EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss J Partridge	**v**	The University of Northampton

Heard at: Cambridge (using CVP) **On**: 26 and 27 August 2020

Before: Employment Judge Tynan

Appearances
For the Claimant: Ms Angelica Rokad, Counsel
For the Respondent: Mr Kieran Wilson, Counsel

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.

2. The Claimant's complaint that she is owed holiday pay is not well founded and is dismissed.

RESERVED REASONS

3. The Claimant was employed by the Respondent from 23 September 2013 to 13 June 2019 as a Senior Lecturer in Human Resource Management and Organisational Behaviour, within the faculty of Business and Law. She was also the Programme Leader for the BA in Human Resource Management.

4. It is not in dispute that the Claimant was dismissed for gross misconduct. She was dismissed on notice, rather than summarily.

5. By a claim form presented to the Employment Tribunals on 9 November 2019, the Claimant complains that she was unfairly dismissed and also claims that she is owed holiday pay. Her claims are resisted by the Respondent.

6. The Claimant gave evidence in support of her claims; I also heard evidence on her behalf from two former colleagues, Mr Hugh Davenport and Dr Phillip Bowen, who also lectured in Organisational Behaviour and Human Resource Management. For the Respondent, I heard evidence from Mr Steven Wood, currently an Associate Dean at the University and Ms Ann Shelton-Mayes, an emeritus Professor with the University. Mr Wood was the Disciplinary Hearing Officer who conducted the disciplinary hearing that resulted in the Claimant's dismissal. Professor Shelton-Mayes heard the Claimant's unsuccessful appeal against her dismissal.

7. There was a single, agreed bundle of documents for the Hearing running to 403 pages.

8. Counsel submitted written closing submissions to which they spoke. I have re-read and carefully considered their submissions in coming to this Judgment and, where relevant, refer to those submissions in the course of this Judgment.

9. Once an employer establishes a potentially fair reason for dismissing an employee, Section 98(4) of the Employment Rights Act 1996 requires a Tribunal to consider whether in the circumstances (including having regard to the size and administrative resources of the employer's undertaking) the employer has acted reasonably, or unreasonably, in treating that reason as a sufficiently fair reason for dismissing the employee. Neither party has the burden of proof in this regard. The question of whether an employer has acted reasonably or unreasonably is to be determined in accordance with equity and the substantial merits of the case.

10. In British Home Stores v Burchell [1978] ICR 303, Arnold J said,

> *"What the Tribunal have to decide every time is, broadly expressed, whether the employer who [dismissed] the employee on the ground of the misconduct in question (usually, though not necessarily a dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds on which to sustain that belief. And thirdly, we think that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances."*

Findings

11. The Respondent is a higher education institution providing courses at Undergraduate and Post Graduate levels. The Claimant commenced employment with the Respondent on 23 September 2013. Her Contract of Employment is at pages 48 – 58 of the Hearing Bundle. Clause 6.2 of the Contract defined her duties as including:

> *"Teaching and tutorial guidance, research and other forms of scholarly activity, examining, curriculum development, administration and related activities."*

Clause 6.2 goes on to state,

> *"You are expected to work flexibly and efficiently, and to maintain the highest professional standards in discharging your responsibilities, and in promoting and implementing the corporate policies of the University."*

12. There was a detailed job description and personal specification attaching to the Claimant's role (pages 58A to 58D). Under the heading 'Principal Responsibilities' the job description identifies the following principal responsibilities in relation to student experience,

> *"Provide high quality management of modules and / or small programmes including the provision of pastoral and academic advice to students, taking a pro-active approach to the implementation of established quality assurance processes and contributing to the design and implementation of quality enhancement initiatives."*

13. The defined 'General' responsibilities in the job description include,

> *"Work flexibly and undertake any responsibilities and tasks reasonably requested by the Head of Division."*

14. The person specification is in tabular form and sets out various criteria. Amongst those deemed essential are,

- Ability to provide a high quality student learning experience (e.g. via lectures, seminars, supervision, pastoral support);
- Evidence of excellent communication skills; and
- Ability to work independently and to successfully manage multiple priorities and to meet tight deadlines.

15. For the reasons below, I conclude that the Respondent had genuine and reasonably held concerns that the Claimant was failing to perform the above duties of her job and to meet these essential criteria.

16. The Respondent's Code of Conduct is at pages 59 – 70 of the Hearing Bundle. The Code is not contractual, though it makes clear the Respondent's expectation that employees will comply with the Code and that breach of the Code will be addressed via the Respondent's Disciplinary Policy and Procedure. The Code defines standards of behaviour and conduct expected of the Respondent's employees and reminds employees that they are expected to have regard to the impact of their behaviour on others and the University. The Code is stated not to be exhaustive and that,

> *"…employees should be seen to be exhibiting the highest standards of conduct and behaviour and avoid bringing the University into disrepute."*

17. The Respondent's Disciplinary Policy and Procedure is at pages 71 – 87 of the Hearing Bundle and its Grievance Policy and Procedure is at pages 88 – 99 of the Hearing Bundle. There are examples of misconduct at Section 5 of the Disciplinary Policy and Procedure. The Claimant's conduct complained of was categorised by Mr Wilson as conduct falling within the ambit of Section 5.1 of the Policy and Procedure, namely:

- Refusal to comply with reasonable management instructions;
- Failure to observe and comply with University Policies and / or procedures; and
- Breach of trust and confidence.

In so far as the Claimant was also alleged to have been verbally aggressive towards a colleague, Kevin Lamb, that would also fall under the heading of "Unacceptable behaviour (particularly aggressive or offensive)".

18. The Respondent's Disciplinary Policy and Procedure states,

> *"General misconduct tends to cover minor misdemeanours. Behaviour like this would not warrant dismissal for a first offence but may lead to a written warning."*

(page 73 of the Hearing Bundle)

19. Section 5.2 of the Disciplinary Policy and Procedure deals with 'Gross Misconduct / Gross Negligence'. It was not suggested by Mr Wilson in cross examination or in his submissions, that the conduct complained of fell within the specific examples of gross misconduct in Section 5.2 of the Policy and Procedure. However, he submits, and it was accepted by the Claimant in the course of cross examination, that the examples are not exhaustive.

20. For reasons I shall come to, I note the provisions of Section 7.6.10 of the Disciplinary Policy and Procedure,

> *"When deciding any disciplinary sanction, the following should be taken into account,*
>
> - *The sanction imposed in similar cases in the past;*
> - *Whether standards of other employees are acceptable, and that this employee is not being unfairly singled out;*
> - *The employee's disciplinary record (including live warnings, general work record, work experience, position and length of service);*
> - *Any special circumstances which might make it appropriate to adjust the severity of the sanction;*
> - *Whether the proposed sanction is reasonable and proportionate in view of all the circumstances; and*
> - *Whether any training, additional support or adjustments to the work are necessary."*

21. Section 6.6 of the Disciplinary Policy and Procedure, confirms that employees have a right to be accompanied by a companion at disciplinary hearings and that the chosen companion will be allowed to address the hearing or meeting, in order to put forward the employee's case, sum up the employee's case and respond on behalf of the employee to any view expressed at the meeting. This reflects the statutory position and confirms that the only limitation is that a companion does not have the right to answer questions on the employee's behalf or prevent the employer from explaining their case.

22. The Respondent's Grounds of Resistance note that in addition to the Claimant there were 10 other Senior Lecturers in Human Resources Management and Organisational Behaviour. The Claimant reported directly to Linda Coles, the Subject Group Leader.

The First Disciplinary Proceedings

23. In or around March 2018, there was a formal investigation into the Claimant's conduct as a result of concerns raised by Ms Coles regarding the allocation of second markers for Post Graduate Dissertations that needed to be moderated. There were also concerns the Claimant had failed to comply with a request by Ms Coles to change the accreditation of her HEA Fellowship Award on the HEA website, despite repeated requests from Ms Coles and a further request from the Deputy Dean of the Business and Law Faculty. Mr Drew Gray, Subject Leader in History, was appointed as the Investigating Officer. Whilst he did not uphold that there was a disciplinary case to answer, he did make certain recommendations. Mr Gray identified a level of poor time management on the part of the Claimant, as well as poor communications between the Claimant and Ms Coles, rather than wilful unsatisfactory performance or a refusal to comply. Likewise, in relation to the HEA website, Mr Gray identified poor

communications between the Claimant and Ms Coles. He made detailed recommendations which can be found at page 123 of the Hearing Bundle. He noted that it was evident that there had been a breakdown in the relationship between the Claimant and Ms Coles and that efforts should be made to repair it. It was identified that mediation would be a means by which the relationship might be repaired if both the Claimant and Ms Coles were willing to engage with this. It was further recommended that the Claimant complete two training courses, including an Email Effectiveness e-learning course to address her lack of responsiveness to emails. It was identified that this course would be completed by 10 May 2018.

24. The investigation outcome was also confirmed in a letter to the Claimant dated 10 April 2018 from Beckie Copp, an HR Advisor who had supported Mr Gray in the investigation (pages 124 and 125 of the Hearing Bundle). The Claimant was asked by Ms Copp to confirm by 20 April 2018 if she wished to go ahead with mediation. At paragraph d) of her letter, Ms Copp documented that the Claimant would be expected to complete the Email Effectiveness e-learning course by 10 May 2018. Further, she noted in her letter,

> *"Failure to obtain the HEA qualification, complete the recommended trainings, or any breaches of data protection, may result in formal action being taken."*

25. When questioned about this by Mr Wilson, the Claimant would not give direct answers to his very clear and specific questions, and this set the scene for much of the Claimant's evidence. In my judgment the Claimant would have reasonably understood that her failure, amongst other things, to complete the recommended training would result in formal disciplinary action being taken against her. However, under cross examination, she persisted in maintaining that she did not know what the formal action might be and said,

> *"It could be anything".*

I found this and quite a number of her other responses to be vague and evasive.

26. The investigation outcome was emailed to the Claimant; by her own admission, it took her a long time to open the email. There was no acknowledgment at Tribunal by the Claimant that she had a responsibility to read the email and act upon the recommendations contained in it. Her evidence was that there were reasons she had not looked at the email, including considerations of her own personal wellbeing. She said that she was not being disrespectful. I do not think it material whether or not this was wilful conduct on her part. What is clear is that this marked an extended period during which the Claimant failed to engage with the Respondent to address her fractured working relationship with Ms Coles and her conduct and performance.

27. There is a wealth of evidence in the Hearing Bundle, and to which the Claimant was taken by Mr Wilson during cross examination, evidencing her failure over a period of many months to respond to work related emails. On 20 April 2018, Ms Copp was chasing the Claimant for confirmation in relation to three matters in respect of which action had been required by 20 April 2018. The Claimant acknowledged at Tribunal that she had not responded to Ms Copp, though offered no specific explanation why this was. Ms Copp emailed her again on 23 April 2018 requesting her response by 9 am on 24 April 2018 and warning the Claimant that her failure to do so may result in formal action. The Claimant did not respond to that email either.

The Second Disciplinary Proceedings

28. On 11 May 2018, Chantelle Rouse, HR Advisor, wrote to the Claimant to inform her that an informal disciplinary investigation was being undertaken in accordance with the University's Disciplinary Policy and Procedure. Rachel Maxwell, Head of Learning and Teaching Development, had been appointed as the Investigating Manager to investigate the Claimant's alleged refusal to comply with reasonable management instructions and failure to engage in the University process. The Claimant was invited to attend an investigation meeting to be held on 18 May 2018. The letter was emailed to the Claimant.

29. The Claimant did not respond to Ms Rouse's email or letter. She explained at Tribunal that on 4 May 2018 her partner had been involved in a serious accident and had nearly died. She stated that she had *"missed"* the email and was unaware, therefore, that the investigation meeting was taking place.

30. Following the Claimant's failure to attend the investigation meeting on Friday 18 May 2018, Ms Rouse emailed the Claimant on Monday 21 May 2018 seeking confirmation as to the reasons why the Claimant had failed to attend. She requested her response by 5 pm that day and warned the Claimant that if she did not reply the investigation may be concluded in her absence based on the evidence collected so far. She also warned the Claimant that her failure to engage in the process might be taken into consideration by the Investigating Manager when determining the appropriate outcome. The Claimant's evidence at Tribunal was that, *"I didn't see that email".*

31. A further follow up email on 22 May 2018, in which Ms Rouse warned the Claimant that unless she heard back from her before 5 pm she would have no choice but to progress the investigation without meeting the Claimant, likewise went unanswered. The copy email at page 143 of the Hearing Bundle evidences that the email was delivered to the Claimant. The Claimant's evidence was that her failure to respond to this third email from Ms Rouse was not wilful. I find that she was aware of the email but did not deal with it.

32. Ms Maxwell finalised her investigation report without input from the Claimant. She concluded that there was a case to answer in relation to the allegations that the Claimant had failed to communicate and comply with reasonable instructions from her Line Manager and failed to communicate and comply with reasonable instructions from HR, and partially upheld that there was a case to answer in respect of her alleged failure to maintain standards of competent job performance including responding to emails.

33. Ms Maxwell recommended that formal action be commenced. That was on 14 June 2018.

34. On 28 June 2018, Kam Shergill, HR Business Partner, emailed the Claimant to invite her to a disciplinary hearing on 17 July 2018. He provided her with a copy of Ms Maxwell's Investigation Report and the various appendices and policies referred to in it. It was not until 13 July 2018, that the Claimant acknowledged receipt of Mr Shergill's email. She did not identify in her email, or indeed at Tribunal, when she had first read Mr Shergill's email of 28 June 2018. It seems she had a pre-arranged appointment which she could not change, so she asked for the date of the Disciplinary Hearing to be rearranged. Mr Shergill responded within an hour asking for any other dates the Claimant may need to avoid. When Mr Wilson pointed out that the meeting had been rearranged without difficulty, the Claimant seemed reluctant or unable to acknowledge this. She described deliberating with herself as to what she should do. She feared the worst having first failed to attend the investigation meeting and then having delayed responding to the Disciplinary Hearing invite.

35. What is clear is that the Respondent was blameless in the matter. The failure to communicate was the Claimant's; it was the Claimant alone who failed to *"see"* the Respondent's emails. Whilst I appreciate that the Claimant would have been dealing with the consequences of her partner's accident, it nevertheless supports that Mr Gray had rightly identified a lack of responsiveness to emails as an issue in May 2018 and that the Respondent was understandably concerned by the Claimant's failure to act upon his recommendations, particularly in circumstances where she had been warned that her failure to do so may result in formal action being taken.

36. The Disciplinary Hearing was rescheduled to 9 August 2018. The Hearing was conducted by Rashmi Dravid, Head of Partnership Programme; the notes of the hearing are at pages 154 – 159 of the Hearing Bundle. The Claimant was not accompanied at the Hearing.

37. The formal notes of the Hearing document that the Claimant was asked by Mr Dravid about the mediation which had been recommended by Mr Gray. She stated that she did not remember and had not looked at all emails. She was specifically asked whether she had gone through Ms Copp's email letter of 10 April 2018 setting out Mr Gray's recommendations and whether she had sought help from HR. She acknowledged that she had

not, and she seemed inclined to blame the Respondent for her own inattention to the matter. She said,

> *"It's all right to send an email, but no one spoke to me."*

38. She went on to say that she did not know the outcome of the first disciplinary proceedings as,

> *"With the stress I was just trying to keep everything going."*

39. Mr Shergill specifically asked her,

> *"Would you agree to mediation now?"*

To which the Claimant responded,

> *"Yes, I would be happy to but she needs to change how she speaks to me, I want to continue with a great programme."*

40. Her attention having also been drawn to the Respondent's 'Employee Assistance Programme', the Claimant reiterated her commitment to mediation. She also acknowledged that she had not completed either of the two training courses that had been recommended by Mr Gray. Her explanations appear contradictory. She stated that she had other things booked on 23 April 2018, the date of the first training session, whereas her explanation for failing to complete the Email Effectiveness training was,

> *"I didn't read it."*

Which I take to be a reference to Ms Copp's email of 10 April 2018.

41. Following a 20-minute adjournment, Mr Dravid's decision was that the Claimant should be issued with a first written warning that would remain live for 6 months. Mr Dravid found that the Claimant had intentionally ignored email communications from HR and her Line Manager and failed to co-operate with an investigation process.

42. The Disciplinary Hearing minutes record that Mr Dravid recommended that the Claimant resume mediation, i.e. to address her working relationship with Ms Coles. He also confirmed that the Claimant would need to complete the Email Effectiveness training. The hearing minutes record that the Claimant regarded the outcome as unfair, though she did not elaborate in detail why that was. In response to criticisms of Ms Coles, Mr Shergill noted that the Claimant had not raised these matters formally, to which the Claimant responded,

> *"I can raise that".*

43. If, by that comment, the Claimant had in mind a grievance, she did not escalate her concerns under the Respondent's grievance procedure. Instead, as I shall come back to, it was only during the hearing of her appeal against her dismissal that the Claimant finally raised a formal grievance in relation to Ms Coles. The Claimant told Mr Dravid on 9 August 2018 that she would appeal his decision, however, she did not do so. I find that is because, in spite of her protestations and in spite also of the criticisms she sought to raise in the course of her evidence at Tribunal, she recognised, even if she would not acknowledge it publicly, that her conduct had fallen some way short and that she had failed to engage with the various recommendations made by Mr Gray and stubbornly failed to engage with the subsequent concerns that had arisen as a result of that non-engagement.

44. As the disciplinary hearing on 9 August 2018 concluded, Mr Shergill reminded the Claimant that she needed to read emails. She responded,

> *"I will read emails from you."*

Her response led Mr Shergill to reiterate that she needed to read *all* emails. Her closing comments are revealing; they are consistent with her approach during cross examination, namely her determination to answer questions on her own terms. Mr Wilson described her as belligerent and evasive; at the very least she gave the firm impression that she can be inflexible and difficult. She sought to deflect Mr Wilson's questions on the basis that the minutes of the hearing were, *"poorly worded"*. However, as the email at page 160 of the Hearing Bundle demonstrates, the Claimant was provided with the notes of the meeting and invited to use tracked changes if she had any amendments to make to them. She did not do so. Even when Mr Wilson took the Claimant to this email she would not acknowledge that she had been offered the opportunity to amend the hearing notes. Instead, as she did throughout much of her evidence, she sought to shift the blame onto the Respondent stating,

> *"I did feel whatever I did and said wouldn't hold weight and would be dismissed out of hand."*

I find that the notes are an accurate and reliable record of the hearing.

45. In her evidence at Tribunal, the Claimant stated that she had not pursued an appeal because,

> *"I realised my appeal would not be taken seriously. Mr Shergill was on the management side and I would stand no chance."*

Her comments and explanation make no sense. Mr Shergill had provided HR procedural support only. He was not the decision maker. The disciplinary hearing was chaired by Mr Dravid, and it was his decision that the Claimant was guilty of misconduct and that she should receive a first written warning. There is no evidence, and it certainly was not put to the

Respondent's witnesses, that Mr Shergill had interfered in the process or that it was a sham because he was the real decision maker, nor was it suggested that he might have interfered in the conduct and outcome of any appeal.

46. The Claimant continued to fail to engage with the Respondent following the disciplinary hearing on 9 August 2018. On 11 October 2018, Ms Rouse emailed the Claimant asking her to confirm whether she was willing to engage with mediation. She asked that she respond by 5pm on 15 October 2018. The Claimant failed to respond to that email, or to a further email on 24 October 2018 from Ms Rouse asking for her response. As regards Ms Rouse's email of 11 October 2018, the Claimant said,

> *"I seem to have missed that email."*

There is a pattern in this case of emails being missed/not seen by the Claimant.

47. As I have observed already, this rather reinforces why the Respondent wanted the Claimant to attend an Email Effectiveness training course. The Claimant's explanation at Tribunal for her failure to respond to the follow up email of 24 October 2018, was to blame the Respondent. She described the autumn term as the worst possible time to engage in mediation and that mediation should have happened in August that year. However, there had been no suggestion on 9 August 2018, or in the written confirmation of the Disciplinary Hearing Outcome, that mediation would be arranged in August 2018. Indeed, it seems to me most unlikely that this would have happened given that August was the holiday period. In any event, it does not explain the Claimant's failure to respond to Ms Rouse's emails. The Claimant may have said on 9 August 2018 that she was happy to attend mediation, but her actions indicate otherwise. At Tribunal she sought to deflect attention from her own conduct in the matter; she said,

> *"I didn't see anything about Linda Coles participating. She'd gone back on her word."*

48. In spite of my further encouragement to the Claimant at that point to listen carefully to the questions being put to her and to answer them, and my explanation why this was important, particularly on the issue of credibility, she persisted all the way through cross examination in giving the evidence she wanted to give rather than answering the questions she was being asked. She was an unsatisfactory witness whose evidence I approach with caution.

49. In the course of cross examination, the Claimant was asked about various emails from Rachel Butterfield of Edulink International College, one of the Respondent's partner organisations. It is not necessary for me to go into detail regarding this exchange which is to be found at pages 268 – 274 of the Hearing Bundle. Suffice to say that Ms Butterfield's emails went

unanswered and were then only partially answered over an extended period. Ms Butterfield's first documented contact with the Claimant was on 22 August 2018. The emails evidence Ms Butterfield's increasing exasperation with the Claimant, leaving her to involve one of the Claimant's colleagues who escalated the matter.

50. As she did throughout her evidence, the Claimant sought to excuse her inaction and to blame others. At one point she said,

> *"If I don't have the information, I don't come back to you."*

51. Not only did this concern an important partner organisation, but Ms Butterfield's enquiry related to a student whom she described as *"very worried about her assignment".* At one point in her evidence, the Claimant sought to blame the internet connection at the Respondent. She even said,

> *"I would have thought they'd be aware we were moving and of the challenges that presented."*

52. I was left with the firm impression the Claimant would not accept any accountability or responsibility in the matter. Her evidence and attitude were that the matter should have been reassigned to someone else. On any reasonable view, the Claimant's inaction was damaging to the Respondent's interests and reputation. When Mr Wilson put that to the Claimant, she would not acknowledge the point.

53. The Claimant was asked about another exchange in October 2018 regarding her PDR objectives. She failed to respond to emails from Ms Coles, her Line Manager, dated 18 and 23 October 2018 with the result was that it was necessary for the Dean of the Faculty to intervene. The Claimant believed that Ms Coles may have recorded their PDR meeting. However, she did not offer this in her witness statement as the reason why she had not progressed the PDR objectives, or why she had failed to respond to Ms Coles' emails.

54. There were other revealing exchanges between Mr Wilson and the Claimant regarding various emails in early November 2018. One exchange concerned four students who required support ahead of re-submitting their dissertations, the other with Harriet Richmond on the subject of 'Assignment Briefs and Room Breaks'. In each case emails evidence the Claimant being needlessly difficult and, in the case of Ms Richmond, failing to respond to emails on a timely basis. I asked about the length of time it had taken the Claimant to respond; she deflected my question by stating that the documents being sought were already accessible to the relevant student. That was not the point. She then suggested that Ms Richmond was confused by the complexity of the matter. Again, it was not the point. The email exchanges speak for themselves; the Claimant failed to respond to emails and failed to engage fully when she did respond. They reflect poorly on her.

55. On 22 November 2018, the Claimant was scheduled to meet Ms Coles, but she failed to attend the meeting. Her evidence was that she could not remember if she had let Ms Coles know. However, it is abundantly clear from Ms Coles' email of 27 November 2018 (page 211 of the Hearing Bundle) that the Claimant had not advised Ms Coles that she would not be attending the meeting. She had simply not turned up. The impression at Tribunal was that she was unapologetic; she said that a parent had appeared at the University without warning and that she had been pulled into sorting the situation out. As far as the Claimant was concerned, that justified not just her non-attendance but also her failure to let Ms Coles know that she would not be attending the meeting.

56. She provided similar responses when Mr Wilson later asked her about an email dated 3 December 2018 from Ms Coles, to which she had not responded. She explained that she had not responded as she was trying to get the information to be able to respond. At the very least she had not thought to keep Ms Coles updated.

Mr Lamb's Grievance

57. On 5 December 2018, a grievance was raised by Mr Kevin Lamb, Senior Lecturer in Human Resource Management, against the Claimant. His grievance was that the Claimant had been hostile and aggressive towards him during a Student and Staff Liaison Committee Meeting on 28 November 2018. I bear in mind that the previous day the Claimant had failed to attend a scheduled meeting with Ms Coles, without either informing her that she would not be attending the meeting or offering any explanation why. It indicates to me her frame of mind at this time.

58. Mr Lamb's grievance arose out of the supervision of CIPD management reports. On 12 November 2018, Mr Lamb had flagged two areas of concern to the Claimant and other supervisors, in supervising the graduate students taking the Diploma in Human Resources Management. In an email to them, he noted that some supervisors (and I am satisfied that this was a reference to the Claimant) were far too slow in replying to messages and emails in connection with arranging meetings and providing feedback. The identified action point was that supervisors reply to emails within 48 hours and provide written feedback to students on drafts within 2 weeks. This followed an earlier Student Experience Committee meeting on 26 September 2018 which set an expectation that staff would acknowledge student's emails within a 24-hour response time (excluding evenings and weekends). The acknowledgement would be a personal email to the student and give an indication of the time frame and / or next steps for addressing the issue raised.

59. Following Mr Lamb's email of 12 November 2018, students had been allocated to the team of supervisors.

60. There was a frustrating exchange between Mr Wilson and the Claimant regarding this issue in which the Claimant was unwilling to acknowledge whether Mr Lamb had, or had not, allocated supervisors. It is plainly the case that students were allocated to the Claimant. On this issue I find she was obstructive in her evidence. Notwithstanding Mr Lamb's request that supervisors reply to emails within 48 hours, the Claimant failed to respond to an email from one of her allocated supervisees. The student in question approached Mr Lamb on 21 November 2018 saying that she was awaiting a response from her email sent 7 days previously requesting a meeting with the Claimant to discuss her appraisal. The student reported that she had sent a reminder email 3 days previously but had also received no response to this. She expressed her annoyance, particularly as all the other students in her group were said to have received responses from their supervisors within a day or two.

61. The Claimant's explanation at Tribunal for her actions was frustrating and unconvincing. She said she wanted to have a conversation with Ms Coles about her workload. She considered that she should be the third year tutor and felt that Mr Lamb should take on responsibility for the students. Her response was not to respond to Mr Lamb's email. She put her own interests and concerns ahead of the students'. As she had done for several months she refused to engage when it did not suit her to do so. In an email to Sarah Jones on 22 November 2018, Mr Lamb complained that it was the fourth time in three years that a student had complained to him about the Claimant's lack of response to emails.

62. The matter did not end there. A second student complained that the Claimant had failed to respond to an email seeking to arrange a meeting. The student in question asked to be reassigned to a different supervisor, stating that she did not wish to spend the rest of the year battling to get a reply,

> *"…as this is something really important to me and I am funding this entire course myself, so I want to get the best support possible."*

63. Mr Lamb asked the student to persevere with the Claimant. However, when the student had still not heard from the Claimant some days later, she indicated that she intended to escalate the matter as a formal complaint. This was 14 days after the student had first made contact with the Claimant. The Claimant confirmed at Tribunal that she had not contacted any of her four allocated supervisees and demonstrated no concern at this state of affairs.

64. Ms Coles intervened in the situation on 28 November 2018 requesting that the Claimant respond to her as soon as possible with confirmation that she was in contact with her four supervisees. Ms Coles also reminded the Claimant of the Respondent's policy to reply to students within 24 hours.

Once again, the Claimant failed to respond to that email. She also confirmed that between 13 November and 28 November 2018 she had not approached Ms Coles about her workload, or with a request that the four students be reallocated to others. At Tribunal, she effectively sought to blame Ms Coles for this state of affairs, stating that she had a temper and that she would *"kick off"*. Whatever the difficulties in her working relationship with Ms Coles, I find that she left the four students in the dark.

65. I am satisfied that the Claimant would have appreciated the seriousness of the situation. At a Student and Staff Liaison Committee Meeting on 28 November 2018, one of the two student advocates who attended the Committee reported that there was an issue with her supervisor not responding to student emails requesting supervision meetings. This was plainly a reference to the Claimant. Yet at Tribunal the Claimant was unwilling to unequivocally acknowledge that it was a reference to herself or to accept her accountability and responsibility in the matter.

66. Following the meeting on 28 November 2018, Mr Lamb endeavoured to speak to the Claimant. His account of this interaction is at pages 299 and 300 of the Hearing Bundle. The Claimant accepts that his account of their interaction was corroborated by Sarah Jones who was also present. Mr Lamb complained that she had become hostile and aggressive towards him. Interestingly, he referred to the Claimant as having deflected attention from her conduct. I too observed that she was prone to deflect attention in her responses to the questions asked of her. She sought to deflect attention from her own conduct on 28 November 2018 by focusing upon the ways she perceived Mr Lamb had spoken to her.

67. Mr Lee Robinson, IT Services and Business Application Manager, investigated Mr Lamb's grievance. He notified the Claimant of the grievance and invited her to be interviewed on two occasions on 14 and 21 January 2019. The Claimant failed to respond to those invitations and failed to attend the scheduled meetings. I find that her failure in this regard was inexcusable.

<u>The Third Disciplinary Proceedings and the Claimant's dismissal</u>

68. A third disciplinary investigation commenced on 3 December 2018. Ms Angela Packwood, Subject Leader for Criminology and Criminal Justice, was appointed as the Investigating Officer. After Mr Lamb's grievance against the Claimant was upheld, this was added to the third disciplinary proceedings as a further area of concern.

69. The Claimant was invited to an Investigation Meeting to be held on 20 December 2018, but she failed to attend. The email invitation was emailed on 17 December 2018, but only opened by the Claimant on the date the meeting was scheduled to take place. The meeting was therefore rescheduled for 8 January 2019. Ms Chantelle Rouse, HR Advisor, was providing HR support in connection with the disciplinary investigation. Although she responded to the Claimant's request to reschedule the

Investigation Meeting within a couple of hours of the Claimant's request, the Claimant's evidence at Tribunal was that she could not remember seeing Ms Rouse's email. She said she was exhausted at the end of term. On 7 January 2019, Ms Rouse emailed the Claimant to remind her of the time and venue of the Investigation Meeting the following afternoon. Again, the Claimant's evidence is that she could not remember seeing that further email. I find that she was not just careless in the matter but that she was effectively disregarding her emails and not engaging in the investigation process.

70. The Investigation Meeting proceeded on 8 January 2019 in the Claimant's absence.

71. On 10 January 2019, Chantelle Rouse emailed the Claimant a letter containing details of the grievance that had been raised by Mr Kevin Lamb and inviting her to an Investigation Meeting on 14 January 2019. She asked the Claimant to let her know if she would be unable to attend. Once again, the Claimant's evidence at Tribunal was that she had not seen the email, or the letter referred to in that email. She said there were reasons for her not being aware, but she did not provide further detail. I find that she was continuing to disregard emails. Her evidence at Tribunal was that she was also unaware of a further email from Ms Rouse dated 16 January 2019, to which Ms Rouse had attached a letter confirming that the Grievance Investigation Meeting had been rescheduled to 21 January 2019. The Claimant said it was not a case of her not being bothered to attend, but that she did not know the meeting was happening. I find that she was culpable in the matter.

72. There is extensive evidence in this case that the Claimant was simply not reading emails or responding to them. I find that by January 2019 she had almost completely stopped engaging with the Respondent and was not reading her emails. Whilst she does not recognise it as such, I conclude that at some level it was a conscious decision on her part.

73. There is evidence of the Claimant's ongoing lack of responsiveness at page 287 of the Hearing Bundle – emails from Ms Harriett Richmond towards the end of January 2019 confirming that the Claimant was continuing to not respond to emails. Notwithstanding an email from Ms Richmond to the Claimant, dated 24 January 2019, expressing regret as to the situation in which they found themselves, the Claimant maintained in her evidence at Tribunal that there was nothing outstanding. I have no hesitation in rejecting her evidence as it is obvious from the emails that a specification was outstanding, and that the Claimant failed to respond to Ms Richmond's requests to finalise it.

74. On 5 February 2019, Ms Clair Culverhouse emailed the Claimant to invite her to a Disciplinary Hearing to be held on 13 February 2019. The hearing was to consider her breaches of the Respondent's Code of Conduct, specifically her failure to maintain competent standards of job performance and breach of trust and confidence, together with breach of Section 7.4 of

the Code of Conduct (Respect at Work), as a result of the decision to uphold Mr Lamb's grievance.

75. IT tracking confirms that that email was delivered to the Claimant's work email account on 5 February 2019 at 3:05pm. I am satisfied that the email was sent and that as a result of the Claimant's neglect, she did not read the email, or the letter attached to it inviting her to the Disciplinary Hearing.

76. As the Claimant did not attend the Disciplinary Hearing on 13 February 2019, Ms Culverhouse wrote to her on 19 February 2019 inviting her to a rescheduled meeting on 26 February 2019. The Claimant accepts that she received that letter. Ms Culverhouse advised in her letter that Ms Packwood would present her Investigation Report on 26 February 2019. She also wrote,

> *"All further information regarding this process can be found in my previous correspondence dated 5 February 2019."*

She also informed the Claimant that she should contact her by phone, or email if she had any questions or wished to discuss the letter further.

77. Notwithstanding, she was on notice that there was an Investigation Report and that further relevant information may be contained in earlier correspondence the Claimant either did not think or bother to contact Ms Culverhouse to request a copy of the report, or the letter of 5 February 2019. I asked her was she not curious about the matter, to which she responded that she just assumed Ms Packwood would present her report at the meeting. It was an unsatisfactory response, a metaphorical shrug of her shoulders.

78. On the morning of 26 February 2019, the Claimant consulted her Doctor who signed her off work until 4 March 2019. She emailed Ms Culverhouse at 10:23am to advise her of this and to say that she would unable to attend the meeting. A few minutes later she emailed Ms Richmond to also let her know. It seems that Ms Richmond may have been deputising in Ms Coles' absence. The Claimant's fit note, at page 348 of the Hearing Bundle, documents that the Claimant was not fit for work because of ongoing investigations for chest symptoms / heart problems. The Claimant did not request that further communications should be via a personal email address. As set out below, she continued to correspond with the Respondent during her sickness absence using her work email.

79. In view of the fact the Claimant had been certified by her GP, the Respondent rescheduled the Disciplinary Hearing to 7 March 2019 when it anticipated she would have returned to work. The letter of 26 February 2019 was sent using the Royal Mail Tracking service. It is recorded by Royal Mail as having been delivered to the Claimant's home address at 9:22am on 2 March 2019 and signed for by *"Partridge"*. The signature is seemingly not the Claimant's. Her evidence is that she does not know whose signature it is and that she did not receive the letter dated 26

February 2019. The Respondent, in my judgment, had no reason to believe that the Claimant had not received its letter. However, nothing ultimately turns on the issue.

80. On 4 March 2019, the Claimant's GP issued a further fit note certifying the Claimant unfit for work until 10 March 2019. I find, and indeed it does not seem to have been disputed by the Respondent, that she was unfit to attend the rescheduled Disciplinary Hearing on 7 March 2019. On 5 March 2019, the Claimant emailed Ms Richmond advising that she had been signed off work for another week. She did not attach a copy of the fit note and it also seems that she did not let Ms Culverhouse know that she had been certified unfit for a further period of 7 days. I find both omissions surprising though perhaps in keeping with the Claimant's poor record of communications. At page 353 of the Hearing Bundle is an email from Ms Richmond to the Claimant sent at 19.26 on 7 March 2019. She said she trusted the Claimant had received an out of office message and requested that the Claimant contact Ms Coles who was said to be back at work. She did not say whether she had forwarded the Claimant's email on to Ms Coles or to colleagues in HR. In the meantime, on 6 March 2019, Ms Rouse had emailed the Claimant to say that the Respondent had not received a further fit note from the Claimant and asking that she contact Ms Rouse or Ms Coles before 5pm that day to update them. She warned the Claimant that if she not hear from her, or receive a further fit note, her absence would be considered to be unauthorised.

81. The hearing scheduled for 7 March 2019 proceeded in the Claimant's absence. Mr Wood determined that the allegations against the Claimant were upheld and considered these to be serious breaches of the Respondent's Code of Conduct amounting to gross misconduct. His decision was that she should be dismissed on 3 months' notice. Her last day of employment was to be 13 June 2019. The decision is confirmed in a letter from Clair Culverhouse to the Claimant dated 13 March 2019, (pages 361 – 362 of the Hearing Bundle).

82. The Claimant was issued with a further fit note by her GP on 8 March 2019 certifying her continued unfitness until 25 March 2019. The Claimant emailed Ms Richmond on 11 March 2019 to let her know. Ms Richmond had, of course, requested on 7 March 2019 that the Claimant correspond with Ms Coles and she emailed the Claimant requesting that she send any future notifications to Ms Coles and HR. Approximately 20 minutes later Ms Rouse emailed the Claimant to remind her that the Respondent had not received her medical certificates and requesting that she post the originals to her. She asked in the interim that the Claimant scan copies of the medical notes to her.

83. I note that when Ms Rouse emailed the Claimant on 11 March 2019 to request copies of her fit notes, she did not mention that the Disciplinary Hearing had proceeded in her absence. I find that surprising. The fact the Claimant had apparently been certified unfit at the time of the disciplinary hearing should have put Ms Rouse on enquiry as to the reasons for the

Claimant's non-attendance at the hearing on 7 March 2019. At this point, the Disciplinary Hearing Outcome letter had yet to be issued by the Respondent.

84. The Disciplinary Hearing Outcome letter is dated 13 March 2019 and contains limited information as to why the allegations of misconduct were upheld. The explanation in the letter is as follows,

> *"Following a disciplinary investigation in March 2018, an informal outcome was reached with five specific requirements, however, these were not completed.*
>
> *A second investigation was undertaken in Mary 2018 which resulted in both the first written warning and clear expectations for improvements in communication and engagement. Regrettably, since then, there appears to have been no improvement with these areas of your behaviour, and additional issues have arisen, as documented in the Investigation Reports and your invite letter. It was also noted that you have failed to engage with any of the investigation process, including failing to attend four investigation meetings and two disciplinary hearings."*

85. There is some further explanation for the rationale for the disciplinary outcome at pages 359 – 360 of the Hearing Bundle. The document is structured by reference to the allegations, outcome and rationale. However, it only includes a rationale for the first and third allegations namely,

- Failure to comply with reasonable management instructions; and
- Failure to maintain competence standards of job performance.

As regards the alleged failure to communicate and comply with reasonable requests from HR, breach of trust and confidence and breach of the Code of Conduct regarding Respect at Work, the rationale is left blank. In her evidence at Tribunal, Professor Shelton-Mayes described the quality of the letter and the rationale document as poor. I agree.

86. From the letter of 13 March 2019, the Claimant would not have clearly or fully understood the reasons why the allegations against her had been upheld and why, therefore, she had been dismissed. There was certainly insufficient information in the letter to enable the Claimant to identify and articulate her grounds for appeal. Indeed, the lack of a clear rationale in itself could be grounds for an appeal.

<u>The Claimant's appeal against her dismissal</u>

87. The Claimant's evidence is that she only learned of her dismissal on or around 26 April 2019, following her return to work following her sickness

absence. Emails at page 365 of the Hearing Bundle evidence that the Claimant informed Ms Richmond on 5 April 2019 that she had been signed off for a further period until 21 April 2019. The fit note at page 364 is dated 9 April 2019 and covers the period 8 to 21 April 2019, in which case it is unclear how the Claimant was able to advise Ms Richmond on 5 April that she had been signed off until 21 April 2019. However, this was not explored with the Claimant in cross examination.

88. On 26 April 2019, following the Claimant's return to work, Ms Rouse emailed her and attached a copy of the letter of 13 March 2019 confirming her dismissal and reminding her that with immediate effect from the date of that letter, she had been requested not to attend site or complete any further work. Subsequently, on 7 May 2019 the Claimant emailed Ms Rouse from her personal email address to inform her that she had not seen any Disciplinary Outcome letter. She asked for a copy of this as a matter of urgency. On 11 May 2019, she followed up with a further letter to Ms Rouse notifying her appeal against her dismissal. She requested a re-hearing on the basis that she had been absent due to illness and set out various points in support of her appeal, albeit without having sight of the dismissal letter. There were follow up emails to Ms Rouse on 14 May 2019 and subsequently to Ms Mattock on 19 May 2019. Mr Shergill emailed the Claimant on 29 May 2019 inviting her to the Appeal Hearing on 10 June 2019. The email attached a Disciplinary Appeal Invite letter which included the following,

> *"The decision on this will not be made until you have had a full opportunity to put forward your points of appeal. Further investigation may be required, and a decision will be issued in writing."*

89. However, it seems that the Respondent had still not provided the Claimant with a copy of the dismissal letter. The Claimant emailed Mr Shergill on 30 May 2019 requesting this as a matter of urgency. Having not received any response she followed the matter up on 3 June 2019 and again on 5 June 2019. Mr Shergill responded on 7 June 2019 explaining that the Claimant's emails had been going into his 'junk' folder. By then the Claimant had requested for the Appeal Hearing on 20 June 2019 to be rescheduled as her partner had a hospital appointment that day. Some minutes after his initial email, Mr Shergill emailed the Claimant again confirming a new Appeal Hearing date of 16 July 2019, but he had still not addressed the Claimant's outstanding request for a copy of her letter of dismissal notwithstanding her numerous requests.

90. The Disciplinary Appeal Hearing took place on 16 July 2019 by which time the Claimant did have a copy of the dismissal letter. The appeal was conducted by Professor Shelton-Mayes in conjunction with Professor Ale Armellini, Dean of Learning and Teaching. The Claimant was accompanied by Mr Davenport, her workplace companion. Mr Shergill was present to provide HR procedural guidance and an HR Assistant also attended as a note taker. The notes of the Disciplinary Appeal Hearing

are at pages 397 – 403 of the Hearing Bundle. The Appeal Hearing lasted just over an hour.

91. At page 398 of the Hearing Bundle, there is evidence of Mr Davenport seeking to make representations on the Claimant's behalf. The notes record that he was reminded by Professor Shelton-Mayes that he was there to support the Claimant stating,

> *"and not for advocacy, the panel need to hear from* [the Claimant]*".*

92. However, the Hearing notes do not suggest that Mr Davenport was purporting to answer questions on behalf of the Claimant. Instead, the notes evidence that he was seeking to advocate on her behalf, a statutory right conferred by s.10(2B) of the Employment Relations Act 1999. This important statutory right and protection is reflected both in the Acas Code of Practice on Disciplinary and Grievance Procedures and in the Respondent's own Disciplinary Policy and Procedure. Following that intervention relatively early in the Disciplinary Appeal Hearing, there is no record of Mr Davenport having made any further representations on the Claimant's behalf. I find the he had been effectively prevented from doing so as a result of Professor Shelton-Mayes' firm intervention.

93. In her evidence at Tribunal, Professor Shelton-Mayes confirmed that the Appeal had proceeded by way of a review of the original decision rather than by way of a full re-hearing. In fact, that is not quite the whole picture, since the Claimant's allegations regarding Ms Coles' treatment of her were investigated as a formal grievance. So that those aspects were effectively considered afresh.

94. Following the Appeal Hearing Professor Shelton-Mayes and Professor Armellini discussed the matter and decided the Appeal should be paused whilst the Claimant had the opportunity to raise her grievance as a separate process and until that process was completed. In the course of the Appeal Hearing, when discussing the Claimant's relationship with Ms Coles, the Claimant had raised various concerns about Ms Coles, albeit which she had not previously followed up with a formal complaint. Professor Shelton-Mayes asked the Claimant whether she wished to raise a formal grievance against Ms Coles, to which the Claimant responded that she did. Professor Armellini and Professor Shelton-Mayes felt this was important because a substantive part of the Grounds of Appeal referred to Ms Coles' alleged behaviour towards the Claimant. If the grievance was upheld, Professor Shelton-Mayes and Professor Armellini felt they would need to reconsider the previous allegations, specifically whether instructions given by Ms Coles were reasonable in the first instance. In my judgment, they reasonably concluded that in the event the grievance was not upheld, this would resolve a number of points raised in the Appeal.

95. The Claimant's grievance in relation to Ms Coles was heard by Mr Owen Morris, Head of Public Relations and Corporate communications. His decision was sent to the Claimant on 21 August 2019. The Claimant is critical of Mr Owen's approach though she did not appeal against the outcome. She acknowledged at Tribunal that she had been allowed to present her points during the grievance hearing.

96. Following the decision on the grievance, the Claimant was invited to a reconvened Appeal Hearing on 4 September 2019. The Claimant's evidence is that she did not receive Mr Shergill's email inviting her to that meeting, or an email of 21 August 2019 from Ms Alison Ryan, an HR Advisor at the Respondent, who had sent the Claimant the outcome of the grievance. The Claimant chased both matters up in an email to Mr Shergill on 10 September 2019. In the absence of the Claimant on 4 September 2019, the Hearing proceeded in her absence. Ms Rokad does not make any criticisms of this decision in her submissions. The outcome was communicated in a letter dated 24 September 2019. Her Appeal was not upheld.

97. Mr Shergill emailed the Claimant a copy of the Appeal Outcome Letter on 27 September 2019.

98. I accept Professor Shelton-Mayes' evidence at paragraphs 26 – 36 of her statement regarding the discussions that took place between herself and Professor Armellini and her explanation as to the reasons why they had not upheld the Claimant's appeal against her dismissal and why they considered that dismissal was an appropriate sanction.

Law and Conclusions

Unfair Dismissal

99. I have already referred to the provisions of s.94 of the Employment Rights Act 1996 and to the often-cited passage from the Judgment in Burchell. In their respective written closing submissions, Counsel have referred me to other relevant authorities, including Airbus UK Ltd v Webb [2008] ICR 561 regarding the proper approach in relation to expired written warnings.

100. Where a Tribunal is satisfied that an employer genuinely and reasonably believed that an employee was guilty of misconduct, it must still have regard to whether dismissal is within the band of reasonable responses, that is to say whether it is a disciplinary penalty that could reasonably be imposed in light of the employer's findings, even if some employers would impose a disciplinary sanction falling short of dismissal. Employment Tribunals may not substitute their own view as to whether or not an employee was guilty of gross misconduct providing that the employer in question has a genuinely and reasonably held belief in the employee's guilt following a reasonable investigation and disciplinary process. Likewise, it is not the role of the Employment Tribunals to substitute their

own view as to the appropriate disciplinary penalty if dismissal was within the band of reasonable responses.

101. I am in no doubt that Mr Wood and Professor Shelton-Mayes genuinely believed the Claimant to be guilty of misconduct and, given the sequence of events set out in some detail in my findings above, I agree with Mr Wilson's submission that there was an abundance of evidence to support a finding that the Claimant was guilty of the misconduct alleged and, indeed, his further submission that the case against the Claimant was "overwhelming". In my judgment the question in this case is whether the disciplinary process (including the investigation) was reasonable, and whether dismissal was within the band of reasonable responses.

102. As to the adequacy of the disciplinary investigation, although Ms Rokad makes various submissions under the heading "DH Investigation" they relate to the disciplinary hearing and related process rather than Ms Packwood's investigation. I cannot discern in the Claimant's 32-page witness statement any criticisms of the investigation. That is perhaps unsurprising given the Claimant's failure to participate in it.

103. Turning to the disciplinary process, whilst there is some force to the submissions at paragraphs 18 to 20 of Mr Wilson's closing submissions, particularly given the weight of evidence against the Claimant, the fact remains that the disciplinary hearing proceeded in the absence of the Claimant in circumstances where the Respondent was on notice that she was undergoing investigations for chest symptoms / heart problems, which Mr Wood accepted was a serious matter. Mr Wood acknowledged that he had not considered postponing the hearing to give the Claimant a further opportunity to attend. Equally, he did not give her the opportunity to put forward written representations. Amongst other things, Mr Wilson relies upon the Claimant's failure to attend the disciplinary investigation meeting as providing relevant context on this issue. I disagree. In my judgment, the fact that as at 7 March the Claimant had not provided any explanation of her actions to the Respondent and, perhaps more significantly, had not put forward mitigating circumstances, notwithstanding this was as a result of her own failure to participate in the investigation, was all the more reason why Mr Wood ought to have given active and careful thought to whether the hearing should proceed in the Claimant's absence or, at least, without first affording her a final opportunity to make written representations. The Respondent may have been frustrated, or in the words of Mr Wood "disappointed" by the Claimant's conduct but, if so, that would not have warranted Mr Wood proceeding in her absence. It is a normal feature of any disciplinary process, and an important procedural safeguard, that employees are afforded a reasonable opportunity to state their case and to put forward any mitigating circumstances before disciplinary decisions are taken in relation to them. That is particularly the case where, as here, the employee is at risk of dismissal. Whilst it seems that as at 7 March 2019 the Claimant had not provided the Respondent with a copy of her most recent fit note, enquiries by Mr Wood would have confirmed that the Claimant had not returned to work on 5 March 2019. It

was not the case that the Claimant was working as normal and had simply failed to attend the disciplinary hearing. The Claimant can be criticised for her failure to participate in the disciplinary investigation and also for causing the hearing scheduled for 13 February 2019 to be postponed, but as at 7 March 2019 the more immediate context was her ongoing absence from work in circumstances where she was known to be undergoing investigations for chest symptoms / heart problems. It could be said that by 7 March the Claimant had persistently failed to attend meetings, but her non-attendance on 7 March itself was not without good reason. In my judgment, notwithstanding the Claimant's history of poor communication and significant history of failing to engage, it was ultimately unreasonable for Mr Wood to proceed in her absence on 7 March.

104. I am critical of the quality of the documented reasoning underpinning Mr Wood's decision to dismiss the Claimant. Professor Shelton-Mayes acknowledged that the Disciplinary Outcome letter and underlying rationale was "poor". I am also critical of the length of time it took the Respondent to provide the Claimant with a further copy of the Disciplinary Outcome letter once she informed it that she had not received the letter. The Respondent has never explained why it took multiple requests by the Claimant before a copy of the letter was provided and I would encourage their HR department to reflect critically on their failure to deal with the matter in a timely manner. By their actions they will have caused the Claimant avoidable stress and uncertainty. Ultimately, however, she had secured a copy of the letter by the time of the Appeal Hearing and accordingly was in a position to prepare for it with an understanding of Mr Wood's stated reasons for dismissing her.

105. As regards the Appeal, whilst it did not proceed by way of a re-hearing, the minutes of the Appeal Hearing evidence that the hearing was thorough and, as the Claimant acknowledged at Tribunal in response to a question from Mr Wilson, that she was able to put forward all the points she wished to make. That is in spite of Mr Davenport's suggestion in his evidence that she had been shut down. The minutes do not support that the Claimant was shut down. Instead they evidence that during the hearing the Claimant was specifically asked if she wished to add anything further, to which she relied that she thought that was it. In contrast, Mr Davenport was precluded from participating fully. He was prevented by Professor Shelton-Mayes from advocating on the Claimant's behalf. In my judgment it does not matter that the Claimant was able to make all the points she wished to make. Mr Davenport plainly wished to make points on her behalf but was prevented from doing so. That was in breach both of the Employment Relations Act 1999 and paragraph 17 of the ACAS Code of Practice. I am required to have regard to the Code when deciding whether or not an employer has acted fairly. In my judgment the Respondent behaved unreasonably in denying Mr Davenport his statutory role as the Claimant's chosen companion.

106. I do not accept Ms Rokad's other criticisms of the appeal process. I do not accept that the Claimant was wrongly given to understand that the Appeal would proceed by way of a re-hearing, even if that is what the Claimant wanted. The fact that the Claimant was advised that the Appeal Hearing would review her points of appeal does not amount to a commitment to re-hear the matter. Certainly, the Respondent's Disciplinary Policy does not state that appeals provide an opportunity for a full re-hearing, rather that the University will give proper consideration to the grounds of appeal, which is what I am satisfied happened in this case. I also think it is unfair of Ms Rokad to characterise Professor Armellini and Professor Shelton-Mayes' decision to pause the Appeal process to enable the Claimant's concerns in relation to Ms Coles to be investigated under the Respondent's grievance procedure as "contract[ing] out" the appeal to a third party. Their approach was in fact entirely in accordance with paragraph 46 of the ACAS Code of Practice. They were entitled to proceed on the strength of the grievance outcome and had no obvious reason to go behind it. The Claimant failed to attend the reconvened Appeal Hearing and accordingly they had no further representations from her as to the correct way to proceed. It does not matter, since I am satisfied that they acted as reasonable appeal officers might have acted in the circumstances i.e. within the band of reasonable responses.

107. For the reasons above, namely Mr Wood's decision on 7 March to proceed in the Claimant's absence, when there was a good reason for her absence, and Professor Shelton-Mayes' unreasonable refusal to allow Mr Davenport to put and sum up the Claimant's case, I conclude that the Claimant was unfairly dismissed. Nevertheless, for completeness, I shall deal with the issue of whether dismissal was within the band of reasonable responses. In my judgment it was, notwithstanding the conduct complained of was strictly categorised as misconduct rather than gross misconduct under the Respondent's Disciplinary Policy. As the Claimant herself conceded, the list of behaviours in the Policy is not exhaustive and the Policy itself is explicit that general misconduct "tends to cover minor misdemeanours". The multiple instances of misconduct detailed elsewhere in this Judgment did not involve minor misdemeanours, they impacted students and risked the Respondent's reputation and commercial interests. The Claimant's misconduct was serious and sustained, and it went to the heart of the Respondent's continued trust and confidence in her. It was inconsistent with her stated duties in her contract of employment and with the responsibilities and expectations of her contained in her job description and related person specification. It is an essential feature of all employment relationships that both parties have ongoing trust and confidence in the other. Once essential trust and confidence is destroyed the relationship is untenable. Mr Wilson submits that the Claimant's conduct towards Mr Lamb evidences a lack of contrition. Her lack of contrition and failure to accept responsibility or professional accountability were evident at Tribunal. Furthermore, the majority of the conduct with which the Claimant was charged took place when she was the subject of a live disciplinary warning. The warning was in respect of similar misconduct. I think it is a weak point that the warning

may have expired by the time of the disciplinary hearing. That would provide an incentive to employees to delay any proceedings and would advantage employees such as the Claimant who fail to attend scheduled meetings and respond to correspondence. In any event, as at the date of the first scheduled disciplinary hearing on 13 February 2019, which the Claimant failed to attend through her own neglect, the disciplinary warning was still live. Furthermore, and in accordance with the principles in Airbus UK Ltd v Webb [2008] ICR 561, Mr Wood, and in turn Professors Armellini and Shelton-Mayes, not unreasonably had regard to the warning in coming to their decision. It was, however, just one factor in the overall decision making process.

108. Whilst Counsel were agreed that I should not deal with remedy, they did make submissions and invite me to make a determination on the issues of whether or not, in the event the Claimant succeeded in her unfair dismissal complaint there should be any award, alternatively a reduction or adjustment in any award, in accordance with the well established principles in Polkey v AE Dayton Services Ltd 1988 ICR 142 and/or to reflect contributory conduct and/or pursuant to s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A").

109. I first remind myself of the order in which any adjustments and deductions should be made. In Digital Equipment Co Limited v Clemence (No 2) [1997] ICR 237 EAT, Morrison J held that the correct approach is first to offset any contractual or ex-gratia termination payments and any sums earned by way of mitigation in order to arrive at an employee's net loss, then to make any reduction to reflect contributory fault or the chance that the employee would have dismissed or left employment in any event. In Rao v Civil Aviation Authority [1994] IRLR 240 the Court of Appeal held that an employment tribunal should first make the *Polkey* reduction under s.123(1) of the Employment Rights Act 1996, as the size of the reduction may have a significant bearing on what further reduction falls to be made for contributory conduct under s.123(6), albeit the two reductions address different issues. S.124A of the Employment Rights Act 1996 stipulates that any adjustment for failure to comply with a relevant ACAS Code should be made "immediately before any reduction under s.123(6) or (7)" i.e. after any *Polkey* reduction but before any adjustment for contributory fault.

Polkey

110. Ms Rokad submits that there are too many variables in the case for the Tribunal to make an assessment based on sufficient confidence as to what is likely to have happened. She goes on to submit, amongst other things, that in the absence of having heard evidence from Professor Armellini who determined the appeal together with Professor Shelton-Mayes it would be impermissible for me to take the evidence of Professor Shelton-Mayes alone. I do not accept that as a proposition. Likewise, I do not attach weight to the fact the Respondent did not call Ms Coles to give evidence

given that she did not act as the investigating, disciplinary or appeal officer in the case.

111. In Software 2000 Limited v Andrews & Others [2007] ICR 825, EAT, Elias J reviewed all the authorities on the application of *Polkey* and summarised the principles to be extracted from them. He confirmed that if an employer contends that an employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee. He confirmed that there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Nevertheless, tribunals must recognise the need to have regard to material and reliable evidence that will assist it in fixing just and equitable compensation, even if there are limits to the extent to which they can confidently predict what might have been. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary is so scant that it can effectively be ignored.

112. I should consider making a *Polkey* reduction whenever there is evidence to support the view that an employee might have been dismissed or otherwise left employment if the respondent had acted fairly. In my judgment this is not a case which is riddled with uncertainty. On the contrary, the Claimant's failings and misconduct are laid bare in the documents in the Hearing Bundle and were amplified during cross examination. As I have said already, I agree with Mr Wilson when he says that the case against the Claimant was overwhelming. The rationale for Mr Wood's conclusions is writ large in the Hearing Bundle even if he failed to articulate it fully at the time. I agree with Mr Wood's submission that the Claimant had plainly been failing in her responsibilities for an extended period of time, was making no effort to address it, and instead was verbally aggressive towards another colleague who sought to ensure that standards of communication with students were upheld. In reaching an informed view as to what might have been, the Claimant was an unsatisfactory witness. She was evasive at times and prone to deflect questions put to her. She rarely accepted responsibility or accountability for her own actions, preferring to blame others. As I set out below, her position in these proceedings is that there should be no reduction in any award to reflect contributory conduct on her part; given the weight of evidence that is unrealistic though revealing. I have set out in some detail the sequence of events in the months leading up to the Claimant's dismissal and do not repeat them here, save to note again that she put her own interests and concerns ahead of her students' and was verbally aggressive to Mr Lamb when he sought to ensure basic standards were upheld. Ultimately, this is a case where I am confident on the evidence in the Hearing Bundle and from everything, I heard at Tribunal that the

Claimant would inevitably have been dismissed had a fair process been followed. It is abundantly clear to me that had the Claimant attended either the disciplinary hearing on 7 March or a re-scheduled hearing, or in the alternative submitted written representations, the Respondent would still have concluded on the balance of probabilities that she was guilty of serious and sustained misconduct and, critically, that it could not have continued trust and confidence in her. In arriving at that conclusion, I further take into account that her grievances against Ms Coles were investigated independently of Professor Armellini and Professor Shelton-Mayes and not upheld, and that the Claimant did not appeal against that decision. Further, that by her actions the Claimant demonstrated that she was not committed to repairing her working relationship with Ms Coles or improving her engagement with the Respondent or the standard of her communications with colleagues, students or others.

S.207A TULR(C)A

113. Ms Rokad invites the Tribunal to award a 25% uplift to reflect the Respondent's unreasonable failure to comply with the ACAS Code, though does not identify the specific provisions of the Code that were not complied with. Be that as it may, I consider that the provisions of paragraph 17 of the Code regarding a companion's right to put and sum up a worker's case was breached, and that the circumstances envisaged in paragraph 25 of the Code were not met in this case. The ability of an employee to attend a hearing and to state their case, and to be assisted in that regard by their chosen companion are important protections. This was a well-resourced Respondent. Professor Shelton-Mayes may not have appreciated that she was acting in contravention of the Code, but Mr Shergill was on hand at the appeal hearing to ensure that the process was compliant. In my judgment, as an experienced HR professional, he would or should have appreciated that a companion has the right to put and sum up the employee's case on their behalf. The Code breach was unreasonable and, in my judgment, should be reflected in a 10% uplift under s.207A.

Contributory Conduct

114. The Claimant does not accept that there was any contributory conduct on her part that should be taken into account under s.123(1) or s.123(6) of the Employment Rights Act 1996. Mr Wilson's submissions on contributory conduct are at paragraphs 28, 29 and 34 to 36 of his written submissions. I do not repeat them here. In my judgment, the Claimant's conduct was significantly blameworthy and extended beyond the serious and sustained conduct that gave rise both to the disciplinary proceedings and to Mr Lamb's grievance against her, to include an almost total failure on her part to engage with the early stages of the disciplinary process and with the grievance process invoked by Mr Lamb. Mr Wilson not unfairly characterises her failure in this regard as foolish, negligent and unreasonable. Even on receipt of Ms Culverhouse's letter dated 19 February 2019, when she learned that she had failed to attend the

disciplinary hearing scheduled for 13 February, the Claimant made no effort to secure a copy of Ms Culverhouse's earlier letter of 5 February or the investigation report referred to in her letter. I find that omission inexplicable. The Claimant even has some culpability in the Respondent's decision to proceed in her absence on 7 March 2018, in so far as she failed to advise Ms Culverhouse on 5 March that she remained unfit to work. Whilst the Claimant's conduct significantly contributed to her dismissal, that does not mean it would not be just and equitable to make a basic award in her favour. The Respondent's failure to adjourn the hearing on 7 March in light of the Claimant's continued sickness absence and Professor Shelton-Mayes' intervention in relation to Mr Davenport represented material failings on its part. In all the circumstances I determine that it would be just and equitable to reduce the basic award by 80% to reflect the Claimant's significant contributory conduct. Had I not already determined that the Claimant's dismissal was inevitable, I would have made the same reduction to any compensatory award.

115. There may be no need for me to list this matter for a remedy hearing if the parties are agreed as to the amount of the basic award. The claimant has calculated the basic award as £3,937.50 (page 463 of the hearing bundle). This figure increases to £4,331.25 as a result of the 10% uplift and then reduces to £866.25 applying the 80% contributory conduct reduction. If the tribunal has not received any representations to the contrary from either party within 14 days of this Judgment being sent to them, £866.25 is the amount I shall award to the claimant in respect of her unfair dismissal. However, in the event further written representations are received from either party I shall give consideration to whether I can determine the issue on the strength of their correspondence or whether I shall need to list the matter instead for a short remedy hearing.

Holiday Pay

116. I heard various evidence regarding the Respondent's approach to carry over of unused holiday. The Respondent's holiday year runs from 1 August to 31 July. The Claimant asserts that she is owed 5 days' pay in respect of holiday carried forward from the 2017/2018 holiday year. The issue was barely addressed in paragraph 91 of her witness statement so I permitted the Claimant to give further evidence on the matter. Nevertheless, it remains the case that there is insufficient evidence available to me to uphold the complaint. The Claimant does not identify in her witness statement and gave no evidence at Tribunal as to the number of days' leave, she took between 1 August 2018 and 13 June 2019. The only information available to me is her annual leave form for 2017/18 (page 153 of the Hearing Bundle) which indicates that she had booked 6 days' leave in early September 2018. Even if I were to conclude that the Claimant had carried over 5 days' leave from 2017/18 there is no information available to me as to the position as at 13 June 2019 when the Claimant's employment terminated. I do not know whether she had taken some, all or more than her pro-rata entitlement. Without that basic

information I cannot arrive at a properly informed decision. In the circumstances I do not uphold the complaint.

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Employment Judge Tynan

Date: 25 September 2020

Sent to the parties on: .....

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For the Tribunal Office