EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MR N LUCK	**V**	**UNIVERSITY OF THE ARTS LONDON**

HELD AT: LONDON CENTRAL **ON: 14-18 SEPTEMBER 2020**

EMPLOYMENT JUDGE: M EMERY

REPRESENTATION:
FOR THE CLAIMANT **Mr T Gillie (Counsel)**
FOR THE RESPONDENT **Ms M Tutin (Counsel)**

JUDGMENT

The claims of unfair dismissal and wrongful dismissal fail and are dismissed.

REASONS

The Issues

1. Judgment and Reasons were provided orally at the end of the Tribunal Hearing.

2. The claimant was dismissed for gross misconduct. The respondent contends that it reasonably believed that the claimant had committed gross misconduct.

3. Has the Respondent shown that the reason for the Claimant's dismissal was a potentially fair reason under section 98 (2) ERA 1996?

    a. Did the respondent:

        i. Act reasonably in commencing a disciplinary process against the claimant?

        ii. have reasonable grounds for believing that the claimant had committed misconduct?

        iii. carry out as much investigation as was reasonable in all the circumstances of the case?

    b. Was dismissal within the range of reasonable responses available to a similar size and resourced reasonable employer in the circumstances?

    c. If the dismissal was unfair, would the claimant have been dismissed under a fair process, had one been followed, if so when? Alternatively, under a fair process, what was the percentage prospect of the claimant being dismissed at some point? (The *Polkey* issue).

    d. If the dismissal was unfair, did the claimant contribute to his dismissal by way of his conduct, and if so would it be just and equitable to reduce compensation by any extent? (The compensatory fault issue).

The legislation and relevant legal principles

4. Employment Rights Act 1996

Part X Unfair Dismissal

Chapter I

Right not to be Unfairly Dismissed

s.94 The right
(1) An employee has the right not to be unfairly dismissed by his employer.

Fairness

s98 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—

(b) relates to the conduct of the employee,

(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.

5. The following paragraphs contain summaries of the relevant legal principles, as set out in *Harvey on Employment Law.*

6. S.98 requires the respondent to prove its reason for dismissal. If it cannot, the claim succeeds. If the respondent can prove the reason for dismissal, s.98(4) requires the tribunal to be satisfied that the respondent has acted reasonably in all the circumstances in treating this reason for dismissal as sufficient. There is a neutral burden of proof, and the tribunal must make up its mind whether s 98(4) is satisfied in the light of all the information before it.

7. It is not for the tribunal to substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not. Rather its job is to determine whether the employer has acted in a manner which a reasonable employer might have acted, even although the tribunal, left to itself, would have acted differently

8. *British Home Stores v Burchell [1978] IRLR 379:*

    1. first, there must be established by the employer the fact of a belief in the misconduct; that the employer did believe it;

    2. secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief;

    3. and thirdly, that the employer, at the stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances.

9. *Iceland Frozen Foods v Jones [1982] IRLR 439*:

(1) the starting point should always be the words of s 98(4) themselves;

(2) in applying the section a tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct the tribunal must not substitute its decision of what is the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

10. This means, in principle, that an employer need only adopt such procedural safeguards as a reasonable employer would adopt.

11. *Linfood Cash and Carry Ltd v Thomson [1989] IRLR 235*, the relevant question is whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which he did. The tribunal is not entitled to interfere simply on the grounds that it prefers one witness to another; it must have logical and substantial grounds for concluding that no reasonable employer could have assessed the credibility of the witnesses in the way in which the employer did.

12. Cross examination by experienced advocates in the tribunal may produce a picture of the evidence which is quite different to the picture which emerged before the employer, yet it is the reasonableness of the latter's conduct, in the light of the circumstances prevailing at the time of dismissal, which must be assessed.

13. In *Morgan v Electrolux Ltd [1991] IRLR 89* the court of appeal considered that “serious allegations”, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by lay persons and not lawyers. The test is still whether a reasonable employer could have acted as the employer did. However, more will be expected of a reasonable employer where the allegations of misconduct, and the consequences to the employee if they are proven, are particularly serious: see *Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721*

14. In considering whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the employer's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses that an employer could reasonably make in the circumstances. The

fact that other employers might reasonably have been more lenient is irrelevant (see the decision of the Court of Appeal in *British Leyland (UK) Ltd v Swift [1981] IRLR 91*

15. On the question on the disciplinary process, the question to consider is:

— had the employer reasonable grounds on which to sustain his belief;

— had he carried out as much investigation as was reasonable; and

— was dismissal a fair sanction to impose?

16. The investigative process is important for three reasons in particular:

a. it enables the employer to discover the relevant facts to enable him to reach a decision as to whether or not an offence has been committed;

b. if properly conducted, it secures fairness to the employee by providing him with an opportunity to respond to the allegations made and, where relevant, raise any substantive defence(s); and

c. even if misconduct is established, it provides an opportunity for any factors to be put forward which might mitigate the offence, and affect the appropriate sanction.

17. The ACAS Code emphasises the importance of an investigation to establish the facts**.** Paras 5 to 7 of the ACAS Code of Practice highlight the following elements of disciplinary procedures which are relevant to investigations carried out by employers:

> "5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case…

18. The EAT commented in *ILEA v Gravett [1988] IRLR 497*, the extent of the investigation depends upon the extent of the evidence available to the employers.

> "… at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation, including questioning of the employee, which may be required, is likely to increase'.

19. Delay in carrying out the investigation may itself render an otherwise fair dismissal unfair, there being no formal requirement for the employee to prove actual prejudice caused by that delay (though of course evidence of actual prejudice could strengthen the employee's case) (*RSPCA v Cruden [1986] IRLR 83*; *A v B [2003] IRLR 405, EAT*).

Witnesses

20. I heard evidence for the respondent from Ms Virginia Harvey an independent HR adviser who undertook the disciplinary investigation, Professor Frances Corner Pro-Vice Chancellor and Head of London College of Fashion where the claimant was based and who chaired the disciplinary hearing; Ms Sim Scavazza an independent governor who chaired the claimant's appeal against dismissal. For the claimant's case I heard evidence from the claimant's Trade Union rep Ms Christine McKean, the claimant, Ms Kristina Gerdin an Associate Lecturer who was also at the student's interview and was also disciplined, and Ms Bianca Rafaella, a former student of the respondent who was taught by the claimant. Prior to hearing the evidence, I read all witness statements and the documents referred to in the statements and I listened to a recording of the meeting which was at the centre of the allegations.

21. I do not recite all of the evidence I heard, instead I confine the findings to the evidence relevant to the issues in this case, all of which was known to the parties during the investigation and disciplinary process. This Hearing was conducted by CVP online without any objection from the parties and without any significant issue occurring which affected its conduct.

22. This judgment incorporates quotes from my notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

23. The claimant is an experienced and highly regarded academic in the field of fashion with over 30 years' experience. His role with the respondent was Course Leader in the MA in Womenswear Fashion Design (the Course). He had overall responsibility for the design of the Course and the teaching and assessment of students; his role included teaching, tutorial guidance, research, examining students, developing the curriculum and general management and administration of the Course. Throughout his employment until the issues in this case, his conduct and performance were unquestionably good. His job description includes undertaking health and safety *"duties and responsibilities appropriate to the role"*, which included health and safety assessments, although in practice the assessments were undertaken by course technicians insofar is it related to Studio machinery. His JD included a requirement to work in accordance with the University's Equal Opportunities Policy; in his evidence he accepted that he was *"expected to be familiar"* with this policy. He was under an obligation to undertake *"continuous personal and professional development"* (pages 52-3). The claimant's employment contract stated that he was *"required to implement"* the Equal Opportunities policy; any breach of this policy would be considered as a disciplinary issue. His contract references the Staff Charter and the University's *"zero tolerance approach to discrimination"* (70). The Staff Charter sets out the University's approach towards expectations and responsibilities; it requires managers to *"embody and promote the values, rights*

and responsibilities of the staff Charter" including a requirement to *"be responsible for following diversity and equal opportunity guidelines…"*. (94-6)

24. The respondent's disciplinary policy states that there are four disciplinary *"stages"*; stage 4 is the *"dismissal"* stage; it references the possibility of suspension in cases of gross misconduct (77-80).

25. An issue of significance in the case, the claimant had only undertaken one training course on issues relating to discrimination and the respondent's legal obligations for its students, a course on unconscious bias in December 2017. No mandatory training was provided on issues such as disability and reasonable adjustments and the claimant did not undertake any such courses himself. Given the respondent's legal obligations towards students on such issues as reasonable adjustments for disabled students, the Tribunal regarded this as a failing on the part of the respondent. I noted Ms Rafaella's criticism of the respondent in its approach to her disability, and her evidence of the claimant's caring and proactive approach towards her. I concluded that had such training been given to staff, as it should have been, the claimant would have had greater insight of the legal rights of students with disabilities, that it is highly unlikely he would have acted as he did, and that he would not have been dismissed.

26. In July 2016 a foreign-national MA student on the Course was involved in a road traffic incident in which she suffered a serious traumatic brain injury. The student was two-thirds of the way though her course at this time and had started preparing her fashion collection on which, along with a written dissertation, her MA would be assessed. The student underwent operations and extensive rehabilitation in the UK and her home country. In March 2018 the student enquired about returning, and the claimant was in contact with the student by email in April and May 2018. The student and the claimant met in early June and the claimant was concerned both by the lack of work produced and what he considered to be the student's inability to communicate or understand what was being said. Studio technicians determined that they could not induct her in the Studio for the same reason. Given the student's lack of preparatory work, the claimant was concerned about the student's ability to produce the required work in time, accordingly she would likely fail the Course. The claimant involved Ms Becky Keen an Adviser in the respondent's Disability Service.

27. On 8 June 2018, Ms Keen advised the claimant that they should meet with the student to explore these difficulties, and to assess whether adjustments could be made to enable her to complete the course; she suggested a translator if loss of language was an issue (128-129). There was then a significant delay, not at all the fault of the claimant, before a meeting was arranged to discuss the student's work and reasonable adjustments needed between Ms Keen, the student and the claimant, this took place on 23 July 2018.

28. Prior to this meeting, the claimant's position was that he wanted to be supportive but that a translator was a *"ridiculous option I could not endorse";* one of his concerns was that he had to think of the other students on the course, (128). He told the student *"you should have informed us regarding your poor health and the problems with communication"* (134)*;* to Ms Keen he said the student's

language skills were *"very, very poor"* and suggested the student complete the whole year at a later stage (124). This, plus the possibility of gaining a lesser qualification was considered within the College, and it was agreed with Ms Keen that options should be explored with the student. It was the claimant's view that when he tried to explain some of these issues the student *"had not understood"* even when speaking with a cousin present in the meeting who was acting as support. The claimant's view was this is *"really a ridiculous situation however sympathetic"* they were to the student's situation (140). Prior to the meeting, Ms Keen told the claimant that there was an obligation to enable the student to complete her course, the student was disabled and reasonable adjustments needed to be made to assist the student to do so (176).

29. Updates on the student were received – on 9 July 2018 Ms Keen was told by a Student Health Advisor that the student was physically and mentally well, but had difficulties in communicating; a notetaker in tutorials would be helpful and a mentor to assist with planning and organisation (143-144); the student's cousin who had attended meetings with the student was suggested as a support; this led to an Individual Support Agreement ("ISA") for the student (154-158) which was to be discussed with the student. The claimant's response to the ISA and Ms Keen's email – which made clear the student wished to complete the MA that year, and that the student's issue was communication, and not comprehension, that the student considered their technical skills to be unaffected – was that Ms Keen was *"too willing"* to take the student's advice rather than his academic advice; the course was not a service it was about *"talent and skill"* and that he was *"not accepting this I'm afraid"* (160). In response Ms Keen said the student wanted to finish the course *"to the best of her ability"*, that assistance would be given to allow the student *"the best opportunity to finish her course"*; the claimant's response was that Ms Keen's suggestion was *"impossible and it also wouldn't be right"* (159-61)

30. On the morning of the 23 July 2018 meeting, the claimant sent the student an email, saying that the student had not fully recovered, had lost language skills, had not informed the College of this, and that the that the student *"must have known it would be impossible to complete your MA successfully"* as a consequence (165). In a pre-meeting briefing, Ms Keen reiterated to the claimant that *"we would need to look at appropriate reasonable adjustments… to remove disability-related barriers",* there was a discussion about suggested adjustments and the claimant's concerns about some of these. One of the issues he raised with Ms Keen was his concern about other students would see the student *"working to different standards … and this would affect the group dynamic and motivation"* (176).

31. The meeting was attended by Ms Keen, the claimant, Ms Gerdin, another Visiting Lecturer, the student and cousin. An issue arose as to whether the claimant knew the meeting was recorded; the respondent's case is that the claimant knew and assented to it being recording, the claimant states it was recorded without his knowledge. I accepted that whether or not the claimant was aware the meeting was being recorded had little to do with the issues of concern to the respondent. I concluded that it is not unreasonable for an employer to rely on recorded evidence as long as there is a reasonable belief

the contents are accurate. Here there was no dispute as to the accuracy of the recording, in particular what it was the claimant said to the student.

32. The claimant made several remarks to the student at the meeting as heard on the recording. Among the comments of concern were the following: *"you should have realised that coming back with no English was bound to present a problem"; "are you sure you're going to be able to do this?";* he *"strongly advised against"* the student completing, he was *"surprised"* she had not been in touch with him about coming back onto the Course; it was *"ridiculous"* that the student believed she was *"actually up to doing it";* the student *"can't have everything",* and was *"not the person that started the course"*. The claimant stated that *"I don't feel at the moment I can go through with this journey ... So I will have to be disciplined or whatever …. no, I can't go through with this at the moment, I'll have to think about it, sorry* (166-175).

33. Following the meeting, the claimant said he wanted to send an email to the student reiterating some of these points, that the student had not fully recovered, that she should be refunded fees with a place held open for the future, that Ms Keen should not *"indulge"* the student as this would *"likely let her down in the long term"*.

34. This email was forwarded by Ms Keen's line manager to the Associate Dean (183). The student complained and this complaint was subject to a separate investigation (189-196).

35. A decision was made to suspend the claimant following advice from HR that if his comments were regarded as an act of gross misconduct, suspension should be considered. One issue was that suspension was recommended by Professor Corner, who chaired the disciplinary hearing. I did not consider that this recommendation affected the fairness of the process, that it suggested the disciplinary hearing was prejudged. The University Dean had said he was worried that the remarks were *"deeply offensive",* which may have *"broken the Equalities Act 2010"* (206). What the claimant had said was not in dispute and I concluded that it was reasonable to treat the conduct towards the student as a breach of the Staff Charter and the Equal Opportunities policy, as an act of potential gross misconduct.

36. The claimant was informed of allegations against him: his treatment to the student had been *"less favourable treatment"* as he had concluded a disabled student was incapable of achieving the outcome and doing so without considering reasonable adjustments; he had failed to make reasonable adjustments; he had caused emotional distress to the student by use of potentially offensive and discriminatory language; he had treated the student's work less favourably than a non-disabled student.

37. Ms Harvey of Peopletime Limited, was appointed to investigate the allegations – she interviewed the student and the claimant, who was accompanied by his Union rep. Ms Harvey also interviewed other staff members including a technician who was concerned about the h&s implications of the student's use of the equipment. Her report considered the evidence provided by all witnesses

in the investigation; it concluded that there was sufficient evidence to proceed to a disciplinary hearing; Ms Harvey concluded that there was little evidence the claimant had actively sought to engage on the suggested reasonable adjustments. She considered that the health and safety induction was arguably the responsibility of the claimant as course leader; that it was reasonable to conclude that the comments made during the meeting on 23 July 2018 may have been offensive, that the claimant appeared to be aware that his conduct was wrong. She concluded that there was no evidence the language used was discriminatory on the ground of the student's disability. She concluded there was no evidence that the student's work had been treated less favourably by the claimant on grounds of the student's disability.

38. The claimant was invited to attend a disciplinary hearing on 10 January 2019 (511-512). An issue in contention is that the Disciplinary invite did not say that the claimant could be dismissed in this process; the letter also stated that it was a *"stage 4"* hearing under the disciplinary code. In his evidence to the tribunal the claimant accepted he knew the outcome of the process could be dismissal. The claimant provided a statement in advance of the hearing (558-559). Witnesses were heard at the hearing.

39. The claimant argues that the misconduct allegations were not clearly worded, vague and lacking in detail, and he was not aware of what he was being accused of (paragraph 39 statement). Professor Corner confirmed that this was not an issue raised during the disciplinary hearing, *"… there was no discussion of a lack of clarity, we focused on his intentions which was not to cause discourtesy or distress to the claimant; that was the was focus, there was no debate on the nature of allegations…"* I accepted this evidence, and also accepted that the hearing was conducted in a reasonable and non-intimidating atmosphere.

40. Professor Corner's recommendation, which required authorising by the Vice Chancellor, was to dismiss the claimant for gross misconduct; she concluded there was a strong inference that the claimant had decided that *"the student was incapable of achieving the outcome without making any reasonable adjustments.."* that the claimant did not actively seek to engage with the reasonable adjustments offered by the university; that remarks made could be regarded as offensive and discriminatory. Professor Corner considered the context, the *"difficult and stressful situation"* the claimant was in. She considered the claimant's arguments on mitigation. Professor Corner concluded that the claimant's conduct was a *"serious breach of trust and integrity" … that there is no place for such behaviour in a teaching environment"* (598-604).

41. The claimant appealed against his dismissal (614-615) and he attended an appeal hearing of 3 – two governors and a manager. The claimant made submissions in advance of the appeal; his appeal was not upheld.

Submissions

42. For the claimant, Mr Gillie handed up written submissions; there were 5 issues:
    a. Clarity of allegations

b. Shifting nature of allegations against the claimant
c. The evidence did not support the charges that were upheld
d. Predetermination of the decision
e. A failure to properly consider mitigation

43. Mr Gillie argued that the claimant and Ms Gerdin's evidence was credible, unlike that of Professor Corner, whose evidence was contradicted by the documents.

44. On the issue of clarity – "*it's not good enough to say 'it's about 23 July'"* on allegation 3, the alleged discriminatory language is not identified; it was reasonable for the claimant *"not to know what they refer to"* as the respondent didn't have a consistent understanding of the case. It is for the employer to say what the alleged misconduct is and make the disciplinary charges clear; particularly when they allege discrimination – *"reputationally damaging".* The respondent has failed to comply with the ACAS Code.

45. On the shifting nature of the allegations *"Words have meaning - and this is very important where livelihood is affected".* For example allegation 2 was whether the claimant had made reasonable adjustments, but this was investigated differently. Ms Harvey understood the charge as whether the claimant had failed to implement adjustments set out in the ISA; the report referenced a breach of duty to make adjustments. But by the disciplinary hearing this was now an allegation that the claimant had *"failed to follow a reasonable management instruction to make reasonable adjustments"*. And at appeal, this turned to a breach of duty again. *"So it's an inconsistent application of the disciplinary charge at different stages".*

46. Allegation 3 - investigation was use of potentially offensive and discriminatory language causing distress. In fact what the disciplinary hearing considered was *"a potential to cause distress by use of actual discriminatory language".* There was on fact no finding that the language was discriminatory language, Professor Corner *"was not able to identify this";* there's a distinction between offensive or discriminatory language. At appeal it is recognised the language was not discriminatory, but Ms Scavazza agreed that the element of discriminatory language is integral to the charge*. "If the goalposts keep moving – how can an allegations be tested, or a defence put".* Mr Gillie argued that the respondent cannot show the language was discriminatory, *"We say they can't - and it's not reasonable to do so".*

47. The evidence of the claimant was that he did not believe the student could succeed because there was so little time and so much to do. It can't be said that the claimant stopped the student from attending, or that she lost an opportunity to complete the course.

48. On the lack of training for the claimant – it is clearly unacceptable to fail to tell staff about issues and then blame them. Even if information was given by Ms Keen, the claimant did not find this guidance helpful there were *"lots of gaps in support for disabled people"*

49. Mr Gillie argued that *"there are indications of a predetermined outcome in this case",* that this is not transparent, but the evidence is that in part the respondent had reached a conclusion about the severity of the claimant's acts and decided what the response would be: the comments of the Dean; the upholding of the student complaint; Professor Corner authorising suspension; the Dean signing-off all four allegations even though two were not proven at investigation; a suggesting the claimant could resign *"… this should drive the tribunal to the conclusion that the respondent had decided the severity and had determined the outcome"*.

50. Mitigation was not considered properly – the claimant's clean record is not weighted against misconduct; no reference at all by Professor Corner. *"His career was everything"* he had a clean record. Mr Gillie invited the Tribunal to find that the dismissal was procedurally and substantively unfair.

51. Ms Tutin argued that the claimant's evidence was evasive; that the allegations were clear, that it is *"blindingly obvious"* what the less favourable treatment being alleged; that the issue of reasonable adjustments was that the claimant had not engaged in adjustments required – these were *"course specific adjustments"* for the claimant to make. Instead the claimant had concluded that the student was not capable of completing the course. The claimant had a closed mind and therefore he said no adjustments. But *"… the whole purpose was to ensure the student had a chance to complete the course" .*

52. The lack of training on reasonable adjustments was not such a disadvantage to render the dismissal unfair, because there was an onus of the claimant to understand this. It is *"not the easiest of provisions to understand but the claimant had experience in dealing with disabled students who required adjustments … and he had support available"* including Ms Keen, and there was *"an ongoing conversation, Ms Keen explained on several occasions to the claimant what was required".*

53. While the specific comments were not set out in the allegations, the claimant was given a chance to review the transcript *"… and it was a matter of common sense what comments were offensive and discriminatory".* There was a finding at appeal that the remarks were offensive and could potentially cause distress;

54. The shifting nature of the allegations: the fact there is a difference between allegations and the disciplinary / appeal findings - *"Professor Corner is entitled to reach a different conclusion"* that the language was potentially discriminatory. The allegations don't in fact change – the issue is whether the claimant had prejudged by concluding the student could not complete the course.

55. On allegation 2 – in fact the issue is a wider time period than the meeting; there is an acknowledgement that the claimant did make suggestions on adjustments but the context shifts to a failure to obey a reasonable management instruction; that the students was registered disabled and that reasonable adjustments needed to be made to enable the student to complete the Course.

56. On allegation 4 – to the extent that Professor Corner did err in fact findings, this allegation did not form part of the decision to dismiss.

57. The breakdown of relationships – that the claimant did not have an opportunity to comment on this at disciplinary stage. But this is a *"matter of interpretation for Professor Corner"* based on the evidence.

58. It is not reasonable to treat allegation 1 as a legal concept on direct discrimination, the issue was the reasonable lay-person's understanding. The issue is the reason for the treatment - the respondent had evidence to reach the conclusion that the claimant had concluded the student could not pass because of matters related to disability. Implicit that the treatment was not the same for a non-disabled treatment. This may be implicit, but there is sufficient evidence for this conclusion.

59. Ms Tutin accepted that there was a lack of training for the claimant. But Ms Keen was *"trying to give advice on 23 July and a has pre-meeting catch-up."* It was *"an unfair criticism"* to say that mitigation was not considered; Professor Corner took time to reach her decision, and she took all relevant factors into account.

60. There was no predetermination, just because Professor Corner had some involvement prior to the disciplinary hearing. There was no link, and Professor Corner says she didn't see the complaint prior to her formal involvement.

61. The claimant accepted he knew that gross misconduct was an option on dismissal. On the claim of wrongful dismissal, this was culpable conduct and there was no breach of contract.

Conclusions on the evidence and law

62. As stated above, an issue of significant concern was the claimant's lack of training on issues such as reasonable adjustments. While I noted that the claimant is required to keep up to date with relevant training, it is not for Course Leaders to necessarily understand where their training is lacking. The lack of mandatory training on such issues for Course Leaders was I considered a significant factor in the claimant's failure to engage in the concept of reasonable adjustments in the student's case. This is a legally very complex area and conceptually it is an area where an academic institution may be obliged to treat a student more favourably than other students. I regarded it as folly for an academic institution not to have such training in place.

63. In this case, further factors for the claimant which complicated his view on the best way forward for the student included the fact that technicians had not signed-off the student's access to the Studio, also the student's lack of material which meant in the claimant's view the student could not possibly gain the MA qualification. All of these factors fed into the claimant's settled view that the student should not attempt to complete the Course at that time.

64. I reminded myself that it was not for the tribunal to substitute its opinion for that of the respondent; that the test is whether the respondent's actions were within the *"range of reasonable responses"* open to an employer of similar size and resources. I noted that to fairly dismiss for misconduct:
    a. the respondent must show it had reasonable grounds for this belief in the claimant's misconduct ;
    b. it had carried out as much investigation as was reasonable in the circumstances; and
    c. dismissal was a fair sanction to impose.

65. I first considered the rationale for determining to investigate and then I considered whether the investigation was reasonable. I concluded that there was a sound reason for determining to open a misconduct investigation – the concerns of the respondent's Disability Service after they had heard the 23 July meeting recording, Ms Keen's concerns on the claimant's conduct at the meeting, the claimant's follow-up email, the student's complaint. I also concluded that the investigation was conducted fairly and reasonably. While the claimant's lack of training in the area of reasonable adjustments was not properly addressed in the investigation, Ms Harvey was reasonable in concluding that Ms Keen provided advice to the claimant in no uncertain terms on the University's legal obligations to the student – which was that the student wanted to complete the course, it was an exceptional issue, and the student had the right to complete the course. While the claimant believed it was within his academic knowledge to determine that the student would not successfully complete the course, this was not the issue: the claimant had been told that the student was re-enrolling and wanted the opportunity to attend. The respondent's view was that the claimant determined that this was impossible in advance of the 23 July meeting, and I concluded that it was within the range of reasonable responses for the respondent to take into account this as context for the claimant's conduct at the meeting.

66. The disciplinary and appeal hearings: I concluded that the respondent was acting within the range of reasonable responses in concluding that the claimant's comments included offensive and in some cases discriminatory language. In saying this I accepted that it was not the claimant's intention to be offensive or discriminatory, and I accepted that he considered he was speaking from a position of academic judgment. But I also concluded that the employer was entitled to find the words as said offensive and potentially discriminatory, as this is clearly what, on the face of the words, they were.

67. I concluded that the respondent was acting in the range of reasonable responses in finding that the claimant had subjected the student to less favourable treatment. This is not a case where a comparator exercise was needed as suggested by the claimant, as it was clear that the reason why the claimant acted as he did towards the student was because she was disabled and this was a factor in his concluding she could not successfully complete the Course.

68. On the issue of reasonable adjustments, I accepted that the claimant did make suggestions for reasonable adjustments. But I also conclude that the

respondent was acting within the range of reasonable responses in Professor Corner determining that the claimant had effectively refused to discuss, engage with or progress the issue of adjustments. And this is despite the claimant being informed at the meeting by Ms Keen that the student is disabled and is protected under discrimination law, and as an enrolled student had a right to study. The respondent was entitled to find that the claimant was not prepared to hear this and instead he decided to make clear attempts to dissuade the student from her decision. In saying this, I accepted that the claimant did so for the reasons he said, he was concerned of the impact on the claimant on remaining on the Couse, but the lack of a deliberate motive was not a factor which the respondent was required – under the range of reasonable responses test - to take into account.

69. On the issue of mitigation, I accepted that Professor Corner properly considered the claimant's length of service and prior good record. I concluded that the facts as found could reasonably lead to a conclusion that the issues were so serious that they outweighed the issues of mitigation, including (although not expressly considered at the time) the claimant's lack of relevant equal opportunity training. The reason, again, was because Ms Keen made serious attempts to advise the claimant of the legally correct course of action, but he failed to engage with her on this issue.

70. For these reasons, I concluded that dismissal for gross misconduct was a sanction that was within the range of reasonable responses of a similarly sized and resourced employer in these circumstances. For the same reasons it follows that the claim of wrongful dismissal also fails, because the respondent was entitled to dismiss without notice under the claimant's contract of employment.

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EMPLOYMENT JUDGE M EMERY

Dated: 13 December 2020

Judgment sent to the parties
On: 15th Dec 2020

For the staff of the Tribunal office

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