. Mr Cheetham acknowledged that the Employment Tribunal's decision did not refer distinctly to the specific aspects of Mr Carr's particular arguments in the way that he had broken them down. Nor did it set out, or refer to, the specific questions which HHJ Richardson had directed it to address. However, it had a copy of HHJ Richardson's decision, and both counsel had referred the Tribunal to what he had said. There could be no doubt that it knew what it had to do.

73. The Employment Tribunal plainly also understood, and had in mind, he submitted, the fundamental submission that the changes to the investigation report, instigated by Ms Rowe,

had led to unfairness, in particular by the excision of Professor Green's opinion on the ISD question. This was the central argument identified by Soole J when allowing the appeal to go forward. The Judge also plainly knew that the investigation report had to be considered by the Vice-Chancellor, who would decide what, if any, matters should be referred to a Disciplinary Tribunal. All of this was covered in paragraphs 17 – 20 of the Reasons.

74. Further, submitted Mr Cheetham, in reaching its conclusions that the investigators had accepted Ms Rowe's advice, and (paragraph 21) that the final report did not present a "false or incomplete position", it had necessarily, implicitly, rejected the arguments that this rendered the process unfair. While it did not specifically address Mr Carr's arguments about charges 2 and 3, it must have had in mind the Claimant's argument that, taken as a whole, the investigation process was defective.

75. However, it was for the Disciplinary Tribunal to consider the charges as framed to it. As the Employment Tribunal found that the Disciplinary Tribunal acted reasonably in reaching its conclusions, and that the dismissal was fair, it also implicitly rejected the argument that the panel had created "its own disciplinary construct." In paragraph 42, in its reference to "breaching the rules: having a sexual relationship with a student without reporting it" the Employment Tribunal had merely been referring to the factual conduct that had been admitted.

76. Mr Cheetham acknowledged that it could be said that, had the Vice-Chancellor seen the penultimate draft of the investigation report, it was likely that he would have reached a different conclusion on what matters should go forward to a Disciplinary Tribunal. But (as Mr Carr acknowledged) he would not have been bound to follow the investigators' views, either way. Further, in paragraph 43 of the Reasons the Tribunal crucially found that the investigators were

entitled to change their position and no longer to include their draft conclusions. Though he did not address Mr Carr's individual detailed arguments, it must follow that the Judge did not consider that fairness required the Vice-Chancellor to have sight of the previous draft(s).

77. Reading its decision as a whole, argued Mr Cheetham, the Employment Tribunal had given sufficient reasons to comply with the standards in **Meek v City of Birmingham District Council** [1987] IRLR 250 (CA) and **English v Emery Reimbold and Strick Limited** [2003] IRLR 710 (CA) (and Rule 62 of the **Employment Tribunals Rules of Procedure 2013**).

78. So, I now come to my conclusions on this aspect of the appeal. I start by observing that there were, in this case, a number of unusual features.

79. First, and foremost, it bears repetition that Grounds 1 and 3 were not advanced on the basis that the Tribunal had rejected the Claimant's arguments, but erred in doing so. Rather, it was contended that the Tribunal had erred in failing to *address* those arguments, adequately or at all. It was *also* Mr Carr's position that, had the Tribunal properly addressed his arguments, it would have erred had it not accepted them. But the main engine of the Grounds of Appeal, was the proposition that the Tribunal had erred by not properly engaging with his arguments.

80. I put it to Mr Carr in the course of oral argument that (although this is raised separately in Ground 3) the whole of Ground 1 is, therefore (as, indeed Mr Cheetham had responded to it) by way of a **Meek** (or Rule 62) challenge. Mr Carr said not. This was not, he said, a case where the Tribunal had addressed the arguments, and rejected them, but not properly explained *why* it had rejected them. It had simply not addressed them at all. However, in my view, for the purposes of what I have to decide, that is a distinction without a difference. Either, applying

A the guidance in the **Meek**, **English**, and **Fuller** lines of cases, the Tribunal has given a sufficiently-reasoned decision, or it has not.

B 81. Secondly, the arguments that Mr Carr said the Tribunal had not (or at least not sufficiently) addressed all concerned what had happened at what employment lawyers sometimes call the pre-investigation stage. Further, it was never suggested that the investigators had, in the final report, withheld any evidential material that they had gathered. C The Employment Tribunal was, it seems to me, plainly alive to that feature. It referred at paragraph 22 to the Claimant's account being fully set out in the report, and to the fact that his written submissions and notes of investigation meeting were included as appendices. So, this D evidential material was, in turn, all available to the Disciplinary Tribunal.

82. A further feature was that the changes to the investigation report were identified, and E submissions were made about them, prior to the final decision on the Claimant's appeal against dismissal. The Employment Judge plainly appreciated that, and made full findings about that aspect, including setting out the conclusions to which Ms Prince came about it, in paragraphs 37 and 38 of his Reasons. It is established that what the Tribunal must consider is the overall F fairness of the "end to end" process, which includes the appeal stage (see **Taylor v OCS Group Limited** [2006] ICR 1062 (CA)).

G 83. However, when I raised this point with him, Mr Carr reiterated that it was integral to the case that he had advanced before the Employment Tribunal, that the effect of the changes to the investigation report was to render the subsequent process up to the point of dismissal unfair in a H way that was not cured on appeal. Therefore, he said, had his arguments been considered, the Tribunal should have concluded that the end to end process was unfair. Any points about what

would, or might, have happened, had the Vice-Chancellor (and any Disciplinary Tribunal directed by him) seen the draft report, would then have fallen for consideration at the remedy, not the liability stage.

84. The third unusual feature, which cannot go unremarked, was that the whole line of argument turned on the contents of a *draft* (or drafts) of the investigation report. As Mr Cheetham pointed out in his submissions, *drafts* of such a report would not normally be provided to the decision-maker(s) responsible for the next stage or stages. (That is all leaving aside the fact that the advice sought from, and dispensed by, Ms Rowe was privileged – the Judge was evidently able to form the picture that he did, in relation to her role and advice, without such privilege being either waived or breached).

85. All of these features, in my view, provide relevant context, when considering and appraising the adequacy and robustness of the Tribunal's Reasons.

86. Of course, there could be a case in which the evidence which emerges from draft documents, and/or otherwise from "behind the curtain", supports an argument or finding that some plain and serious impropriety has occurred. Even legal professional privilege may have to yield where there is evidence of a sufficiently high degree of iniquity. In this case, however, as the Tribunal records at paragraph 38 of its Reasons, Ms Prince, who considered the material at the internal appeal stage, rejected the submission that the report had been changed in order to make the Claimant's dismissal more likely, and she did not find that there was any pressure placed by anyone on Professor Green or Ms Rolstone to change the report.

87. Further, Mr Carr's written submissions to the Tribunal did not advance any positive case of impropriety. He challenged Ms Rolstone's evidence that it was she, as opposed to Ms Rowe, who advocated that evaluative conclusions should not be included in the report, as not credible. He wrote in his written submission to the Tribunal that that "does give rise to a significant suspicion that there was something untoward", but that the real difficulty was that, absent a clear explanation for why the changes had occurred, it would be difficult for the Tribunal to conclude that the Respondent had acted reasonably in this regard. He also submitted that what he called the self-denying ordinance was "bad advice" and "badly executed".

88. In my view, paragraphs 17 – 22 of the Tribunal's Reasons show that the Employment Judge plainly had on board the nature and substance of the changes made to the draft report, *including* that they extended to the removal of the previous expression of the investigators' views on the ISD test and on whether the Claimant's conduct amounted to an improper abuse of power, and/or a breach of duty. He plainly had on board the significance of the over-arching ISD test. He made a clear finding as to the rationale of the solicitor's advice, and that the investigators had in fact acted on it. There was no positive case advanced to him of serious impropriety or anything of that sort – on anyone's part. The Judge certainly made no such finding, and it has formed no part of the grounds of appeal to suggest that he should have done.

89. Mr Carr, as I have noted, argued that, in referring to "the" Disciplinary Tribunal, the Judge neglected to consider that it fell to the Vice-Chancellor to decide whether to refer any matter to such a body at all. I do not think that is right. The Judge plainly appreciated that the investigators' report went to the Vice-Chancellor (paragraph 17); and cited, in terms, the framing in it of allegations which referred to questions to be determined by "any" subsequent

disciplinary panel (paragraph 18). But the Judge was, himself, writing his decision from the vantage point of knowing that there had, indeed, been such a Disciplinary Tribunal.

90. The Judge found that the Claimant's account was fully set out in the investigators' report (paragraph 22). He found that it was fair and reasonable for the Respondent to have had a solicitor advise on the process (paragraph 41), that the position adopted by the investigators following the solicitor having advised was reasonable (paragraph 42) and that the final report did fairly set out the investigators' position (paragraph 43). It is also clear, from paragraphs 37 and 47, that he thought that Ms Prince's view of the reasons for, and significance of, the changes from the draft to the final report was one that she was reasonably entitled to reach.

91. It is also clear, I think (and this is the particular territory of Ground 2), reading paragraph 42, that the Judge focussed there on the breach of the "rules" by the conduct of having had a sexual relationship with a student without reporting it, because that was both the underlying essential factual basis for all of the charges, and the conduct which the Claimant had from the outset, as such, admitted, the whole process thereafter proceeding on the basis that his more detailed factual account was also fully accepted.

92. Further, to repeat, the Judge plainly understood that the draft report had set out conclusions on charges two and three, as well as the over-arching ISD test, and that these were removed. It is also clear that, having regard to his findings about *why* that was done, the Judge did not think that that rendered the dismissal unfair. Read literally and in isolation, his statements that it was reasonable for the Respondent to have solicitors advise the investigators might seem trite and uninformative. But reading the Decision as a whole, I think it is clear that the Judge considered it was not unreasonable or unfair for the solicitor *specifically* to advise,

and the investigators to act on the advice, that statements of evaluative *conclusions* on counts two and three, and the overarching ISD test, should not be included in the final report.

93. In paragraph 45 of his Decision HHJ Richardson observed that it was a difficulty with the Decision of the first Tribunal that it "appears to have treated its findings as to the honesty and integrity of Professor Green and Ms Rolstone as conclusive." But the test was "not subjective integrity but objective fairness." As to that, the second Tribunal, it seems to me, clearly had no criticism to make of the honesty or integrity of Ms Rowe, Professor Green or Ms Rolstone. But it *also* made specific findings as to the particular reasons *why* the draft report was amended, and that it did not consider that an unreasonable thing to have done. Though it did not recite them, this decision therefore, I conclude, addressed all the aspects which HHJ Richardson said that it ought to address.

94. I return to Mr Carr's specific arguments, and the three general themes that I identified at paragraph 37 above. First, in my judgment it is clear from the Tribunal's Decision as a whole that it did not think that it was unfair that the Vice-Chancellor and Disciplinary Tribunal did not know the investigators' views on whether the Claimant's conduct amounted to an abuse of power, a breach of duty or ISD. It is also clear that the Judge thought that was because it was fair for conclusions on those questions to have been left to any Disciplinary Tribunal. It is also clear, reading the Decision as a whole, that the Judge *was* able to conclude what the explanation for the changes was. He concurred with Mr Carr that Ms Rowe's advice was instrumental, and he was able to infer what that advice was; and it is clear that the Judge thought that it was not unfair for that advice to have been given, nor for it to have been followed.

95. In all the circumstances I think the Judge said sufficient, reading his Decision as a whole, to convey not only his conclusions on those points but also the reasons for them.

96. That leaves what Mr Carr says was the failure to address his arguments that the effect of the changes to the report was to leave charges 2 and 3 extant in a form which was unparticularised, making it difficult for the Claimant to understand what it was, factually, about his conduct that formed the basis of those charges, giving rise to what he called "disciplinary drift" and enabling the Disciplinary Tribunal to create its own "disciplinary construct".

97. I remind myself that the premise of Grounds 1 and 3 is that the Judge did not address, or sufficiently address, this line of argument. But in judging whether the Tribunal ought to have said more about it, or each element of it, than it did, some regard has to be had to its place in the constellation of arguments presented to the Tribunal, and, once again, what does emerge from the Tribunal's *overall* Decision, about its conclusions and the reasons for them.

98. In this case the Tribunal identified correctly that the underlying factual conduct was admitted. It was plainly aware of, and fully set out, the Claimant's account of the details of what happened, and identified correctly that it was accepted as true. It identified that all his statements (including his reasons for not having reported the sexual relationship) were included in the investigators' report. The Judge knew that it was for the Vice-Chancellor to decide which, if any, matters should proceed to a Disciplinary Panel; and, later, to decide whether to dismiss; and that the Claimant had had the benefit of a full appeal.

99. The Tribunal was also aware of, and again recorded very fully in its decision, the passages in the Guidance which referred specifically to the duty of care, and to the potential for

abuse of power. It did not, which was the premise of Ground 2, lose sight of the fact that the charges extended to those matters, and that the investigators had taken out their own conclusions in relation to them. As to duty of care, it cited the relevant passages in the Guidance, referring in particular to assessing or examining the student, and to the relationship of that to the duty to report; and it recorded that the Claimant had specifically admitted in the investigation process that he had continued to teach A, and been involved in her academic supervision and the marking of her dissertation. It is, therefore, difficult to see on what basis the Tribunal could or should have concluded that he did not appreciate the basis for that charge.

100. The Tribunal also plainly knew that the charge of abuse of power had not been upheld on appeal, and recorded Ms Prince's specific reasons in that regard; and it plainly considered whether the dismissal was unfair, taking account of the final outcome of the appeal, and Ms Prince's reasons for upholding the dismissal.

101. The Tribunal indeed fully identified and recorded not only the Disciplinary Panel's, but Ms Prince's reasons for concluding that the Claimant's conduct amounted to ISD (including noting that Ms Prince would have dismissed on the basis of count 1 alone); and it went on to set out its own reasoned appraisal (in paragraph 45) of why it considered that the ultimate conclusion, upholding the dismissal on the basis that there was conduct amounting to ISD, was fairly reached. Having regard to all the other findings, its reasoning at that point, focussing on the facts of the sexual relationship, the failure to report it, and the ongoing assessing and teaching role, and the reasons for the Guidance, was, in my view, cogent and proper.

102. Given all of that, I do not think the Tribunal needed to say more than it did, in answer to Mr Carr's arguments that counts 2 and 3 should have been "killed off" by the investigation, that

the failure to do so unfairly tainted the whole of the subsequent process in relation to count 1 and the ISD test, and that the conclusion that Ms Prince reached about the significance of the changes from the draft to the final report was unfair. The Tribunal plainly considered that the findings of guilt on counts 1 and 3, and that the conduct amounted to ISD, had been reached, and upheld on appeal, for identifiable and sustainable reasons, and it explained why.

Outcome

103. I conclude that the Tribunal did not fail to give a **Meek** compliant decision or (however any of the Grounds are characterised) err as alleged in any of the Grounds of Appeal.

104. Accordingly, this appeal is dismissed.

Appendix – Full Text of the Grounds of Appeal

Ground 1 –

a. The ET failed to address key arguments advanced by the Claimant in seeking to establish that he had been unfairly dismissed;

b. In particular (but in summary form) the Claimant submitted that his dismissal was unfair inter alia in that:

i. The purpose of the investigation conducted by Professor Green was to establish whether there was a prima facie case against the Appellant that he had been guilty of immoral, scandalous, disgraceful conduct ("ISD");

ii. In particular, it was submitted on behalf of the Claimant, and accepted by the Respondent's witnesses, Professor Green and the Vice-Chancellor, that the purpose of the report by the former was to inform the latter in relation to a decision which he would then be required to take under section 16 of the Respondent's disciplinary process, as to whether the case was sufficient to warrant charges of ISD being put before a disciplinary tribunal at all;

iii. The investigation report ("the Report") prepared, on its face by Professor Green and an HR professional, Ms Rolstone underwent substantial changes at a very late stage in the writing process and which materially altered its content and conclusions in 21 respects which were almost without exception unfavourable to the Appellant;

iv. The Respondent, through Ms Rolstone, had advanced an entirely false explanation for the changes being made – claiming that they were as a

result of her interventions rather than being at the behest of the Respondent's in-house employment lawyer, Ms Rowe;

v. Given that a false explanation for the substantial changes to the Report had been advanced by the Respondent, the Tribunal could not properly conclude that the Respondent had conducted a reasonable investigation;

vi. Even if, as appeared to be the case, the significant changes to the Report were as a result of the intervention of Ms Rowe, the advice that she had given was bad advice, which had in any event been badly executed and which was inexplicable by reference to any of the evidence which the Respondent's witnesses had sought to give;

vii. The significant and adverse changes to the Report could not be explained simply by reference to a decision to leave the question of ISD to a disciplinary tribunal – not least because at that stage there had been no decision that the case should even be referred to one;

viii. The defective investigative process through which the Report was amended in multiple respects which were unfavourable to the Appellant had meant that he had been deprived of the benefit of the report in its original form for the purposes of:

- the initial decision to be taken by the Vice Chancellor as to whether there was a prima facie case of ISD at all which might warrant the setting up of a disciplinary tribunal; and/or
- his defence to be presented at any disciplinary tribunal based on charges of ISD; and/or
- the ultimate decision to dismiss taken by the Vice Chancellor following the disciplinary tribunal which the Appellant faced;

ix. The investigative process adopted by the Respondent ultimately resulted in the allegations against the Claimant being left in vague and unspecific terms in relation to 2 of the 3 charges against him, which allowed the disciplinary panel to create its own disciplinary construct so as to find the Appellant guilty of those 2 charges;

x. The Respondent, by formulating the charges in the way that it had, had caused the Appellant to face 3 charges which amounted to the same conduct simply being described in 3 different ways;

c. At Reasons, paragraph 17, the Tribunal acknowledged that the changes to the Report and the role of Ms Rowe were "a crucial part of the [Appellant's] case in this claim". However, the Tribunal went on the following paragraph to record that the report had been changed "so as to focus on whether there was prima facie evidence which could then be evaluated by a disciplinary tribunal against the standard of [ISD]". This ignores the key argument made by the Appellant (and accepted by the Respondent's witnesses) that a key purpose of the Report was to enable a decision to be taken by the Vice Chancellor as to whether there should be a disciplinary tribunal at all;

d. At Reasons, paragraph 19, the Tribunal appeared to acknowledge the significance of the point being made on behalf of the Appellant in making the following finding:

"Without the crucial alteration [to the Report] mentioned above, there would be no prima facie case against the [Appellant] whereby he might be dismissed."

e. However, under the heading "Discussion and Conclusion", the Tribunal went on to conclude that:

i. Reasons, paragraphs 41 and 42 – it was sensible for the Respondent to have a solicitor advising investigators and the position agreed by the investigators following that advice was reasonable – in so concluding the Tribunal failed to engage with the case advanced by the Claimant that the explanation for the changes given by the Respondent was a false one and that any advice given was bad advice, badly executed;

ii. Reasons, paragraph 42 – the issue for the investigators was whether there was a case to answer in respect of breaches of the rules relating to the reporting of relationships with students and the issue as to whether that involved ISD was" left for the Disciplinary Tribunal". In so concluding the Tribunal overlooked its own finding as to the purpose of the investigation set out at Reasons, paragraph 19 and ignored the Claimant's submissions that the investigation was conducted in order to enable the Vice Chancellor to reach a conclusion on whether there should even be a Disciplinary Tribunal at all;

iii. Reasons, paragraph 43 - the investigators accepted the advice given to them by the Respondent's in-house lawyer – in so concluding the Tribunal failed to engage with any of the arguments advanced by the Claimant and set out at paragraph 9.b.i. – viii. above

f. In addition, at no point in its decision did the Tribunal address the specific and substantial criticisms set out at paragraph 9.b.ix. and x. above.

Ground 2 – advancing its own explanation for the manner in which the Report was compiled

a. As set out above, it was the Appellant's case, and accepted by the Respondent and its witnesses, that the purpose of the investigation by Prof Green and Ms Rolstone was to look into the question of whether there was a prima facie case of ISD, in relation to which 4 allegations had been made;

b. That this was the scope of the investigation appeared to be acknowledged by the Tribunal at Reasons, paragraphs 18 and 19;

c. However, when returning to the investigation, at Reasons, paragraph 40, the Tribunal introduced its own construct as to what had been the issue for the investigators, namely not whether the Appellant had "committed prima facie breaches of the rules";

d. It is clear from Reasons, paragraph 42, that the reference to "rules" is simply a reference to the Respondent's rule relating to the reporting of sexual relationships with students. In other words, the conclusion of the Tribunal was that the scope of the investigation into the Appellant's conduct was not to consider the 4 specific allegations that had been made against him but to consider one issue alone, namely

whether he had breached the rules in relation to the reporting of a sexual relationship;

e. The Respondent itself had never advanced such a case as it had accepted that it was the role of the Report to consider the issue of ISD contained in the 4 allegations that had been made against the Claimant;

f. This Tribunal imposed limitation in the scope of the Report, was then used by it as the basis (at Reasons, paragraph 42), for not criticising the approach that the Respondent had taken as evidenced by the changes to the Report itself, thereby disposing in a wholly illegitimate way with a major part of the Appellant's case.

Ground 3 – failure to provide reasons – the Appellant's primary case is that the Tribunal failed in the respects set out above, to address the substantial arguments that he advanced as to why his dismissal was unfair. If and to the extent that, it is determined that the Tribunal in fact addressed those arguments, it failed to provide any or any adequate reasons as to why those arguments were not accepted.