Appeal No. UKEAT/0031/19/DA

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 September 2019

**Before**

**HIS HONOUR JUDGE AUERBACH**

**(SITTING ALONE)**

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MR MARTIN JAMES SCOTT — APPELLANT

KENTON SCHOOLS ACADEMY TRUST — RESPONDENT

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Transcript of Proceedings

JUDGMENT

## APPEARANCES

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| For the Appellant | MR MARTIN JAMES SCOTT<br>(The Appellant in Person) |
| For the Respondent | MR PAUL SANGHA<br>(of Counsel)<br>Instructed by:<br>DAS Law<br>North Quay<br>Temple Back<br>Bristol<br>BS1 6FL |

**DISABILITY DISCRIMINATION**

**UNFAIR DISMISSAL**

The Claimant was employed by the Respondent as a teacher. He was dismissed for the given reason of conduct. This concerned, principally, his admitted conduct in carrying out a request, made by a colleague, to give pupils taking an assessment exam, manuscript notes that she had prepared for them to follow.

The Tribunal found that the Claimant had, at the relevant time, a mental health disability. It was his case that this had impaired his judgment and decision-making. He claimed discrimination arising from disability and failure to comply with the duty of reasonable adjustment. He also claimed that he had been automatically unfairly dismissed for making protected disclosures about the extent of the malpractice, and, in any event, ordinarily unfairly dismissed.

The Tribunal found that the Claimant was disabled at the relevant time. However, it did not find that his conduct arose in consequence of his disability. In any event it considered that dismissal was a proportionate response, and it was not a failure of reasonable adjustment for the Respondent not to have imposed a lesser sanction. The unfair dismissal claims also failed. The Claimant appealed the dismissal of his **Equality Act 2010** claims, and the decision on the ordinary unfair dismissal claim.

**Held**: The Tribunal had erred (1) in taking the wrong legal approach to whether the conduct for which the Claimant was dismissed arose in consequence of his disability; (2) in not applying the correct legal approach to the consideration, when applying the proportionality test, of the possibility of imposing a lesser sanction; (3) in relation to whether it would have been a

reasonable adjustment to impose a lesser sanction, given the impact on that question of its other erroneous conclusions. **Pnaiser v NHS England** [2016] IRLR 170 and **City of York Council v Grosset** [2018] ICR 1492 applied.

The Tribunal did not err in dismissing the unfair dismissal claim. **O'Brien v Bolton St Catherine's Academy** [2017] ICR 737 and **City of York Council v Grosset** (above) considered and applied.

**HIS HONOUR JUDGE AUERBACH**

1. I shall refer to the parties as they were in the Employment Tribunal ("the ET") as Claimant and Respondent. Following a hearing held in May 2018 at North Shields the Employment Tribunal (Employment Judge Shepherd, Ms L Jackson and Mr J Adams), dismissed the Claimant's claims of disability discrimination and unfair dismissal. This is his appeal against that decision.

2. The following account of the facts is drawn from the more detailed account given by the ET in its decision. The Claimant was employed by the Respondent from September 2009 as Head of Modern Foreign Languages at Kenton School. In October 2013 the Senior Vice Principal, Richard Devlin, raised concerns regarding his performance, and objectives to address these concerns were agreed. In September 2014 he was placed on a support plan to address concerns regarding his leadership. In May 2015 he stepped back from the leadership role and another teacher, referred to by the Tribunal as CL, became Head of Spanish. In October 2015 the Claimant was placed on a support plan, again because of issues with the management of his workload. As of early May 2016, there were ongoing issues and it was agreed that he would be relieved of certain additional duties. There was some reference to certain difficult personal circumstances. Later in May he sent an email indicating that the changes were helping.

3. At around this time the Claimant was referred to the City Council's occupational health department. In a report of 19 May 2016, they stated:

> **"Mr Scott reports work-related and personal stressors leading to his anxiety at the moment. He indicates he is finding the appraisal process stressful and this appears to be having an effect on his mental and physical health. Assessment of his mood today shows that he is experiencing moderate symptoms of depression and severe symptoms of anxiety. He is taking appropriate medication. We have discussed counselling support Mr Scott feels this would be helpful. I will refer him to our services today."**

4. The Claimant was indeed referred to the counselling service. It emerged that he had had support from an acute mental health team the previous summer, although this was not at that time shared with the Respondent. There were further review meetings between May 2016 and the end of the school year in July. The Claimant came under the charge of a new Head of Modern Foreign Languages, Claire Smith, on 22 July. There were signs of improvement. The action plan, "disappeared", as did the threat of formal capability proceedings. However, there had been an episode on 25 June 2016 which ultimately led to the Claimant's dismissal. The Tribunal gave the Claimant's account of this at paragraph 7.12 of its Decision as follows:

> **"7.12 The claimant said that on Saturday, 25 June 2016 CL informed the claimant that she would be working with his students in her classroom. Only one pupil arrived and she took that pupil into the classroom. An hour later CL returned to the claimant with that pupils completed work and a series of manuscripts for the other students in her handwriting. She told the claimant to hand them out to the students and to have the students write it up. These were Spanish GCSE controlled assessments. The claimant said that he did as he was told. He felt overwhelmed and rather battered. He was suffering with depression and severe anxiety. He said that he was under extreme pressure from Richard Devlin to improve and had been told by Richard Devlin to see CL on the issue of controlled assessments and that she had then told the claimant what he was to do. He accepted that what he did was wrong but said that he felt unable to object. He said that he accepted that he had "crossed a moral line".**

5. In November 2016, on a "walk through" of the department, Mr Devlin and Ms Smith noticed that some students working on controlled assessments appeared to be copying verbatim from handwritten notes. The Tribunal described what happened next:

> **"7.14. CL was suspended following which she resigned and was not seen at the school again. The claimant went to see Claire Smith and provided her with a file which included information in respect of the controlled assessments for pupils which had been swapped from the claimant to CL. The claimant said that he told Claire Smith exactly what had happened and that what was missing from the file was the controlled assessments which the pupils had copied out from CL's handwritten manuscripts.**
>
> **7.15. Claire Smith said that the claimant came to see her and provided a folder of controlled assessments that CL was to improve. These were for students in his class as the claimant and CL had swapped a year 11 class at the start of the year. Claire Smith said that the claimant was shaking and made a point of telling her that he was. He told her that there were bits of controlled assessments for his class that CL had been given to improve. Claire Smith said that the claimant was shaking and made a comment about hardly sleeping and being given his marching orders. However, she said that she had no reason to think that the claimant was involved in any way and she thought he was concerned that he should have given her the file earlier. She did not discuss it any further with the claimant as it was not appropriate to discuss another colleague who was under investigation with him.**
>
> **7.16. On 12 December 2016 the claimant met with Richard Devlin as part of the investigation into C. In that meeting the claimant told Richard Devlin that CL had given him work to give to the students in her writing to ask the students to copy and write in their own handwriting as their controlled assessments. The claimant confirmed that he had done this and that he later marked and inputted the results onto the department tracker where students' progress is**

**logged. Richard Devlin said that it became evident from this discussion that the claimant may have been complicit in malpractice and suspended him pending an investigation."**

6. The Claimant was suspended and an investigation was begun by Mr Devlin. At the request of the Claimant's Trade Union representative, John Hall, the investigation meeting was postponed several times. Mr Hall also sought a change of investigator because of Mr Devlin's prior involvement; and the Vice-Principal, Andrew Clark took it over. He then invited the Claimant to an investigatory meeting to discuss the following allegations:

**"7.21. On 28 February 2017 Andrew Clark wrote to the claimant inviting him to an investigatory meeting on 13 March 2017. In that letter it was stated that the purpose of the meeting was to give the claimant the opportunity to respond fully to the allegations which were set out as:**

- **That you have provided help to students in relation to year 11 Spanish controlled assessments by allowing pupils to copy the work produced by another teacher knowing this was not permitted by the exam board.**
- **That you failed to follow the instructions of the principal when on Monday, 5 September 2017, she instructed all members of staff to ensure that they fully understood the requirements of the course specifications and adhered to them.**
- **That by your actions you have breached the mutual trust required between employer and employee."**

7. That meeting took place on 13 March 2017. The Tribunal found:

**"7.22. On 13 March 2017 the claimant attended an investigatory meeting with Andrew Clark and Joanne Jacoviak. The claimant was accompanied by his Trade Union representative, John Hall. During the meeting the claimant confirmed that CL had handed him a file of manuscripts with her notes and said to give them to the pupils to copy and then update the tracker. The claimant confirmed that he knew that what he was doing was wrong and in breach of the specification. He referred to pressures inside and outside of school and said that he felt he could not say no. He felt it was a decision that was being imposed on him but his mistake was not reporting it.**

**7.23. The claimant said that he handed over a file of manuscripts to Claire Smith when he discovered that CL was not at work. He referred to having suffered from anxiety long-term with pressures at work and at home. He said that his judgment had gone."**

8. Mr Clark then met with Mr Devlin and Mr Smith. He then wrote to the Claimant that there was a case to answer at a disciplinary hearing, as to whether he should be dismissed for gross misconduct, and the Claimant was subsequently given further details of the process. Following this the Claimant called two colleagues, saying that he would be blowing the whistle on the department and calling them as witnesses. One of them reported this to Ms Jacoviak.

She said the Claimant had sounded drunk and had made certain other comments which made her uncomfortable. He had told her that he was going to say that Mr Devlin had told them they had to get the coursework done whatever it takes, and, therefore, effectively to cheat. The other colleague also provided an email that she had received from the Claimant about this.

9. The Claimant subsequently provided a statement under the whistleblowing policy accusing Mr Devlin, CL, and these other two colleagues, of involvement in various capacities in the malpractice. He was told that the disciplinary process would be suspended while these allegations were investigated. A further occupational health report was obtained in June 2017, which expressed the view that the Claimant was a disabled person in law. Following a further meeting the Claimant was told that the investigation was complete and that the formal disciplinary hearing would now go ahead. The Tribunal found:

> **"7.33. On 22 June 2017 Sarah Holmes-Carne wrote to the claimant indicating that the investigation was complete and the stage 4 disciplinary hearing would take place on 7 July 2017. It was stated:**
>
> **The allegations under consideration at the hearing are:**
>
> - **That you have provided help to students in relation to Spanish controlled assessments by allowing pupils to copy the work produced by another teacher knowing this was not permitted by the exam board.**
> - **That you failed to follow the instructions of the principal when on Monday, 5 September 2016, she instructed all members of staff to ensure that they fully understood the requirements of the core specifications and adhere to them.**
> - **That you have failed to follow a reasonable management instruction through discussing the disciplinary case against you with colleagues when expressly instructed not to on two occasions (14 December 2016 and 3 April 2017).**
> - **That during these discussions you made serious allegations against other colleagues either directly or indirectly in contravention of the schools Dignity at Work policy.**
> - **That you attempted to coerce colleagues into providing false statements/evidence to support your case and therefore influence the outcome of the disciplinary process.**
> - **That by your actions you have breached the mutual trust required between employer and employee.**
>
> **The date of the disciplinary hearing was changed to 13 July 2017 following a request from the claimant's Trade Union representative."**

10. David Pearmain, the Chief Executive, had investigated the whistleblowing allegations. He wrote to the Claimant that he had found no evidence of any form of malpractice in relation to the controlled assessments. The Tribunal continued at paragraph 7.35 as follows:

> **7.35. On 5 July 2017 the respondent was provided with a copy of a report from Professor Turkington. This had been prepared on the instructions of the claimant's solicitor. The report referred to the claimant's previous psychiatric history. It indicated that the claimant had been diagnosed with anxiety in 2003 and suffered from depression in 2007 following the death of his brother. It stated that the claimant was disabled at the relevant time at which the error was reported to have taken place. It said that the claimant's**
>
> > **"judgment and decision-making were impaired by his high levels of anxiety and ongoing symptoms of depression at the time of this error."**
> >
> > **"The support or adjustment which might have alleviated his mixed anxiety and depressive disorder would have included an increased dose of an anxiety reducing antidepressant medication... He would have required a full course of structured evidence-based psychotherapy i.e. cognitive behavioural therapy. He would have required 20 sessions and he would have required ongoing support from Occupational Health and monitoring of his performance in the school environment."**

11. There was a disciplinary hearing before the school's Principal, Sarah Holmes-Carne, on 13 July, and continuing on 20 July 2017. She had an HR advisor from the Council with her. The Claimant was accompanied by Mr Hall. Mr Clark presented the management case accompanied by Ms Jacoviak. Ms Holmes-Carne wrote to the Claimant on 26 July 2017 informing him of her decision to dismiss him. It was a long and detailed letter and the Tribunal cited extensively from it. Of the first allegation (giving them letter A to F) what she wrote included the following:

> **"It was clear that you knew that this was "wrong" and was professional malpractice, not only when you were interviewed about it by Richard Devlin on 12 December 2016, but also more importantly at the time you committed the act about six months earlier i.e. 28 June 2016.**
>
> **……there were a series of judgments and decisions in committing this professional malpractice and it could not be regarded as a "one-off" decision or single isolated error of judgment."**

Further on:

> **"That carrying out this professional malpractice involved a conscious and deliberate series of actions and activities. This included identifying the students and them to copy the prepared work for the controlled assessments produced by CL and telling them to write it in their own handwriting and also updating the tracker."**

Further on:

> **"Your explanation for your actions in relation to this allegation is primarily based on your medical circumstances and your disability, and pressure you felt you were under at the time**

**whilst on a support programme to address some concerns about your performance, which I shall address below."**

12. She described this as the most serious allegation. She went on to find allegations B, C, and D also substantiated. As to E, it was difficult to form a conclusion, but she observed it was inappropriate and unprofessional to have contacted the two colleagues. She found F to be substantiated. As to mitigation she wrote as follows:

**"7.37….**

**Most of the explanations for your behaviour, conduct and actions in relation to the allegations concern certain mitigating factors. In summary, the main areas were:**

- **That your decision-making and judgment was impaired by your medical condition and disability;**
- **That issues relating to your mental well-being should have been addressed at an earlier stage and you were not supported by the school with regard to your medical condition;**
- **That you were at or around the time subject to significant pressure by Richard Devlin whilst in support plan;**
- **That professional malpractice for controlled assessments for students was at the time widespread in the modern foreign languages department...**

**In conclusion, I felt that there was limited evidence to indicate that your decision-making and judgment was at the time around the end of June 2016 impaired to any significant degree as you continued to perform your professional duties and responsibilities, which involved making decisions and judgements as a teacher on a daily basis, and this was done to a generally, satisfactory level. However, I do accept that where a member of staff is having to be supported through a support plan/appraisal process this can be stressful to the teacher concerned …The school only became aware of disability related to your mental health following the medical support from the consultant psychiatrist in May 2017...**

**Also, I think it is appropriate to point out that you have not helped the school support you with your mental health and well-being issues. Indeed, you have been less than honest with the school about your mental health issues and circumstances as it became clear at the hearing that you had made a false declaration on your application form regarding a sickness absence in 2007. It was clear that your sickness absence in 2007 was due to depression and anxiety as you said at the hearing and not a "virus" as stated on the application form...**

**No evidence was submitted in relation to being subject to significant pressure by Richard Devlin...**

**As stated at the hearing I take allegations of professional malpractice extremely seriously and stated that three referrals — concerning teachers that have now left the school — had been made to the appropriate bodies whilst I have been Principal of the school.**

**Having carefully considered the mitigating factors put forward by you and your trade union representative, and weight and validity of them, I felt a proportionate response**

**— taking into account the extremely serious nature of the misconduct and that your behaviour was in breach of the Teachers' Standards — was that you should be dismissed on grounds of gross misconduct. I did not feel that the issuing of a final written warning would have adequately reflected the extremely serious nature and magnitude of your misconduct.**

**Therefore, I am writing to notify you that your employment has been terminated without notice by reasons of your conduct on grounds of gross misconduct."**

13. The Claimant appealed and there was a hearing before the Staff Appeals Committee. They dismissed the appeal. Once again, they produced a lengthy decision from which the Tribunal cited extensively. I do not need to cite it to the same extent, but note the following passage:

> **"7.40….**
>
> **The Committee considered the psychiatric report compiled by Professor Turkington at length. Whilst not challenging the credentials of the author of the report the Committee found it notable that the only apparent examples of your impaired judgment was in connection to your active malpractice.**
>
> **At the appeal meeting conversations were held regarding the support offered to you by Kenton School at around the time of the act of malpractice. It was accepted by all parties that you had been assessed as suffering from moderate depression and severe anxiety during an appointment with OHU on 19 May 2016. Following this assessment Richard Devlin met with you on the 23 May 2016 whereby workload and support was discussed; you went on to attend 3 counselling sessions on 27 May 2016, 3 June 2016 and 17 June 2016. After the sessions, OHU confirmed that you had reported an improvement in mood at the end of the sessions.**
>
> **Stephen explored what the employer could have reasonably known in terms of your health/identifying disability. By your own admission you manage to 'function ok' at work and claim that you assumed a 'mode' when teaching; appearing as a positive role model to students. Following that the school would not have noticed any changes in behaviour — no lack of concentration, poor relationships or irritability. Therefore, the Committee had to conclude that it would not have been possible for the students or colleagues to identify any challenges you were experiencing in coping with your mental health. Further, that the school had done as much as they were able given the information you felt able to share.**
>
> **Therefore, it appeared to the Committee that it was at the time of the dedicated support to you that the act of malpractice occurred…."**

14. In December 2017 the Claimant presented his claim to the ET. The complaints were of discrimination arising from disability, failure to comply with the duty of reasonable adjustment, unfair dismissal by reason of a protected disclosure and ordinary unfair dismissal.

15. It is convenient here to set out the following sections of the **Equality Act 2010** ("EqA") (omitting irrelevant parts):

> **"15. Discrimination arising from disability**
>
> **(1). A person (A) discriminates against a disabled person (B) if–**
>
> > **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> >
> > **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**

**(2). Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

**….**

**20. Duty to make adjustments**

**(1). Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**

**(2). The duty comprises the following three requirements.**

**(3). The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**

**….**

**(6). Where the first or third requirement, relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.**

**(7). A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.**

**(8). A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.**

**….**

**(11). A reference in this section, Section 21 or 22 or an applicable Schedule to any auxiliary aid includes a reference to an auxiliary service.**

**….**

**(13). The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.**

**21. Failure to comply with duty**

**(1). A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**

**(2). A discriminates against a disabled person if A fails to comply with that duty in relation to that person.**

**(3). A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly not actionable by virtue of another provision of this Act or otherwise."**

16. I note that further provisions concerning the duty of reasonable adjustment are found in a schedule. I note also that the **Equality Act 2006** Section 14 makes provision for the **Equality and Human Rights Commission** ("the EHRC") to introduce a code of practice in connection with matters arising under the **2010 Act**, that Section 15(4) of the **2006 Act** provides that such a

code shall be taken into account by a Court or Tribunal in any case in which it appears to the Court or Tribunal to be relevant, and that the Commission did introduce a code in 2011, being its code of practice on employment.

17. I set out the following relevant provisions of the **Employment Rights Act 1996**:

> **"98 General**
>
> **(1). 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.**
>
> **(2). A reason falls within this subsection if it–**
>
> > **(a). relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
> >
> > **(b). relates to the conduct of the employee,**
> >
> > **(c). is that the employee was redundant, or**
> >
> > **(d). is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**
>
> **(3). In subsection (2)(a)–**
>
> > **(a). "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and**
> >
> > **(b). "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.**
>
> **(4). Where the employer has fulfilled the requirements of subsection (1), 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 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.**
>
> **(6). Subsection (4) is subject to—**
>
> > **(a). sections 98A to 107 of this Act, and**
> >
> > **(b). sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).**
>
> **103A Protected disclosure.**

> **An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.**

18. The concept of a protected disclosure is defined for these purposes in Part IVA of the **1996 Act**.

19. In its Decision the Tribunal set out the detailed list of issues that had been identified at an earlier Preliminary Hearing. After setting out its findings of fact it turned to the law. It cited relevant provisions of the **EqA**, including concerning the burden of proof, and of the **Employment Rights Act 1996** ("ERA"), and it cited extensively from various relevant authorities. There is no criticism of that part of its Decision as such.

20. The Tribunal then turned to its conclusions. For reasons that it set out, it found that the Claimant was a disabled person at the relevant time. In relation to the claims of failure to comply with the duty of reasonable adjustment, and of discrimination arising from disability, it is most convenient to set out the Tribunal's conclusions in full.

> **"47. With regard to the claim of failure to make reasonable adjustments, The Tribunal is satisfied that the respondent did apply a provision criterion or practice (PCP) to the claimant of a requirement to comply with its discipline procedure and teaching standards. The Tribunal is not satisfied that the PCP placed the claimant at a substantial disadvantage in comparison with persons who are not disabled. The claimant could still comply with the teaching standards and perform his role satisfactorily. He continued to carry out his teaching duties to a satisfactory standard.**
>
> **48. If it had been found that the claimant was placed at a substantial disadvantage then the Tribunal is satisfied that the claimant was provided with a reasonable level of support and assistance and that a sanction less than dismissal would not be a reasonable adjustment in the circumstances.**
>
> **49. At the time of the claimant's dismissal the respondent had knowledge of the claimant's disability, or should reasonably have been expected to have such knowledge. However, it would not be a reasonable adjustment to allow a teacher to remain in post having established that he was guilty of serious misconduct that was such that it undermined the integrity of the exam system, and the respondent found that it could no longer trust the claimant to perform his professional duties. The Tribunal is satisfied that there was not a failure to make reasonable adjustments.**
>
> **50. With regard to the claim of discrimination arising from disability, the respondent did dismiss the claimant which was unfavourable treatment. However, this was not established to be because of something which arose in consequence of the claimant's disability."**

21. In paragraphs 51 to 55, the Tribunal then gave a fairly detailed summary of the decision of the Court of Appeal ("CA") in **City of York Council v PJ Grossett** [2018] ICR 1492, which at the time had very recently been handed down. The Tribunal then continued as follows:

> **"56. The Tribunal finds that there were significant differences between the Grossett case and this one. In the Grossett case there was an error of judgment by the claimant in carrying out an inappropriate showing of the film. It was a single error of judgment caused by stress. This case is distinguishable from the Grossett case as it was not a single error of judgment in respect of carrying out an inappropriate act in the classroom, it was a serious act of, or being complicit in, what the principal described as 'cheating' the exam system and goes to the very root of the duties and responsibilities of a teacher. In this case, there was a series of occasions on which the claimant made decisions, the first being when he had handed the work in question to the students for them to copy for their controlled assessments. He then collected the work, marked it, and he then entered the results on the departmental tracker. The claimant continued to carry out his teaching duties. He agreed to go on a school trip to Barcelona with the attendant safeguarding responsibilities. There was no credible evidence that the conduct in question was caused by the claimant's medical condition.**
>
> **57. The Tribunal finds that the something which would need to be shown to have arisen in consequence of the claimant's disability was the malpractice for which the claimant was dismissed and this was not established to have been caused by the claimant's disability. The report from Professor Turkington refers to the claimant's judgment and decision-making being impaired by his high levels of anxiety and ongoing symptoms of depression at the time of the 'error'. However, it does not establish causation. It does not show that the claimant's misconduct, for which he was dismissed, was caused by his impairment. It does not state that his mental condition was such that he was unable to carry out the requirements of the exam regulations and, as the principal said "cheat" and continue to hide that cheating until he was concerned that it might come to light.**
>
> **58. The claimant continued to perform his professional duties and responsibilities at the relevant time and this was not a single error of judgment, it involves a number of actions over a period of 3 to 4 days. The claimant was aware that he had crossed a "moral line".**
>
> **59. If it had been established that the dismissal was unfavourable treatment because of something which arose in consequence of the claimant's disability then the Tribunal would have gone on to consider whether the dismissal was a proportionate means of achieving a legitimate aim. The aim was that of upholding teaching standards and the Tribunal is satisfied that that is a legitimate aim. It is necessary to maintain the integrity of the exam system, the school's reputation and the interests of the children. Balancing this against the effect on the claimant, the Tribunal is satisfied that it was a proportionate means of achieving that aim. It is clear that dismissal would have a devastating effect on the claimant however, in view of the importance of upholding teaching standards in that the integrity of the exam system is fundamental to the reputation and maintenance of the education system, the Tribunal is satisfied that the dismissal was proportionate."**

22. The Tribunal went on to find that the statements relied upon by the Claimant as protected disclosures did not amount to such in law; but, in any event, that he had not been dismissed for the reason or principal reason that he made those statements, but because of the misconduct relied upon by the Respondent.

23. As to the claim of ordinary unfair dismissal, having found that the reason for dismissal was conduct, the Tribunal said the following:

> **"63. The Tribunal is satisfied that there was a thorough and reasonable investigation. The respondent found the claimant guilty of serious professional malpractice. There had been consideration by the respondent of the mitigating factors put forward by the claimant and it was determined that it was a proportionate response to dismiss the claimant. The claimant had been found to have failed to carry out his professional duties and responsibilities. The claimant had said that he was only following instructions, however, the respondent concluded that the claimant had undertaken a series of deliberate and thought-through actions. The claimant's long service and disciplinary record was taken into account and it was concluded that the claimant should be dismissed. The Tribunal has taken care not to substitute its own view for that of the respondent and is satisfied that this decision was within the band of reasonable responses available to the respondent."**

24. Accordingly, all of the claims were dismissed. The original grounds of appeal were somewhat discursive. However, they asserted that the Tribunal had erred in relation to the Section 15 claim, both on the question of whether the "something" relied upon arose in consequence of the Claimant's disability, and in concluding that dismissal was a proportionate sanction. The grounds also challenged the finding that the dismissal was fair, and, in particular, the Tribunal's acceptance of the Respondent's conclusion that he had undertaken a series of deliberate and thought-through actions, as a reasonable conclusion.

25. On consideration of the Notice of Appeal on paper Kerr J was of the opinion that the challenges to both the Section 15 and unfair dismissal decisions passed the threshold of arguability, and directed that the appeal be listed for a Full Hearing, which has come before me.

26. I had the benefit of a written skeleton argument tabled by the Claimant. He now representing himself on the appeal, having previously been represented before the Tribunal by a solicitor, Mr Gibson. I also had the benefit of a written skeleton from Mr Sangha of counsel, who appeared both before the Tribunal and before me for the Respondent. I have also had the benefit of hearing oral argument from them both this morning.

27. The Claimant's written skeleton for the appeal sought to bring his grounds of appeal into better focus, and he sought to advance five grounds. Ground one: that the Tribunal erred in law in that it misunderstood and/or misapplied the test of causation in Section 15 of the **2010 Act**. Ground two: that it erred in law in that, upon considering the issue of proportionality under Section 15, it failed to carry out the necessary exercise of balancing the disadvantage to the Claimant of the unfavourable treatment, and the legitimate aim of the Respondent. Ground three: that it erred in failing to adequately explain and set out the reasons which led it to the conclusion that dismissal was a proportionate means of achieving the Respondent's legitimate aim. Ground four: that the Tribunal erred in concluding that the Respondent, in dismissing the Claimant, had not failed to make a reasonable adjustment. Ground five: that the Tribunal erred in its approach to Section 98(4) of the **1996 Act** in that, in considering whether the Respondent's reason for dismissal was a sufficient reason for dismissing the Claimant, it failed to have regard to the fact that the Claimant's conduct arose in consequence of his disability, and that dismissal was disproportionate.

28. The Claimant acknowledged that ground three was not in his original Notice of Appeal, and applied for permission to introduce it for consideration today. This formed an alternative or fallback position in relation to ground two. In discussion Mr Sangha sensibly did not oppose the Claimant being permitted to run it in that way, and I permitted it to be added.

29. Mr Sangha's position initially was that ground four was also new, but in the course of discussion he said that, ultimately, he did not object to it being added and argued today, on the basis that it was parasitic on other grounds, and, having read what the Claimant had to say about it in his written skeleton, Mr Sangha was equipped to deal with it. I agreed with him that

this was a new ground, but, he not objecting, and, sharing his approach, I permitted this ground to be added as well. Accordingly, I have heard argument on all five grounds.

30. For good order I add that, in the opening discussion, the Claimant confirmed that, whilst he was seeking to appeal the Tribunal's decision on the ordinary unfair dismissal claim, he did not seek in any respect to challenge its conclusion that his claim for unfair dismissal for the sole or main reason of having made protected disclosures had failed.

31. I have heard and read detailed and thoughtful arguments on both sides, and the following is only a summary of the principal arguments that were advanced. The Claimant said, in relation to ground one, that the Tribunal had erred, in particular, in its discussion of the causation issue in paragraphs 56 and 57 of its decision. It had looked for a direct causal link between the conduct for which he was dismissed and his disability, rather than taking the broader approach, to the question of whether the conduct was something arising in consequence of the disability, indicated by the authorities. The Tribunal had also not given sufficient consideration to the medical evidence which it had before it, in the form of the report of Professor Turkington.

32. In seeking to distinguish the facts of the present case from those of **Grossett** the Tribunal wrongly attached significance to what it considered was a single error of judgement in the **Grossett** case, but a series of actions in the present case. It wrongly said that there was no credible evidence to support the Claimant's case on this point, when, apart from his own evidence, there was the evidence of the Turkington report. The Tribunal's reference to that report not stating that he was, "unable to carry out the requirements of the exam regulations" showed that it had set the legal bar too high. It did not properly engage with the background

A evidence of his mental health and personal issues, and the evidence that the conduct was out of character.

B 33. On grounds two and three, concerned with the proportionality test within the defence contained in Section 15(1)(b), the Claimant argued that the Tribunal had either failed to carry out the balancing exercise properly, or to explain sufficiently how it had done so in accordance with the guidance in the authorities. The Tribunal had identified the Respondent's aim, and why it considered that aim to be legitimate, and the significant disadvantage to the Claimant of losing his job, but had then gone straight to the conclusion that the treatment was proportionate. It had not explained specifically how it had carried out the balancing exercise, which was a fundamental element of the process, which required it to carry out a careful appraisal. He cited **Dutton v The Governing Body of Woodslee Primary School** UKEAT/0305/15, **MacCulloch v Imperial Chemical Industries Plc** [2008] ICR 1334, and **Ali v Torossian and Others** [2018] EAT0029/18 in support of those propositions. In particular, he said that the Tribunal did not consider, or show that it had considered, why other less severe sanctions or steps would not have been sufficient to meet the legitimate aim on this occasion.

34. The Claimant's arguments on ground four, relating to reasonable adjustment, were parasitic on grounds one and three. In particular, if the Tribunal had erred in its conclusion that dismissal was a proportionate sanction, then he argued that that rendered unsafe, its conclusion that to take action short of dismissal would not have been a reasonable adjustment.

35. As to ground five in relation to unfair dismissal, again, this was parasitic on his arguments, in particular, in relation to the decision on proportionality for the purposes of Section 15. If the Tribunal had erred in that regard, that had implications for its reasoning in

respect of unfair dismissal, and it was not an answer, he said, to say that these were distinct and different legal regimes. He sought to rely in that regard on the observations of Underhill LJ at paragraph 53 of **O'Brien v Bolton St Catherine's Academy** [2017] ICR 737 (CA).

36. Mr Sangha's principal arguments were as follows. As to ground one, the authorities established that whether something does or does not arise in consequence of the disability in a given case, is a question of fact to be assessed and determined robustly by the Tribunal. Here the Tribunal specifically referred to the Turkington report, and specifically rejected the Claimant's reliance on it. That was a finding properly open to it to make, following a robust factual enquiry. That was supported by a number of other features of the Tribunal's decision. It found that the Claimant was a disabled person, showing that it had had regard to all of the medical evidence put before it. It permissibly concluded that there was more than a single error of judgment, and permissibly had regard to the Claimant's ability to engage normally with other aspects of his work and responsibilities, such as his involvement in a school trip to Barcelona, and the findings it made about positive improvements that had been brought by the adjustments to his work responsibilities. The Tribunal made detailed findings about both the disciplinary hearing chair's consideration of this issue, and the appeal panel's conclusion, drawing on their respective letters. The Tribunal specifically rejected the Claimant's contention that the Turkington report made good his case, and was categorical in its own conclusion that his conduct was not something arising in consequence of his disability.

37. In oral submissions Mr Sangha also referred to **Gallop v Newport City Council** [2014] IRLR 211 and **Donelien v Liberata UK Ltd** [2018] IRLR 535. These together established that, whilst an employer should not slavishly, and without independent reflection, follow or rely upon an occupational health report, it was entitled to have regard to the contents of such a

report, where it gave reflective consideration to it. The Tribunal in this case, he said, had permissibly had regard to the employer's approach to the medical evidence which it had, and had reached its own reflective conclusion.

38. In relation to grounds two and three, concerning the proportionality element of the Section 15 defence, the Tribunal's decision was, he said, sufficiently reasoned. It had to be read as a whole. It was clear from the second paragraph numbered 62, that the Tribunal had engaged in balancing the legitimate aim against the impact on the Claimant of losing his job. Further, in paragraph 49, in its reasonable adjustments findings, the Tribunal considered that it would not have been reasonable to allow a teacher to remain in post, having established that he was guilty of serious misconduct that undermined the integrity of the exam system, and it referred to the Respondent's findings that it could no longer trust him. These supported its reasoning on the proportionality exercise. Overall the decision on this exercise was one that it was open to the Tribunal to reach, and the Employment Appeal Tribunal ("the EAT") should not interfere. See **Piggott Brothers and Company Limited v Jackson, Wood & Mortlock** [1992] ICR 85 (CA).

39. In relation to reasonable adjustments and ground four, the Tribunal reached a properly reasoned decision, that it was entitled to reach for the reasons set out in paragraph 49, that not dismissing the Claimant, but keeping him in employment, subject to some lesser sanction, was not an adjustment that the Respondent should reasonably be required to make.

40. In relation to ground five, it was not an error of law for the Tribunal to have reached a view that the dismissal was fair for Section 98(4) purposes, however matters may have stood with respect to the Section 15 claim. In **City of York Council v PJ Grossett** [2018] ICR 1492,

the Court of Appeal had clarified and confirmed that Underhill's LJ remarks in **O'Brien** did not mean that the two tests were the same for all purposes and in every case; and it was doctrinally possible for a decision that a dismissal was not unfair to stand alongside a decision that such dismissal was not proportionate and justified for the purposes of Section 15. See the discussion in the speech of Sales LJ (as he then was), in particular, at paragraphs 55 to 57.

41. I turn to my discussion and conclusions. In relation to ground one, the test under Section 15 of something arising in consequence of the disability, has been examined in prior authorities now on a number of occasions, as well as other aspects of Section 15. The most useful guidance to be found in one place, I think, is that in the decision of the President of the EAT, as she then was, Simler J, in **Pnaiser v NHS England & Another** [2016] IRLR 170 where she drew the threads together of the previous authorities, as follows:

> **31. In the course of submissions I was referred by counsel to a number of authorities including *IPC Media Ltd v Millar* [2013] IRLR 707, *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14/RN and *Hall v Chief Constable of West Yorkshire Police* [2015] IRLR 893, as indicating the proper approach to determining section15 claims. There was substantial common ground between the parties. From these authorities, the proper approach can be summarised as follows:**
>
> > **(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.**
> >
> > **(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.**
> >
> > **(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).**
> >
> > **(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification**

> **defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.**
>
> **(e) For example, in *Land Registry v Houghton* UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.**
>
> **(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.**
>
> **(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.**
>
> **(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.**
>
> **(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.**

42. In particular, Simler P addressed the "something arising in consequence" test at subpoint (d). She noted that, having regard to the legislative history, the statutory purpose, and the availability of a justification defence, this causal link may include more than one link. More than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case.

43. Similarly, at Court of Appeal level, in the **Grossett** decision Sales LJ upheld the approach of Simler J, and a number of other previous authorities to similar effect.

44. I observe that the tenor of all of this guidance is that, whilst it is a causation test, and whilst there must be some sufficient connection between the disability and the something relied upon in the particular case in order, for the "in consequence test" to be satisfied, the connection can be a relatively loose one. Authorities cited by Simler J such as **Hall** and **Houghton** indicate that the purpose of this choice of wording in Section 15, replacing the predecessor different provision of the **Disability Discrimination Act 1995** ("DDA"), is not to eliminate but to loosen the necessary causative link or connection. As Sales LJ said at paragraph 50 of **Grossett**:

> **"50. …. In any event, this relatively wide approach to that issue of causation is, in my view, inherent in the broadly drafted "in consequence" formula used in section 15(1)(a)….."**

45. I also observe that there was some discussion in **Grossett**, of the ET's reliance in that case on one of the examples given in the **EHRC's** code of practice, and some debate in the speeches of Sales LJ and Arden LJ, but without resolving the point, as to whether that code could properly be relied upon as an aid to interpretation as opposed to merely a guide to the provisions of the **2010 Act**. But those observations of Sales LJ did not themselves turn on the provisions of the code, but on an appreciation of Parliament's choice of language in the statute itself. This broad and looser approach to the connecter required to establish causation is as, again the **Pnaiser** decision and other decisions explain, counterbalanced by the fact that there is always available to the employer the proportionality defence.

46. In the present case the ET's initial self-direction as to the law in paragraph 10, whilst correctly citing the language of Section 15, and making some reference to **Trustees of Swansea University Pension & Insurance Scheme v Williams** at EAT level (UKEAT/0415/14 – the case ultimately went to the Supreme Court), and **IPC Media Ltd v Millar** [2013] IRLR 707,

A does not there cite any other authorities, whether **Pnaiser**, **Hall** or **Houghton**, or other authorities giving further guidance on this limb of Section 15.

B 47. At paragraphs 50 to 58 of its Decision, whilst citing extensively from the then recent decision in **Grossett,** the Tribunal does not further cite any of the other authorities or what they have to say about this aspect of the Section 15(1)(a) test.

C 48. I agree with Mr Sangha that, where the Tribunal cited the words of the statute, it did so accurately, and I accept that its use of the word "causation" is merely a shorthand. However, what the Tribunal does not do anywhere in this decision is show that it has considered, and D taken on board, the guidance given by the EAT and CA as to how the words "arising in consequence of B's disability" should be approached and applied.

E 49. Mr Sangha submitted that the reason why **Grossett** was cited by the Tribunal so extensively was because it was a recent decision at the time, extensively cited to the Tribunal and relied upon by the Claimant's solicitor as, so it had been argued, being factually on all fours with the Claimant's own case. The Tribunal merely responded to those submissions, and was F entitled to distinguish the facts of the instant case from the facts of **Grossett**. It was entitled to attach weight to its own view that the Claimant had not just taken a one-off decision when his judgment may have been impaired. Rather it properly took into account that, as well as G following the directions he was given on the day of the assessment, he followed up in the next three or four days, by marking scripts that had been prepared using the material he handed out, and entering the marks on to the computer record.

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50. However, as I have said, the Tribunal does not anywhere direct itself in line with any of the authorities, on the particular approach to be taken to the test. It does, however, it seems to me, expand on that test in paragraph 57. In the last few lines, after stating that Professor Turkington's report does not establish causation, it observes that it does not state that his mental condition was such that he was unable to carry out the requirements of the exam regulations. This is the only place I can find where the Tribunal expands on what it thinks the test of causation is, beyond citing the words of the statute itself. I agree with the Claimant's submission that, in expanding on the test, the Tribunal has set the legal bar too high, and in a way that is at odds with the guidance given in cases such as **Pnaiser** and **Grossett**. Further, if the Tribunal had understood and applied the legal test on the basis that a more loose connecter, albeit still needing to involve some element of causation, might be sufficient, it might have taken a different approach to the significance to be attached to the fact that the Claimant not only carried out his colleague's wishes on the day, but followed through without taking a different course, when it came to marking the scripts and entering the marks.

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51. Nor do I think that the features of the Tribunal's decision relied upon by Mr Sangha in his written submissions, to which I have referred, provide a sufficient answer to this criticism. The fact that the Tribunal had Professor Turkington's report and other medical evidence on the question of disability before it, does not assist to show that it did not apply the wrong legal test.

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52. As I have said, its characterisation of the Claimant's conduct as forming more than a single error of judgment might potentially have led it to a different conclusion, had it understood and correctly applied the legal test, as might its consideration of the evidence of the Claimant's ability to perform and carry out his duties in other respects, such as on the Barcelona trip. Again, the fact that the Tribunal recited in detail the reasoning of the

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disciplinary hearing chair, and that of the appeal panel, does not help to inform the Tribunal's own reasoning on a question on which it had to come to its own objective decision and finding. Nor does the fact that the Tribunal was categorical in rejecting the Claimant's reliance on Professor Turkington's report assist, if it did not apply the correct approach when doing so.

53. It also seems to me that at least some of these points are potentially more relevant to the proportionality issue than the causation issue, although there is a relationship between the two. The Tribunal was not obliged to automatically accept the contents of the Turkington report, but it was significant evidence that was placed before it, with which it needed to engage, given that the report included the statement that the Claimant was disabled at the relevant time, suffering from a mixed anxiety and depressive disorder that had only partially been treated, and that his judgment and decision-making were impaired by his high levels of anxiety and ongoing symptoms of depression at the time of this error.

54. Mr Sangha made the point that this was not a joint expert's report, or even a single expert's report, permitted or directed by the Tribunal specifically for the purposes of the ET litigation. But it was still a piece of relevant evidence that was put before the Tribunal, and with which it needed to engage. If it considered that it was significant that this report had been commissioned by the Claimant's solicitor at the time when he had been fighting the disciplinary process, it would have been open to the Tribunal to say so, and to explain how that fed into its conclusions. However, it did not say so, and, in fact, it appears that the Tribunal accepted what Professor Turkington said, at face value, as such (see paragraph 57), but that its error was then to apply the wrong legal test.

55. Similarly, I do not see how the cases of **Gallop** and **Donelien** assist Mr Sangha's argument, given that it is not open to the Tribunal under Section 15 simply to slavishly adopt the employer's view. It has to come to its own reasoned view. Again, if, notwithstanding the medical evidence, and the evidence the Tribunal had of the history of the Claimant's mental health difficulties, it considered that other evidence, such as his improving performance, and ability to engage in other activities, such as the Barcelona trip and so forth, impacted on its own view as to whether Professor Turkington had got it right, it could and should have said so. However, again, it did not say so, and nor does that appear clearly to have been its view, given its apparent acceptance of what Professor Turkington said, as such.

56. Accordingly, I conclude that the ET did err by not applying the correct approach to the threshold causation test of something arising in consequence of the Claimant's disability, in line with the authorities, and by applying too high or stringent a test in that regard. Ground one in respect of Section 15 therefore succeeds.

57. I turn to grounds two and three relating to the proportionality test. Again, there is now a substantial and consistent body of authority on the approach to be taken. It is in principle the same as that to be taken to the similarly-worded defence to claims of indirect discrimination. That has been considered in a number of authorities, but most usefully and comprehensively, in **Hardy & Hansons Plc v Lax** [2005] ICR 1565, which is still a good starting point.

58. This is also usefully expounded in relation to indirect discrimination in two of the authorities the Claimant cited. The first is **MacCulloch**, in particular, paragraph 39 referring to the **Hardy & Hansons Plc** decision, and this being a fundamental element requiring the most careful appraisal. The second is **Dutton**, in particular, at paragraph 9, referring to the need for a

critical evaluation, and also to the caveat that the word "reasonably" allows that an employer is not required to prove that there was no other way of achieving its objectives, but that, on the other hand, the test is something more than a range of reasonable responses test. The cases of **Ali**, cited by the Claimant, and also **Grossett** at paragraph 54, indeed confirm that all of this guidance similarly applies where the Tribunal is concerned with a Section 15 claim.

59. I agree with Mr Sangha that it is not right to say that the Tribunal did not carry out any balancing act at all. In the second paragraph 62 the Tribunal not only set out its findings as to the aim, and plainly that it considered that aim to be legitimate; but it is also clear that it considered that aim to be a particularly powerful and important one. One can fairly discern from that paragraph that the Tribunal, therefore, thought that considerable weight should be attached to it, and that it served to outweigh the impact on the Claimant of losing his job.

60. However, the Tribunal did need, in order to carry out this exercise in accordance with the guidance in the authorities with a sufficiently critical eye, to consider the question of whether, or to what extent, it might be said that action short of dismissal would have been sufficient to meet the aim on this occasion. As I have said, the Respondent did not have to go so far as to show that there was no other way of achieving its objectives, but nor is the test one of a band of reasonable responses.

61. The Claimant referred to the separate decision arising out of this matter, that had been taken in the process followed by the Professional Conduct Panel of the Teaching Regulation Agency. Its decision was that it was not appropriate to impose what is called a Prohibition Order. He submitted that the Agency's report, though it was not before the Tribunal, was nevertheless illustrative of the more nuanced approach that the Tribunal should have taken. As

to that, I do not think that the Tribunal was in any sense bound necessarily to reach the same conclusion as the Agency. However, the Tribunal did need to give a more critical consideration to the question of alternative sanction than it appears that it did.

62. Mr Sangha referred to the fact that the Tribunal had identified in paragraph 7.37 of its Reasons that the dismissing officer had considered, and, indeed, also the appeal panel, that there was no acceptable alternative to dismissal; and he suggested that the Tribunal had properly adopted the same approach. However, it is not clear to me that, as well as recording the views taken by the dismissing officer and the appeal panel, the Tribunal was also saying that it came to the same view, and for the same reasons, for the purposes of this part of its Decision.

63. Similarly, I do not think that what it said about why it would not have been a reasonable adjustment to impose some sanction short of dismissal in paragraph 49, is sufficient to make good the gap in its Reasons in paragraph 62. The paragraph 49 finding is, of course, a finding of the Tribunal's own view; but it is not clear there that it has come to a reasoned conclusion as to why it thought that this would not have been a sufficient response, as opposed to, again, referring to what the employer thought.

64. I say this also having regard to the fact that the Tribunal did have in evidence the specific opinion of Professor Turkington, at (e) within paragraph 11.1 of his report, that it was not his view that the Claimant would present ongoing risks within the teaching context once he had had full and effective treatment with certain medication and CBT. Again, the Tribunal was not bound to agree with Professor Turkington, but it needed to engage with the question of the risk of repetitive behaviour were the Claimant not to be dismissed. A further difficulty here is that the Tribunal had concluded, as I have found, in error of law, that the conduct was not

because of something arising in consequence of the Claimant's disability. Had it applied the law correctly, it might have found otherwise. If so, that might in turn have had a bearing on its conclusion as to the impact of the risk of repetition on its decision on proportionality.

65. I therefore conclude, in agreement with the Claimant, that the Tribunal has not taken the correct approach to the proportionality test in accordance with the authorities, and, therefore, ground two also succeeds. The success of grounds one and two mean that ground three falls away, although it follows from what I have said that, had ground 2 not succeeded, I would have found that ground three, **Meek** compliance, succeeded.

66. Because both grounds one and two have succeeded, the Tribunal's decision on the Section 15 claim cannot stand. I stress that it does not follow from my decision that the Tribunal was bound to find either that the conduct for which the Claimant was dismissed was something arising in consequence of his disability, or that the Respondent could not show that the treatment was a proportionate means of achieving its legitimate aim. It merely means that the decision of this Tribunal on those two points, under appeal before me, cannot stand.

67. I turn to ground four. I can take this more shortly. The difficulty here is that the Tribunal, as I have found, reached a decision on whether the conduct was because of something arising in consequence of the Claimant's disability, which cannot stand. It is at least possible that, had it taken the correct approach on the evidence before it, it would have found otherwise on that issue. It is then at least possible, although the legal tests are different, that that could have influenced its conclusions on the reasonable adjustment claim, both as to whether the PCP placed the Claimant at the requisite disadvantage, and as to whether it would have been a reasonable adjustment to impose some sanction short of dismissal. The consequence of the

success of ground one and two is, therefore, that the decision on the reasonable adjustment claim is also unsafe, and ground four must succeed.

68. I turn to ground five relating to unfair dismissal. Mr Sangha is right to say that the latest word on this subject has come from Sales LJ in **Grossett**, although I do not think it actually conflicts with what was said by Underhill LJ in **O'Brien**. Rather, it clarifies and confirms, as a careful reading of **O'Brien** would in fact show, that that authority did not exclude the possibility of the two tests having different outcomes in a given case. It merely was to the effect that it was tenable and not wrong for them to be treated as having the same outcome, noting in particular, in that case, the context being one to do with long-term sickness absence. The observation in **O'Brien**, that in many cases the two tests are unlikely to make a material difference, is not affected by **Grossett**. However, **Grossett** confirms that it is not necessarily always doctrinally wrong for a Tribunal to find, on the one hand, that a dismissal was fair applying the band of reasonable responses test, but on the other that it was not justified, applying the test in Section 15(1)(b). Indeed, **Grossett** was such a case.

69. Accordingly, even though the Tribunal erred in this case, in finding in the way that it did that there was no contravention of Section 15, that does not necessarily mean that it erred in concluding that the dismissal was not unfair. That might, however, be a concern, if the Tribunal had drawn on its Section 15 finding in coming to its conclusion on unfair dismissal. If so, that would leave open the possibility that, had it not reached that Section 15 finding in the way that it did, its unfair dismissal finding might also have been different. However, I do not think the Tribunal did that in this case. It properly reached an independent finding, in the second paragraph 62, that the dismissal was fair, and within the band of reasonable responses, without drawing on its own Section 15 finding, and, indeed, correctly giving itself the

appropriate self-direction not to substitute its own view for that of the Respondent. Ultimately, therefore, I conclude that there was no error of law in relation to the holding that the Claimant was not unfairly dismissed, and ground five, therefore, fails.

70. However, for the reasons I have given, the conclusions on the Section 15 and failure of reasonable adjustment claims cannot stand, and these will have to be remitted to the ET. I stress again that this is not a case where I can say that the Tribunal was bound necessarily to make the opposite findings either on the Section 15 or on the Section 20 claims, and so I cannot see any basis on which I could substitute my own decision on either of those claims. But I will hear further submissions, if any, about that, and/or about the terms of remission.

71. It is regrettable, because it will involve more time and cost, but I have concluded that the outstanding matters should now go back to a differently constituted Tribunal. That is not a criticism. It is not that I lack faith in the professionalism that Employment Judge Shepherd, Ms Jackson, and Mr Adams would bring to this, if I remitted the matter to them. I see no reason to doubt that they would do their best to come to these questions with a fresh eye, and, indeed, would diligently follow the guidance on the law that I have given. However, when they have come to fairly firm conclusions first time around, that this conduct was not because of something arising in consequence of disability and that dismissal was a proportionate sanction, it is a fairly big ask to expect them completely to put their previous thought processes out of their minds, however professional and diligent they might be in seeking to do that. It is also important that, whatever the outcome second time around, both parties feel able to have complete confidence in the decision, win or lose.

72. I am comforted by the thought that the hearing should be considerably shorter, and more focused than it was first time around, because the second Tribunal will have as a given, the finding that the Claimant was a disabled person at all relevant times. That does not have to be revisited. Nor will the second Tribunal be concerned with any of the questions that arose in the whistleblowing claim. That has gone. The focus will be just on the Section 15 claim and the Section 20 claim, and, indeed, though those claims are different, they are intimately interlinked, and both sides agree that the number of witnesses is likely to be much shorter this time around. The legal argument is going to be shorter. The canvas on which the Tribunal paints is going to be smaller. Further, even had I remitted to the Shepherd Tribunal, they might well have considered they needed at least to have some sort of hearing to hear further argument, even if they did not need to hear any more evidence.

73. Therefore, for all those reasons I direct remission, but, as I say, only to consider afresh the Section 15 and Section 20 claims, not unfair dismissal in any shape or form, nor will the Tribunal need to revisit the question of whether the Claimant was a disabled person.