



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4106889/2020

Held in Glasgow by CVP on 23, 24, 25 and 30 March 2021

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Employment Judge: Rory McPherson

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Mrs D Richardson-Webb

**Claimant
Represented by
A Stobart
Counsel**

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**The Royal Conservatoire
of Scotland**

**Respondent
Represented by
G Mitchell
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claim for **Unfair Dismissal** does not succeed.

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REASONS

Introduction

Preliminary Procedure

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1. The claimant presented her ET1 on 29 October 2020 following referral to ACAS Early Conciliation Wednesday 2 September 2020 and issue of certificate Tuesday 29 September 2020. The ET3 was submitted timeously on Wednesday 2 December 2020.

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2. This Final Hearing was appointed to take place by CVP following initial consideration notified to the parties by letter Saturday 12 December 2020 and Case Management Order Tuesday 15 December 2020.
3. The claim is one of unfair dismissal, the respondent admits the dismissal and asserted in the ET3 that it was due to gross misconduct/misconduct.
4. It agreed at the outset that the hearing would consider the merits only, with the issue of remedy, if any, being reserved.
5. The Tribunal heard evidence over 4 days from the claimant, Ms Lea Franchetti the claimant's TU EIS representative, Ms Jackie Russell the respondent's Director of Human Resources, Dr Lois Fitch, the respondent's Assistant Principal and Professor Jeffrey Sharkey, the respondent's Principal. In advance of the evidential hearing, a statement of agreed facts was provided and is incorporated into the Findings in Fact below.
6. Following the evidential element of the merits hearing, written submissions were provided.

Unfair Dismissal

7. The claim is one of Unfair Dismissal, the respondent admits the dismissal and alleges that it was due to gross misconduct, the issues for the Tribunal include:
 - a. What was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 (ERA 1996)? The respondent asserts that it was a conduct dismissal.
 - b. Was the dismissal fair or unfair in accordance with Section 98(4) ERA?

- c. Was the decision to dismiss a sanction within the "*band of reasonable responses*" for a reasonable employer?

Remedy for unfair dismissal

- 5 8. If the claimant was unfairly dismissed and the remedy is compensation:
- a. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed? **Polkey v AE Dayton Services Ltd** [1987] UKHL 8
10 (**Polkey**).
- b. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to Section 122(2) ERA 1996; and if so to what extent?
- 15 c. Did the claimant, by blameworthy or culpable actions, cause or contribute to the dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to Section 123(6) ERA 1996?

20 Findings in fact

9. The Claimant's career started as a Drama Teacher in 1983. The Claimant commenced employment with the Respondent in August 1995. The Claimant "*envisioned and designed*" the "*BA Hons Contemporary Theatre Practice*" course through to its validation in 1998. In 2009, the course
25 changed its name to "*Contemporary Performance Practice*" (the CPP course). The claimant continued to lead the course until 2020.
10. CPP was a small course with around 20 students in each year.

11. The claimant directly taught 1st year and mentored 4th year students on the CPP course.
12. By letter dated **Wednesday 6 February 2019** from Alan Smith, the respondent's Director of Finance and Estates (the A Smith 6 February 2019 letter), the claimant was invited to an Investigation Meeting (pages 89-90).
5 The purpose of the meeting was to discuss statements submitted by 10 student complainants in relation to alleged breach of the respondent's Dignity at Work and Study Policy. The A Smith 6 February 2019 letter set out that
10 *"the purpose of the meeting will be to examine the substantive allegations in detail. Details of these allegations will be provided to you in advance following my consideration of the statement. You will be given the opportunity to respond fully"*.
13. The respondent's Dignity at Work and Study Policy Appendix One set out description of Acceptable Behaviour, and in relation to staff describes that
15 there is a Code of Professionalism and Conduct which staff are expected to adhere to and failing to do so *"may result in disciplinary action being taken"*. It describes that employees *"must maintain professional boundaries... and respect your unique position of trust as a staff member."* and under the heading Working with Students that staff must *"not discuss with students your own intimate and personal relationships and be mindful to maintain an appropriate balance between formality and informality in dealing with students."* Under the heading Offsite Activities, it sets out that staff should not
20 *"allow yourself to overstep professional boundaries"*. Under the heading Professional Responsibilities Towards Students, it sets out that staff *"must treat sensitive personal information about students with respect and confidentiality and not disclose it unless required to do so by the RCS or by law"* and *"identity and respond appropriately to indicators of wellbeing and welfare of students including bullying and harassment."* Under the heading Specific to Academic Staff it describes that describes within the Staff-Student
25 relationship there is an *"imbalance of power"* and that *"many student's pathways develop in relatively narrow fields and that there is a continuing imbalance of power beyond the period of study due to the connections that*
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5 *teaching staff will have within industry” and staff should “avoid behaviours which could lead the RCS to determine that it no longer has trust in the professionalism and integrity of any staff member” describing that “a breakdown of the ethos of trust... would be considered “a serious breach of trust and confidence”” and that under the heading “Professionalism towards colleagues” “You should take great care when expressing opinions in public about the RCS or any of its staff members or students and be mindful of the GDPR requirements concerning the handling of information about others”.*

10 14. On **Monday 8 February 2019** a graduate of RCS emailed Prof Hodgart “a few weeks ago, I received a message from” XX “via another graduate explaining that they were intending to make a complaint about” claimant “and her conduct. The message ... asked if I were willing to assist them in this complaint. They had heard I had been through a complaints procedure... I didn’t wish to go into details about this incident...would like to say my complaint was heard, and dealt with extremely professionally and with care. It was for this reason, I did not wish to be included in any conversation about the CPP staff team and misconduct. ...I have heard through a few different people currently studying on the programme that” XX “has been openly speaking about this complaint as an opportunity to “bring her down ... so I got in touch with” the claimant.

15 15. By letter dated **Thursday 14 February 2019**, Mr Smith set out to the claimant, that he had considered details of written complaints from 10 students on the CPP Programme and set out 20 (numbered) allegations setting out the detail of the allegations, under the respondent’s Dignity at Work and Study Policy.

25 16. On **Friday 22 February 2019** the claimant wrote to Mr Smith with her observations on the allegations, subdividing them into 7 categories;

1. Simply plainly untrue.
2. Not complaints at all, which classification the claimant applied to allegations that she had;

- (a) stated, during a meeting with a group of students from each year group that one of the student's present was "*on a cocktail of drugs*" and the group should know that the student "*was on some very strong meds right now*"; and
- 5 (b) taken "*a student to task for reflecting on upon a professional placement experience that they felt inspired by seeing work by children that was not something which they had been exposed to within the CPP bubble*"; and
- 10 (c) "*In a similar vein, strongly criticised a student for stating that they had had a positive Erasmus Exchange for inferring that that gave them something beyond what the CPP programme had to offer. This included a statement... that the student needed to reconsider what they were trying to do here on the programme and whether they wanted to be here at all.*"
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3. Were unsubstantiated, read as hearsay or casual gossip and it difficult to discern an actual complaint.
4. Relate to historical incidents which did not result in a complaint at the time, applying that classification also to allegations listed
- 20 above as (a), (b) and (c)
5. Without sufficient detail or context ... to recall, she did not apply that classification to either (a), (b) or (c).
6. Referred to matters that were resolved at the time through RCS Dignity at Work and Study plan, in which the Director of DDPF
- 25 and the Academic Register were involved.
7. Misrepresented and occurred in the presence of colleagues. Which classification she applied to allegation (a) and (b).

17. On **Tuesday 26 February 2019**, the claimant attended an Investigation Meeting in relation to the Dignity at Work and Study Policy with (pages 100-

133) Mr A Smith, also in attendance was Suzanne Daly the respondent's Academic Registrar and the claimant's EIS TU representative. A note of the meeting (the February Meeting 2019 Note) was prepared although headed Preparatory Note, it was prepared afterwards as a Note of the Meeting (the February 2019 Note).

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18. The February Meeting 2019 Note, incorporated narrative set out by the claimant split into 2 columns; the first "*original note*" (of the meeting), the second being what the claimant considered reflected her comments. The column split model was applied by the claimant, to opening comment by her representative at that meeting that a student "*had blind copied all students into emails pertaining to complaints and expressed serious concern regarding this*". Mr Smith was noted as stating that he "*was aware of the allegation and confirmed that this was not currently being investigated, but that didn't preclude something being conducted afterwards*". The claimant did not add any comments to the record of her response to allegation 3 (which became allegation 6) and 11, both of which it was recorded she denied; however, she inserted her position in relation to allegations listed 1, 2, 4, 5, 6, 7, 8, 9, 12, and 13 appearing;

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" <i>Original Note</i> " (of meeting)	The claimant's "Comments"
Narrative from original note of the meeting	Narrative inserted by claimant

19. Between **Wednesday 6 March** and **Thursday 7 March 2019** Mr Smith and Ms Daly met the two students and two staff members separately. Notes of the meeting were created and agreed notes of same were appended to the report of Monday 11 March issued to the claimant. The staff members names were redacted from the Notes as were those of the students. The specific allegations were put to the individuals.

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1. During the meeting with one of the complainants, in response to Mr Smith asking if they recalled, in a specific year, a student describing matters

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around a termination, the student indicated they did “*vaguely remember it*” and that the claimant “*said “something about a dog “you should get a dog”*”, subsequently in the same meeting the statement around getting a “*dog*” was confirmed after Mr Smith had set out, he was returning to the “*puppy comment*”. In the meeting with the other student, the student unprompted referred to a discussion on termination and while Mr Smith asked if they recalled “*get a puppy*” the student did not confirm any such statement.

2. One of the individuals interviewed described occasion when describing Erasmus and making comment of CPP bubble, one student described that after the claimant had spoken to that person they were very upset and described it as a horrible experience. One of the staff members offered alternate description of the event which was broadly supportive of the claimant. One of the individuals interviewed described that the claimant had suggested to a student that they should break up with their boyfriend (which was also described in slightly different terms by another of the individuals interviewed). Further when it was suggested, in relation to allegation suggesting that the claimant had made reference to individual on a cocktail of drugs, that the student had openly shared information on medication, the student stated she did not want it to be generally known describing she had stumbled verbally while making introductions, but would not have said anything about medication. The student described that she had not spoken to the claimant at the time as she had felt that the claimant was likely to react defensively.

3. The statements included a student, when asked about complaint incident in the café bar, described walking beside another student who they could see out of the side of their eye, that other student disappearing, then turning round and seeing that the other student had been grabbed by the neck of their jerkin by the claimant. That student clarified the other student who was walking next to them was wearing a hood, and while describing that the other student all of a sudden had gone from their line of sight, clarified that the claimant had grabbed the individual by the collar. It was

described that the incident had occurred right in front of the box office desk and described that the claimant was shouting at the time.

20. On **Monday 11 March 2019** Mr Smith produced a Report in relation to whether the claimant had breached the Dignity at Work and Study Policy (the **March 2019 Dignity at Work and Study Policy Report**). In this report Mr Smith, concluded that the claimant had breached the Respondent's Dignity at Work and Study Policy citing 6 (of the 20 allegations previously notified to the claimant by his letter 14 February 2019) instances;

1 [café bar incident]

10 2 [termination and comments]

3- formerly allegation no. 20 which was not subsequently referred to

4- [Erasmus/CPP Bubble- which was combined from 2 of the allegations]

5 –[leave boyfriend comment]

6- [mental health/medication comment]

- 15 21. The instances were set out. Mr Smith set out that allegations had been made by students about incidents involving the claimant which she had categorically denied, stating that *“Witnesses to events alleged to have happened in meetings or in a public space were spoken with. In all instances the witnesses corroborated the allegations. In the investigatory meeting”* the claimant *“stated that she viewed these complaints as harassment and vexatious”*.

22. Mr Smith in his concluding paragraphs stated that it was *“apparent that at least some of this group of complainants were encouraged to submit a complaint by one of the complainants in particular... it was brought to my attendance that some of the complaints had apparently been speaking about the allegations to other students and alumni. Similarly, there were counter allegations that”* the claimant *“had been speaking with staff, students, and alumni”* the claimant *“has admitted to speaking with colleagues about certain aspects of the allegations during the course of the investigation”*.

23. On **Thursday 14 March 2019** Dr Gordon Munro the respondent's Director of Music (Dr Munro) wrote to the student complainants and the claimant, with the outcome to the students' complaint under the Dignity at Work and Study Policy (the March 2019 Dignity at Work and Study Policy Outcome letter).
- 5 Dr Munro concurred with Mr Smith's overarching finding that the claimant had breached the respondent's Dignity at Work and Study Policy, citing 6 specific instances. The March 2019 Dignity at Work and Study Policy Outcome letter, noted that the complainants had not requested any specific outcome and stated "*As a result of the investigation. Mr Smith notes there is*
- 10 *a 'strong indication of a serious loss of trust' between the student complainants and*" the claimant "*Given that these ten complaints represent a significant proportion of the student body on the BA-CPP programme, the re-establishment of trust should be seen as a priority. The outcome of this Complaint has been referred to*" Prof Hodgart, then the Director of Drama,
- 15 Dance, Production and Film (Prof Hodgart) and to Ms Jackie Russell, the respondent Director of Human Resources (Ms Russell).
24. On **Sunday 17 March 2019** the claimant emailed a 13-page written response to Ms Russell and Prof Hodgart. That 13-page document was broken down into separate sections, setting out the claimants' position:
- 20 1. Chronology and context from Monday 8 January 2019 "*when I reprimanded Student A*",
2. The complainants, the claimant described that it was "*significant that the complaints were from students outwith*" A's year group, that they were from students not currently on the programme, "*Only 5 of*
- 25 *the complainants were attending ... during the time of the complaint*". She made reference a limited number of students having what she classed as mental health issues. She described that 8 students were from a single year. She described that a number were now out with the UK and one within the UK "*has been*
- 30 *difficult to contact*".
3. The complaints

4. The investigatory process
 5. The Role of Investigatory Officer
 6. The Role of the Academic Registrar
 7. Lack of witness evidence
 - 5 8. Unreliability of Evidence
 9. Breaches of confidentiality
 10. Overarching findings
 11. The investigating officers report
 12. Student Suggested outcomes.
 - 10 13. Conclusions
25. On **Monday 18 March 2019** a student complainant was advised by the respondent, that the claimant “*was not involved in the assessment of your work during the remainder of your studies...*” (page 244).
- 15 26. On **Friday 22 March 2019** the respondent, emailed one of the complainant students, setting out that they “*will be writing again what future steps will be necessary.*”
- 20 27. By letter dated **Wednesday 24 April 2019**, the claimant was invited to attend a Disciplinary Hearing with Prof Hodgart and Ms Russell on Thursday 25 April 2019. It was identified that the meeting was to discuss alleged breaches of the respondent's Dignity at Work and Study Policy. This letter identified that Dr Munro had reviewed the March 2019 Report provided by Mr Smith, together with notes of investigatory meetings and statements submitted by ten students. It set out, that Dr Munro concurred with Mr Smith's overarching finding that the respondent was “*more likely than not to have breached*” the respondent's Dignity at Work Policy, and to that extent the complaint was
25 upheld, referencing the March 2019 Dignity at Work and Study Policy

Outcome letter. It set out that there may or may not be disciplinary action taken respondent and that in cases of gross misconduct, a possible outcome may be dismissal, should the concerns be found to be substantiated.

28. The respondent's Disciplinary and Dismissal Policy and Procedure set out that if concerns regarding an employee's "conduct" could be regarded as gross misconduct or if continuing in their role could pose a risk to the individual employee or the respondent, the right to suspend on full pay was reserved while the alleged concern /offence was investigated. Further it provided that if an individual wishes to appeal against "*a disciplinary sanction (i.e., a formal disciplinary sanction)*" they required to do so within 7 days. It set out that the appeal should specifically detail the grounds of appeal, which may include new information, the appeal will "*usually be heard by a senior manager or director and will take place as soon as reasonably possible. The HR Department will contact upon receipt of your appeal letter to offer a date for the appeal meeting or to agree an appropriate timescale for the appeal depending on your availability and that of the manager hearing the appeal. The appeal process will have the same format as the disciplinary process*" it continued that while appeals will be in person if there is a significant delay due to the individual's availability a decision may be made on the basis of the information available and that if this was the case it would be discussed with parties prior to the decision not to meet being taken. It set out examples of Misconduct and Gross Misconduct, within Gross Misconduct is "*A serious breach of the trust and confidence in the staff member by*" the respondent.
29. On **Thursday 25 April 2019** the claimant attended the Disciplinary Hearing, accompanied by her TU EIS representative, with Mr Hodgart and Ms Russell. A 9-page note was prepared of that meeting. The claimant stated she would "*take the hit*" in respect of the findings but she was not willing to take a hit in terms of her professional recognition (page 194). Prof Hodgart stated that he "*he would look to work with*" the claimant "*to repair the situation and allow all involved to move on*". The claimant responded that she "*had been doing this, and last week, attended a creative residency*" (with a Ms Karen Salt) and "*there had been a lot of positivity emerging*" from that event and "... it took

strength for her to be there but her professional and duty of care to the students meant she would never abandon them”.

30. By **Tuesday 7 May 2019**, Ms Russell prepared, at the request of the claimant, a supplementary document headed “Summary of Questions relating to the Investigation in CPP student complaints” (made under the Dignity at Work and Study Policy). It extended to 17 pages and incorporating comment/responses by Ms Daly in Green, A. Smith in blue and the claimants’ comments in red on the following topics;

1. The investigatory process

B. The Role of Investigatory Officer

C. The Role of the Academic Registrar

D. Lack of witness evidence

E. Unreliability of Evidence

F. Breaches of confidentiality

G. Overarching findings

2. The investigating officers report, the claimant set out her comments, denying each of the upheld allegations.

Allegation 1 [café bar incident], the claimant denied the allegation and set out that if she had been really shouting, she felt it would have been reported. Mr Smith set out that the event was corroborated to his satisfaction and on balance of probabilities he believed it to have happened.

Allegation 2 [termination and comments] the claimant denied the allegation. Mr Smith set out that the witness vaguely recalled, but did recall mention of a dog which he believed to have sufficiently corroborated the allegation.

Allegation 3-this was not subsequently referred to.

5 Allegation 4 [Erasmus/ CPP Bubble summarised as creating climate of fear]. The claimant denied the allegation, stating there was no evidence. Mr Smith set out that the Erasmus and CPP bubble provided context for him to reach this judgment that divergent views or perceived criticism was strongly opposed and discouraged.

10 Allegation 5 [leave boyfriend comment]. The claimant denied this allegation. Mr Smith set out that the allegations were corroborated by a fellow complainant and on the balance of probabilities, he judged that the comments were made by the claimant.

15 Allegation 6 [mental health/medication comment]. The claimant denied this allegation. Mr Smith set out that he believed the events which could have been corroborated.

3. Student Suggested outcomes.

31. On **Tuesday 7 May 2019**, Mr A Smith set out his findings in relation to “*student complaints against*” the claimant.
32. Of 20 complaints listed, he dismissed 7 complaints. He upheld complaints which he set out in summary as;
- 20
1. That the claimant stated in a meeting with a group of students from each year group in the Conference Room, that one of the students present, was on a ‘*cocktail of drugs*’ and that the group should know that this student “*was on some very strong meds right now*”. He set out that the
25 alleged comments were corroborated by another student who was present.
 2. That the claimant took a student to task for reflecting upon a professional placement experience that they felt inspired by seeing work by children that was not something which they had been exposed to within the CPP

bubble. He set out that he concluded that it was evident that the claimant's behaviour in this instance was intimidating and unprofessional.

5 3. That the claimant strongly criticised a student for stating that they had a positive experience on an Erasmus Exchange for inferring that it gave them something beyond what the CPP had to offer and included a statement by the claimant that the student needed to reconsider what they were trying to do on the programme and whether they wanted to be here at all. He set out that he concluded that it was evident that the claimant's behaviour in this instance was intimidating and unprofessional.

10 4. That in March 2018 the claimant grabbed a student by the scruff of the neck in a café bar and pulled them away from their friends and criticised them for critiquing one her first-year projects which they had been invited to do by a fellow student.

15 5. At a Check-In session a student described matters around a termination, the claimant alleged specific responses including suggesting that they should get a puppy.

20 6. That the claimant advised a student on numerous occasions to split up from their boyfriend.

7. A further compliant was upheld which is not required to set out for the purpose of this judgment.

33. In relation to the remaining complaints, he set out that these could not be corroborated, that he could neither uphold nor dismiss the complaints.

25 34. In **June 2019** Prof H Hodgart, the then respondent Director of Drama, Dance, Production and Film (Prof Hodgart) provided, direct to the claimant only, his written views by, set out in annotations, of the Record Summary of Questions and Response Note of Meeting with A Smith, S Daly and the claimant (Prof Hodgart June 2019 comments to the claimant). In summary Prof Hodgart's

view was that the process was inadequate, he set out that corroborative statements had been provided by some students, after seeing statements, before they were interviewed; that students had shared the content of their complaints; student names were withheld. He set out that he regarded, it as
5 hard to imagine that the students did not compare notes, something which he considered had not been accounted for.

35. On **Wednesday 3 July 2019** the claimant emailed Ms J Russell, copied to Prof Hodgart, stating that the issue had been with the respondent since January 2019. The claimant set out that she considered that the length of time
10 it had taken the respondent to deal with it to be unacceptable, and that she would have more to say about that following the conclusion of deliberations.

36. On **Friday 12 July 2019** Ms Russell emailed the claimant, and her EIS union rep setting out that she now had the "*formal outcome letter for you from*" Prof Hodgart and whilst the respondent would normally ask her to attend a
15 meeting, Ms Russell had emailed it as the claimant was on leave and she knew that the claimant "*would wish to know the outcome of this process as soon as it was available*". Ms Russell attached;

ii. Investigation Report and appendix list (commenting that as the claimant already had the individual papers these were not included,
20 although set out "*please let me know if you require further copies*"; and

iii. letter to students from Dr Munro (14 March 2019); and

iv. claimant outcome response v2i paper; and

v. the issues clarification from Mr Smith, headed supplementary
25 response May AS; and

vi. the issues arising response paper completed by Mr Smith and Ms Daly; and

vii. letter from Prof Hodgart also dated 12 July 2019 (the July 2019 Prof Hodgart letter).

37. In the July 2019 Prof Hodgart letter, he apologised for the delay and set out that he had given consideration to; the original students statements of complaint, all aspects of the conduct of the investigatory process (including notes of meeting with staff including the claimant and two of her colleagues, and 2 of the 10 student complainers), the complaint outcome report and Dr Munro's resulting conclusion, the claimants own detailed response to the outcome, and the responses of the Investigating Officer and Academic Registrar to questions put to them by Ms Russell.
38. He set out that there were *"a number of lessons to be learned at the institution, school and programme level, and for the protection of all parties, a number of necessary measures to be put in place in order to prevent similar complaints arising in future."* He set out, that those measures would include training for the claimant, her staff team and in due course her students to enable a collective and sustainable practice and interaction in relation to race, mental health and wellbeing and staff/student interaction.
39. He set out that it was his intention to work with the claimant, her staff team and her students to establish, re-establish or reinforce a clear and agreed set of guideline and behaviour for staff and student interaction in relation to all aspects of programme delivery and the student experience. He set out that he was determined to do everything he could to resolve the current situation and he was confident that he would have the claimant's full co-operation in pursuit of this end concluding *"I look forward to beginning this necessary process with you at our earliest mutual opportunity."* His letter of 12 June 2019 did not set out any conduct allegations and any conclusion he reached in relation those conduct allegations. He did not set out whether any specific conduct allegations had been upheld or rejected. He did not describe any disciplinary sanction specific to the claimant. He did not refer to his June 2019 comments to the claimant.
40. In the period **Monday 9 September 2019** to Wednesday 23 October 2019 Prof Hodgart had a further exchange of correspondence with one of the student complainants.

41. On **Wednesday 23 October 2019** Ms Russell emailed the claimant; headed *Re Ex Student complaint ... I was taking some guidance on the GDPR implications of the correspondence before coming back to you on this matter...*.
- 5 42. On **Monday 28 October 2019** an open letter was published on Facebook by one of the student complainants containing allegations that senior management at the respondent had failed to address their complaints in March 2019.
43. On **Wednesday 30 October 2019**, the respondent announced that there
10 would be an External Review of *‘the key areas of concern highlighted [to us] by our student community.’*
44. The External Review Team consisted of Danielle Chavrimootoo whose other further and higher education roles include Senior Lecturer in Teaching and Learning at Kingston University and George Caird whose previous roles
15 included as Principal of Birmingham Conservatoire. The External Review Team was appointed by the respondent including Prof Sharkey, as a review independent of the respondent. It was the first such independent review and reflected the respondent’s view that it was a smaller institution.
45. The External Review Team, in its report set out as background that *“events leading upto the Review began in January 2019 and involve an extended complaint from ten individual students... submitted with 20 specific complaints against”* the claimant. It further set out that Prof Hodgart *“wrote to the lead complainant and promised to write again to confirm what steps were being taken to re-establish trust... This promise was not followed up in the ensuing
20 months. The matter then proceeded through the RCS disciplinary processes”*. It set out that the *“Review was given Terms of Reference requiring it to consider the Culture of the CPP Programme, to ensure a balanced view across all stakeholders to include both positive and critical evaluations.”*
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46. The External Review Team remit set out expressly that the review was not a
30 re-run of the specific complaint that was concluded on 14 March 2019 when

kit described that *“an outcome letter was issued to complainants, which upheld 6 specific complaints of a total of 20 considered by the investigator. The outcome was passed to the relevant Director as appropriate in the process, for action. Subsequent action was taken by “Prof Hodgart “although for reasons of confidentiality this was not shared with the student complainants.”*

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47. On **Monday 4 November 2019** a parent of a student issued an email to Prof Starkey, in terms which were supportive of the claimant, criticising the way in which allegations had been made, describing the claimant as an excellent educator and the unfairness of the situation and setting out that they looked forward to early resolution of the issue.
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48. On **Monday 4 November 2019** Dr Fitch met the CPP student cohort.
49. On **Monday 11 November 2019** Dr Fitch again met the student CPP cohort, she felt that the student cohort was deeply divided on both occasions with some students supportive of the claimant in her role as Head of Programme and others not.
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50. On **Friday 15 November 2019** the claimant, along with her TU EIS representative met with Ms Russell to raise matters around the External Review. The claimant formed the view during that meeting, from comments by Ms Russell, that it would be permissible to issue a private Social Media based message encouraging professional contacts with longstanding relationships with CPP to share learning experiences on the CPP programme with the External Review.
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51. On **Tuesday 22 November 2019** Ms Russell sent an email to all staff asking for their input to the External Review Team. It was stated that *“your identity will not be revealed nor your statement accessed by anyone other than the panel members without your express permission.”*
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52. Subsequently, on or around **Tuesday 22 November 2019** the claimant issued private Social Media based message to professional contacts with longstanding relationships with CPP (the November 2019 Social Media
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Message). The November 2019 Social Media Message, set out that as *“you may be aware that various allegations have been made against me”* the CPP *“programme and the staff team over the last couple of weeks on social media. These allegations are untrue. The RCS Senior Management have commissioned an external review in to CPP which will take place in two weeks’ time., At time of writing this email, we have not received a remit... other than they will be investigating “cultural issues raised by some students centred around the CPP Programme”*”. The message encouraged recipients to share learning experiences on the CPP programme and the impact that *“learning has had on your arts practice since graduating”* with the External Review providing the email for same. The November 2019 Social Media Message issued by the claimant invited, but did not require, the recipient to copy the claimant into any response and concluded *“please don’t share this request on social media but feel free to share it privately with your trusted friends. With love and thanks”*.

53. **Sunday 24 November 2019** the claimant emailed CPP staff *“I sent an incorrect version of my investigation report document to you. Please could you delete... I have attached the correct document with the students anonymised ... “*
54. On **Thursday 28 November 2019** the claimant attended a meeting with the External Review Panel.
55. The External Review Panel received responses, including supportive responses;
- (1) in which the author of a response described that they had *“experienced some of the incidents mentioned in the open letter”* shared on social media and described *“alarm... in not being asked to contribute to a health discussion about the content ... it is incredibly decontextualised, factually incorrect, beyond bias and purposing damaging...”* and concluded *“Do not hesitate to get in touch if more information is required...”* and

(2) a 7 page written statement which described that the Social Media comments had been “*re-contextualised and misrepresented both named individuals and on the ground reality of being a student on CPP*”, while acknowledging that memory can be subjective, described that “*many of us were present for some of the incident listed and can recall with confidence different versions of how these moments played out*” criticising details which were said to be tactically omitted, describing the “*posts language is vexatious, manipulated to gain traction from those keen to support efforts against supremacy*”.

56. On **Friday 6 December 2019** the claimant was asked to go to Ms Russell's office. At this meeting the claimant was advised she was being suspended and was given a letter from Dr Fitch confirming her suspension. Dr Fitch had received assistance from Ms Russel the respondent's Director of HR on this letter. It set out that the respondent was suspending the claimant following what were described as a number of areas of “*considerable concern which have been highlighted in the process of the current review*”. It set out that “*concerns raised so far include*

1. *Behaviour in relation to the current academic delivery of the programme, namely the process of 'Check-In and the perceived lack of support for students in this challenging and emotional process*

2. *There have been allegations made that may amount to bullying behaviour and*

3. *Attempts to interfere with the review process, including allegations of using undue influence on others in relation to their submissions to the review panel*”.

57. On **Monday 3 February 2020** the claimant received an update on her suspension from Ms Russell Director of Human Resources (the February 2020 update), setting out; that the claimant was aware the respondent had commissioned an external review team co-led by Danielle Chavrimootoo and

Professor George Caird to “appraise” its complaints procedures, to address cultural issues raised by some students around CPP and to update on that review. It was indicated that, the respondent anticipated receiving the summary review very soon, and at that point the claimant would be invited to a Disciplinary Hearing and a summary of the review would be provided with the invitation. It set out that as the claimant was aware the respondent had notified the claimant of its decision to suspend, “*following a number of areas of considerable concern which had been highlighted in the process of the current Review*”, those concerns included

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1. the claimant’s behaviour in relation to “*the process of check-in and the perceived lack of support for students in this challenging and emotional process*”;

2. Bullying behaviour by the claimant;

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3. Alleged attempts by the claimant to interfere with the review process, including allegations of using undue influence on others in relation to their submission to the review process.

58. The February 2020 update also set out that the respondent would have to take into account the number and scope of additional complaints against the claimant which were received by the External Review Team (as advised by the External Review Team in advance of their summary report). The respondent indicated that, while it was not in position to consider all claims, it would wish to consider if there had been a breach of its policies. It was indicated that the suspension would continue, and it would be necessary to invite the claimant to a disciplinary meeting under the respondent’s Disciplinary and Procedure once the full Report was available. It set out that the respondent’s policy provided that an investigation may take place in advance of the determining whether any matter should proceed to a disciplinary hearing, that it was proceeding on this basis and that in light of the number of additional complaints received by the External Review Team, the respondent was proceeding to Disciplinary Hearing and that the specific

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nature of the concerns were considered as potential gross misconduct, namely;

1. Serious breach of the respondent policies and procedures, namely the Dignity at Work and Study Policy;
- 5 2. A serious breach of trust and confidence in the staff member by the respondent
3. Bringing the respondent into disrepute

59. The February 2020 update, set out that the claimant should not contact staff or students, the claimant would have the opportunity to submit any materials she felt were relevant, would have the right to be accompanied. It further
10 provided that following the disciplinary hearing, it would be determined if there needed to be any further investigations which could include investigation meetings with other individuals to obtain further information, and in that event, the disciplinary would be reconvened, and the claimant would have the
15 chance to comment on any further investigations. The claimant was reminded of the Employee Assistance Programme and was provided with Ms Russell's email and telephone if she had any queries.

60. On **Tuesday 4 February 2020** the claimant emailed Ms Russell, setting out that a significant period of time had elapsed since the initial suspension,
20 describing that it was having a serious effect of her mental health and that she had had taken advice from her GP and had been accessing the Employee Assistance Programme for a number of weeks. Further she set out that she did not accept any of the allegations. The claimant set out that the ACAS code on Discipline set out that employers must raise issues with employees
25 promptly and carry out necessary investigations. She described that she had taken part in the External Review willingly and in good faith and was advised explicitly that it was not part of disciplinary process. She expressed concern that the respondent wished to cherry pick evidence and that she was prevented from having a fair opportunity to present her case and that she
30 expected to have the opportunity to present her case. She set out that as

5 “none of the allegations has ever been raised with” her previously she was entitled to see any evidence that the respondent was considering. She set out that she considered that it was crucial that an independent investigating officer was appointed in order that she could have confidence that this was a fair process and set out that “ACAS expects a fair disciplinary investigation to establish facts which support the allegations along with facts which disprove them”. She set out that it would be helpful if it could be confirmed that the respondent “intends to out a disciplinary investigation after the report is concluded” and that the claimant would “have access to the entire document so I can prepare my response.”

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61. On **Monday 10 February 2020** Ms Russell wrote to the claimant again providing the claimant the public version of the External Review Team Report which was published on the Respondent's website the same day. The public version of the External Review Team Report did not include appendices. Ms Russell noted that; the claimant did not accept any of the allegations, the claimant had taken medical advice from her GP and had accessed the Employee Assistance Programme. Ms Russell set out that the respondent had not asked the External Review Team to rerun the disciplinary process of 2019 and confirmed that “particular disciplinary process is deemed to be completed”. Ms Russell set out that she would write separately on the disciplinary process and the terms of suspension, set out on **Monday 3 February 2019**, would continue until the outcome of the disciplinary process.

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62. On **Wednesday 12 February 2020** the respondent's Equality and Diversity Officer issued an email to Ms Russell which set out that “Following the release of the Complaints Handling Procedure and the culture within CPP, I feel compelled to share information with you that is relevant to current situation”. She set out a number of matters she said students had raised with her in relation to the claimant. It did not provide specific information on dates or individuals.

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63. On **Monday 17 February 2020** the named person issued an email to Prof Sharkey setting out that the “recent external review supports everything that I

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claimed two years ago regard my experience ... on the CPP programme." It did not set out dates of specific events. There were no particularised complaints.

- 5 64. On **Friday 21 February 2020** Ms Russell emailed the claimant asking for her availability to attend a Disciplinary Hearing on either 12th or 19th March 2020.
65. On **Monday 24 February 2020** the claimant's TU EIS representative emailed Ms Russell asking for clarification about "*the purpose of the hearing you are proposing to hold now...*"
- 10 66. On **Saturday 29 February 2020** a 6-page statement was provided by the named person setting out criticism regarding the claimant (the named person February 2020 statement). It described the author's age when she joined the CPP programme and described what were said to be the circumstances in which the author had left the programme. It described that the author had found elements of the programme hard. The author described that their partner had felt angry at the way in which the claimant had spoken to the author in what was described as the first of two meetings, further and having identified protected characteristics to the claimant related that she had advised that the CPP programme was deeply aware of responsibilities re legislation. The author described that she felt the claimant was dismissive and she had felt pressurised. The author described that during this period the author felt ostracised by some students in the class. In relation to the second of the two meetings a fellow student had described to the author that they were shocked by the way in which the claimant spoke to the author and commented that the claimant had humiliated the author.
- 15 20
- 25 67. On **Tuesday 3 March 2020** Ms Russell issued invite to the claimant for a Disciplinary Hearing (the March 2020 Disciplinary Invite letter0, which proposed to take place in Glasgow on Thursday 13 March 2020, setting out that the claimant had the right to be accompanied, and that in cases of gross misconduct a possible outcome was dismissal.
- 30 68. The allegations set out in the March 2020 Disciplinary Invite letter were

A Breach of Dignity at Work and Study Policy

A1. Bullying,

- 5 a. As found by the original investigation, in March 2018 the claimant grabbed a student by the scruff of the neck, pulled them away from their friends and criticised them for critiquing one of the claimant's 1st year's project which they and been invited to do by a fellow student.
- 10 b. As found by the original investigation, the claimant took a student to task for reflecting upon a professional placement experience that they felt inspired by seeing work by children that was not something which they had been exposed to within CPP "bubble".
- 15 c. As found by the original investigation, the claimant had strongly criticised a student for stating that they had a positive experience on an Erasmus Exchange, including a statement that they needed to considered what they trying to do on the programme and whether they wanted to be "*here at all*".
- d. As found by the original investigation, at a check in session when a student matters around a termination, the claimant alleged responses included that they should get a puppy.
- 20 e. As found by the original investigation, the claimant had advised a student on numerous occasions to split up from her boyfriend
- f. As reported to the review team in relation to "*the 33 individual reports which contained allegations of bullying/abusive behaviour.*"
- g. As claimed in statement by named person
- h. As reported to the Equality and Diversity (Officer)

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A2 Favouritism

- a. As reported to the Review Team in relation to 7 individual reports

- b. As claimed in statement by named person;
- c. As reported to the Equality and Diversity (Officer)

A3 Exclusion

- a. As claimed in statement by named person;
- 5 b. As reported to the Equality and Diversity (Officer)

A4 Discrimination (Protected characteristics)

- a. As reported to the Review Team in relation to 15 individual report
- b. As claimed in statement by named person
- c. As reported to the Equality and Diversity (Officer)

B. A serious breach of Trust and confidence in the staff member by the RCS

The individual allegations under B were;

B1. Interference with the Process

- 15 a. Exerting pressure on contributors (by circulating an email to individuals asking for their support, which was sent to respondent Head of Programme and which was reported to the review panel as exerting pressure on individuals to provide a positive report (page number provided))
- 20 b. Implying the programme would close (by stating at a student meeting that the programme was in danger of closing, as verified by students to the review team).

B2. "Presiding over an unsafe environment"

- 25 a. By using a process of Check-in which was found by the review team to be unsafe. The review team questioned that application of Check in as part of the programme. *"An urgent review of Check-In to*

ensure safeguarding of students s strengthened was a major recommendation of the review team”.

5 b. Based on both number and volumes of documentation presented to review team reflected their belief that CPP was in November “in a time of crisis” and they observed what they felt was a “deeply divided community’. *In their view – and based on the feedback they received – the* claimant “*was a major factor in the development of the culture of CPP- both positive and less positive*”

10 c. As found by the original investigation, the claimant had stated “*in a meeting with a group of students from each year on the Conference Room that one of the students present was on a ‘cocktail of drugs’ and that the group should know that this student ‘was on some very strong meds right now’*”

C. Bringing the Conservatoire into disrepute

15 The individual allegations under c were

C1 “*Reputational damaged caused by negative press interested caused by your alleged action.*”

20 a. Facebook and press interest caused the respondent immense reputational damaged, particularly in relation to the effective running of a programme and the respondent commitment to Equality and Diversity and the provision of a safe place for learning

25 b. The “*impact of this negative publicity*” was said to have led to a reduction in student recruitment to the CPP programme, with consequential impact on the RCS finances and standing with the Scottish Funding Council.

69. The enclosures with the **12 June 2020** letter included, the CPP Review Document provide by external review team co- led by Danielle Chavrimootoo and Professor George Caird, Investigation Report, Supplementary response to the claimant, “*summary of responses to the review@rcs.ac.uk confidential*

email address”, email from the claimant inviting submissions, report from the Equality and Diversity officer, email from named person to the respondent principal and statement from the named person

- 5 70. On **Wednesday 4 March 2020** the claimant was signed off sick with *“reactive depression”* for 84 days, and emailed her medical certificate to Ms Russell at mid-day covering the period to **Wednesday 27 May 2020**.
- 10 71. On **Wednesday 4 March 2020** Ms Russell replied to the claimant by email, attaching correspondence and documentation inviting the claimant to a disciplinary meeting, on **Friday 13 March 2020**, setting out that *“You may not be fit to attend this meeting in the next few weeks but I would ask you to consider when you would be able to attend the meeting (as opposed to a return to work). I would ask you to consider this with your GP.”*
- 15 72. This email included a full copy of the External Review Report, including the appendices. Independent Review of the student complaints procedures, and the cultures of and behaviours in the BA (Hons) Contemporary Performance Practice November 2019 – February 2020 which incorporated a summary identifying that 131 responses had been received and the External Review Team’s classification of how many responses were positive and negative to the CPP Programme. It did not include the 131 responses.
- 20 73. On **Thursday 5 March 2020** the Claimant emailed Ms Russell stating *“I am currently signed off sick and I am therefore not available to attend a meeting”*.
74. On **Friday 13 March 2020** Ms Russell emailed the claimant inviting her to attend a disciplinary meeting on **Thursday 2 April 2020**.
- 25 75. On **Monday 16 March 2020** the claimant advised Ms Russell by an email that she was unfit to attend the disciplinary hearing on **Thursday 2 April 2020**. The claimant provided a letter from her GP confirming she was unfit to attend on **Wednesday 25 March 2020**. She also stated that she was following advice to self-isolate due to coronavirus developments.

76. On **22 May 2020** Ms Russell emailed the claimant, referring to the email of 13 March 2020, inviting the claimant to attend a Disciplinary Hearing, to take place via Microsoft Teams (or “*Zoom if preferable*”) on **Tuesday 16 June** and **Wednesday 17 June 2020** both at 2.30pm it being explained, that while one meeting may be sufficient, they were offering two meeting slots with a break between a first and second part “*if you wish*” (**the May 2020 Remote Disciplinary Hearing Email**). That email set out that the claimant would be aware that the respondent premises were closed and staff were working remotely. It was acknowledged that the claimant had been advised to shield. It was indicated that it was hoped that “*the additional counselling sessions*” provided by the respondent will be of assistance and that the claimant would be fit to attend. It was confirmed that the claimant would have the right to be accompanied and that it was assumed that the claimant had all the documents referred to and it was intimated that the claimant should let Ms Russell know if she needed anything else.
77. **On Tuesday 26 May 2020**, the day before the existing Fit Note was due to expire, the claimant was signed off sick for a further period of 84 days, that is to say, until on or about **Tuesday 18 August 2020**.
78. On **Friday 12 June 2020** the claimant, while not directly responding to the **May 2020 Remote Disciplinary Hearing email**, provided Ms Russell via email a copy “*to whom it may concern*” letter she had obtained from her GP dated **9 June 2020**, which (incorrectly) indicated that the proposed remote disciplinary hearing was due to take place on **27 June 2020** but confirmed that the claimant “*will be unfit to attend this meeting due to ongoing symptoms of reactive depression*”. No indication was provided as to when the claimant might be able to attend a meeting.
79. **Friday 12 June 2020** Ms Russell responded by email, to the claimant’s email, enclosing an 8-page letter dated that day (the **12 June 2020 Letter**) setting out the respondent’s intention to proceed by correspondence. The claimant was asked to submit her response in writing by 5pm on Monday 22 June 2020. The claimant was reminded, both in the 12 June letter and the email of

even date, that support remained available via the respondent's Employee Counselling Scheme. The 12 June 2020 letter set out reasons for proceeding by correspondence included;

8. the suspension letter of 6 December 2019; and
- 5 9. the invite letter of 3 March for disciplinary hearing then to take place on 13 March; and
10. the subsequent provision of a 12-week GP Fit Note and note from the GP that the claimant was unable to attend disciplinary hearing of 13 March 2020; and
- 10 11. the respondent's provision, at the claimant's request, for access to a trained counsellor via the respondent's Employee Assistance programme; and
12. the rejection of a second date 2 April which the claimant stated she was unable to attend; and
- 15 13. the provision, again at request by the claimant of the 6 further counselling sessions; and
14. the proposed remote disciplinary hearing over afternoons of 16 and 17 June with break which (the respondent described) the claimant had formally declined; and
- 20 15. the subsequent provision on 26 May of a 12-week absence Fit Note; and
16. *"we would want to hold a meeting (by video conference) given the social distancing rules or in person if these eased in the next month however, given your further 12-week sick note this s not going to happened for a considerable period of time, if at all";*
- 25 80. The 12 June 2020 letter set out that the respondent had considered their own policy and the ACAS Code on Disciplinary Matters, noting that the ACAS code provided that parties *"should raise and deal with issues promptly and should*

not unreasonably delay meetings decisions or confirmation of those decisions”, the ACAS Guidance on Disciplinary Matters set out that suspension should be kept as brief as possible, and that “where an employee continues to be unable a meeting the employer may conclude that a decision will need to be made on the evidence available”. It further provided a summary of reasons for suspension following what it described as a number of areas of concern which had been highlighted “so far in the process of the current” External Review, describing that, as the claimant was aware, the respondent had commissioned an External Review team co-led by Daneille Chavrimootoo and Professor George Caird to appraise the respondent’s complaints procedure and to address cultural issues raised by some students centred around the CPP programme, noting that the claimant had received that report and it had been intimated to the claimant that concerns raised so far included, behaviour in relation to the process of “check in” and lack of support for students in “this challenging and emotional process”; allegations that may amount to bullying behaviour and attempts to interfere with the review process, including undue allegations on others in relation to their submission to the review panel.

81. The 12 June 2020 letter further set out that the respondent took the view that a Disciplinary Hearing was required because:

17. There had been an independent external review process which had highlighted a large number of serious allegations of bullying behaviour.

18. There had already been a full investigation of previous claims made which “are in the same areas of allegations of bullying behaviour by you”

19. The respondent was a small intuitional and it would be very problematic to find a senior manager who has not already been involved this or a similar process.

82. The 12 June 2020 letter set out that in view of that, the claimant had been invited to a Disciplinary Hearing with DR Fitch which had been planned to be held in two stages. It set out that the claimant had the opportunity to respond

to the allegations made in the report and appendices by correspondence, and “*following your written response to this letter, if there is further information or enquires that are reasonable*” those would be conducted by Dr L Fitch (or delegated by her to be carried out) and the claimant would be provided with notes of any such documentation and the claimant would have the opportunity to state her position in relation to all the allegations. It confirmed that Dr Fitch would be disciplining officer and that the specific nature of the concerns were considered under the respondent s policy as potential gross misconduct.

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83. The allegations as set out in the **12 June 2020 letter** are repeated below at the **claimant’s June 2019 response**.

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84. The enclosures with the **12 June 2020** Letter included, the CPP Review Document provided by External Review Panel co-led by Danielle Chavrimootoo and Professor George Caird, Investigation Report, Supplementary response to the claimant, “*summary of responses to the review@rcs.ac.uk confidential email address*”, (summary of responses to External Review) email from the claimant inviting submissions, report from the Equality and Diversity officer, email from named person, and statement from the named person.

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85. The summary of responses to the External Review was a table identifying 131 responses had been received, it set out a categorisation those responses including what were said to be 33 allegations of bullying/intimidating behaviour, 15 allegations of inclusivity (related to protected characteristics), 7 allegations of favouritism, and 20 regarding the learning environment being damaging to safety and mental health/unsafe practices. It provided no particularisation as to what the alleged events or incidents the authors of the report had relied upon in relation to their categorisation.

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86. The External Review Team Report itself described that the CPP was a deeply divided community. Its authors described that from meetings and emails received opinions differed starkly between supporters of the CPP and the claimant and detractors. It described that CPP did not enjoy a happy atmosphere and that opinions differed between those who were satisfied with

the course who were not. It described that the claimant was “referred to as at times as combative and not always easy to work under”. It described that “more worryingly a significant number of submission (around 40%) are extremely critical of the programme and” the claimant “Submissions included allegations of favouritism a, bullying and misuse of authority.” In relation to “Check-In’ sessions where students were enabled to unburden themselves of inner thoughts... came under particular criticism... the confidentiality of these sessions was seen to be being breached... This and other considerations led the Team to conclude that there was an urgent need for a professional review of ‘Check-In’... to ensure that student safety is in place.” The report described that the overall culture of CPP is “one that appears to be in urgent need of repair... it has developed a worrying level of discord, internal division and the impression of an excessively controlled environment.” It set out that there was no doubt that claimant had been an architect and a major factor in the development of the culture of the CPP programme “But their contribution divides opinion sharply. On the one hand they are seen as a visionary leader. On the other hand, others highlight the controlling nature of their leadership.” The Review Team in their conclusions set out that it was reported to the Team that “it overreaches appropriate boundaries of behaviour favouring some students over others and undermining the confidence of many students. ... The Review Team concluded that urgent action is needed to bring about a less-divided atmosphere, reassure all students of a safe passage through the programme... The Review Team... have not been unaffected by the negative experiences of the students some of which were reported as traumatic”

87. The deadline for the claimant to provide her written response to the allegations was extended, in agreement with the respondent to 5pm on **Monday 29 June 2020**.
88. On **Monday 29 June 2020** the claimant provided her Written Response (the **claimant’s June 2020 response**) to the allegations, by email to Ms Russell. The response extended to 80 pages including 7 appendixes. There were 6 sections of the response including:

1. Background and Context, with subheadings; the history and Pedagogy of CPP, Prevailing Cultural Discourse, Safer Spaces, Boundaries and Check-In, Inclusion and Diversity; and
2. Leadership, with subheadings; Track Record of Proven Leadership, Professional Profile and a Pedagogue, Management of the Programme, Management Responsibilities in the School, Recent External; and
3. Responses to allegations from letter dated 3 March 2020.

89. The claimant's June 2019 response, set out that it was not possible to respond to unspecified allegations. She set out that Dr Fitch had previously attended two "*full cohort meetings*" prior to the claimant's suspension, indicating that she had raised concerns with Ms Russell that (unspecified) "*worried students*" had subsequently approached the claimant stating that the removal of the claimant would disrupt their studies; that Dr Fitch suspended her and Dr Fitch "*played an active role in supporting complainants*" and she likely to have already formed a view". The claimant set out that having cross referenced to the respondents Disciplinary and Dismissal Policy and Procedure with the documentation provided she "*fail to see how any of the allegations made against me can be deemed gross misconduct. There is very little evidence to support this serious claim and what evidence exists is questionable*".

90. The claimant's June 2019 response, set out her position in relation to allegations (a) to (e) from letter dated 3 March 2020; including that as those had been investigated and no disciplinary action had been taken, it was not appropriate to include these. Further the claimant set out her view that the External Review Panel had not been privy to her previous response and that subsequent to matters "*being made public on social media in October 2019, at least seven students from the same year group not involved in the original investigation, but who were witnesses to that the events that led to the allegations have come forward to refute the claims, including making it clear to*" Dr Fitch "*in their meetings that the six allegations upheld against me by*

the Investigating Officer were fallacious". The names of those 7 students were not provided.

91. The claimant's June 2019 response did not directly provide responses to allegations (a) to (e); however, the claimant effectively incorporated her original responses to the allegations as previously formulated:

92. **Allegation a.** As found by the original investigation, in March 2018 the claimant grabbed a student by the scruff of the neck, pulled them away from their friends and criticised them for critiquing one of the claimant's 1st year's project which they had been invited to do by a fellow student (page number provided).

Response; It was apparent that the claimant continued to deny the allegation; in relation to the previous the formulation of the allegation the claimant asserted: the '*corroborating*' evidence was that of another complainant and if she had been shouting, she felt sure there would be independent witnesses and it would have been reported at the time.

93. **Allegation b.** As found by the original investigation, the claimant took a student to task for reflecting upon a professional placement experience that they felt inspired by seeing work by children that was not something which they had been exposed to within CPP "*bubble*" (page number provided)

Response: While no specific separate response was set out, the claimant had set out her position in the February 2019 meeting as reflected in the revised notes, including that "*the Feedback was in direct response to*" the students "*inability to acknowledge the critical field of enquiry*"

94. **Allegation c.** As found by the original investigation, the claimant had strongly criticised a student for stating that they had a positive experience on an Erasmus Exchange, including a statement that they needed to be considered what they were trying to do on the programme and whether they wanted to be "*here at all*". (page number provided)

5 **Response;** It was apparent that the claimant continued to deny the allegation; in relation to the previous the formulation of the allegation the claimant asserted: the claimant had set out in Investigatory Meeting on 27 May 2019 that, during a CPP all student meeting on a specific date it had been clear to the claimant that a specific student was not going to make a statement about the educational opportunities they were given but rather to imply their past experience was much better than their current one, the claimant had spoken to a colleague tutor within CPP who agreed with her view.

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95. **Allegation d.** As found by the original investigation, at a Check-In session when a student described matters around a termination, the claimant alleged specific responses including suggesting that they should get a puppy.

15 **Response;** It was apparent that the claimant continued to deny the allegation; in relation to the previous the formulation of the allegation the claimant asserted: that she could not imagine a situation where she would be so insensitive, that the conventions around check in *“do not allow for comment on anyone’s contribution”* and set out *“Once again, the corroborating evidence comes from another complainant who “thought she did vaguely remember it””* setting out that, as the entire class was present *“perhaps a student who wasn’t a complainant could have been asked to be a witness”*, contending that any student would remember such a significant disclosure.

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- 25 96. **Allegation e.** As found by the original investigation, the claimant had advised a student on numerous occasions to split up from her boyfriend (page number provided).

30 **Response;** It was apparent that the claimant continued to deny the allegation; the claimant asserted that the corroborating evidence was vague and comes from another complainant. Further the

claimant asked why was corroboration of her statement not sought from former member of staff cited as witness.

97. **Allegation f.** As reported to the review team in relation to “*the 33 individual reports which contained allegations of bullying/abusive behaviour.*”

5 **Response** The claimant set out that this did not provide her with specific evidence to which she could answer. She set out that whilst “*appreciating the comments to the independent review are divided, the figures evidence the fact that there were more positive comments than negative ones but only the negative comments appear to have been*”
10 *given credence*” in this process. She set out that her view was that many of the comments were paradoxical, and while the External Review Team observed that the CPP team did not enjoy a happy atmosphere, she felt they did not acknowledge the “*likely impact of a public campaign from a vocal minority on the current student*”
15 *population*”. She described the CPP staff were under unprecedented strain setting out her view that no formal support was provided and “*so I consider it to be an endorsement of the strength of our strong and longstanding working relationship that no one felt that they had grounds for complaint*”

20 The claimant criticised what she said was the view of the External Review that “*obvious merits in the CPP culture seem to have been brought down by allegedly inappropriate and unchallenged behaviours*”, setting out “*that even now it is not clear what these behaviours are, how I am allegedly ... engaging in them and how they*”
25 *have impacted on those that are making them*”. The claimant criticised the lack of redacted copies and observed that they had not been made in the usual way, noting that there were fora for complaints. The claimant further described that in the 7 preceding years she had always had another member of the CPP staff present conducting a
30 tutorial or student meeting. She described that her leadership style was robust, courageous and vulnerable.

5 The claimant concluded that *“I stress that none of the colleagues I have ever worked with over 25 years has questioned my leadership negatively and the” External Review” report confirms that. I am content to provide the names of witness from colleagues who have team taught with me over the past 7 years should you require this in your investigations.”*

98. **Allegation g.** As claimed in statement by named person

10 **Response;** The claimant set out that this amounted to a re-stating of previous complaints which had referred to bullying in a class led by someone else, the complaints had been previously been dealt with through the respondent complaint’s procedure and were not upheld after appeal.

99. **Allegation h.** As reported to the Equality and Diversity Officer.

15 **Response;** The claimant set out her position, including *“that the email did not provide the claimant with any specific evidence I could answer. It does however, come as a surprise to me”* as the Equality and Diversity Officer *“has relied significantly on me and my department over the past decade to aid her in the writing of Mainstreaming Equality Annual Reports (email evidence can be provided).* The claimant set out her position that the CPP under her leadership had an unrivalled reputation in all of the equality issues referred to in the letter and was *“widely acknowledged across the institution and significantly documented that CPP has been pioneering in best practice for decades”*. The claimant further set out her position that, if the Equality and Diversity Officer had such concerns over time; why had she not reported these earlier including using the many processes to report such matters including Whistleblowing *“which ensures anonymity.”*

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100. **A2 Favouritism**

101. **Allegation a.** As reported to the Review Team in relation to 7 individual reports.

5 **Response;** The claimant set out her position that it was difficult to identify what she was be accused of, that External Examiners reports “*testify to the rigour of our marking processes in CPP so it cannot be that some students perceived that ‘favourites’ are advantage in any way.*” She set out that the CPP has tried and tested approaches to ensuring equity and fairness in teaching and
10 grading, further that CPP has been praised in “*numerous fora for the rigour and transparency of our approach*”. The claimant inclusions set out her position that that “*the perception of 7 individuals of ‘favouritism’ represents 1.6% of all CPP students I have taught*” and taking the period of her career, this was “*robust evidence that I do not favour some students over others*”.
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102. **Allegation b.** As claimed in statement named individual (provided in appendix);

Response; The claimant referred to her responses above.

103. **Allegation c.** As reported to the Equality and Diversity (Officer)

20 **Response;** The claimant set out that there was no mention of favouritism, however also referenced her comments above in specific paragraph above.

104. **A3 Exclusion**

105. **Allegation a.** As claimed in statement by named person

25 **Response;** The claimant set out that she did not “*understand what is meant by the term ‘exclusion’ here*” and referenced her comments above in specific paragraph above.

106. **Allegation b.** As reported to the Equality and Diversity (Officer)

Response; The claimant set out that she did not “*understand what is meant by the term ‘exclusion’ here*” and referenced her comments above in specific paragraph above.

5 107. **A4 Discrimination (Protected characteristics)**

108. **Allegation a.** As reported to the Review Team in relation to 15 individual report

Response; The claimant set out that “*the numbers do not present me with any specific evidence to which I can answer*”.

10 109. **Allegation b.** As claimed in statement by named person

Response; The claimant set out that she did not “*understand what is meant by the term ‘discrimination here*” and referenced her comments above in specific paragraph above.

110. **Allegation c.** As reported to the Equality and Diversity (Officer)

15 **Response;** The claimant set out that she did not “*understand what is meant by the term ‘discrimination here*” and referenced her comments above in specific paragraph above.

111. **B1. Breach of Trust**

112. **Interference with the Process**

20 113. **Allegation a.** Exerting pressure on contributors (by circulating an email to individuals asking for their support, which was sent to respondent Head of Programme and which was reported to the review panel as exerting pressure on individuals to provide a positive report (page number provided)

25 **In response** the claimant set out that she understood from a meeting with Ms Russell that her actions, in issuing private Facebook Messenger and not by email [set out above] (to what were described

as professional contacts with longstanding relationships with CPP) had effectively been permitted. The claimant asserted, that she considered there was no pressure on anyone to respond and no implied consequence. The claimant indicated that this action was taken by the CPP department as *“we perceived a negative bias could be in operation due to the framing of the review”* and *“the coercive approach”* of the lead complainer. The message issued by the claimant invited, but did not required, the recipient to copy the claimant in.

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114. **Allegation b.** Implying the programme would close (by stating at a student meeting that the programme was in danger of closing, as verified by students to the review team).

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In response, the claimant denied this. She indicated that it was unclear when or why she would have suggested this and asserted that a fair investigation would have interviewed students. She continued that on the morning of 29 October 2019 she referred to information that she asserts was in the public domain, applications continued to be low compared to other programmes and negative publicity was potentially damaging to CPP. She stated that she and her colleagues had little explaining to do to students *“as there were so many of the existing students who were witnesses to the alleged incidents and they were able to disabuse ... student colleagues”* She did not provide the identity of any of those existing students. She described that her conduct *“at that meeting was widely praised”* by her CPP colleagues and the student cohort. She did not provide the identity of colleagues or individuals within the student cohort who she considered ought to be invited to provide a statement as part of the investigation.

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115. **B2. Presiding over an unsafe environment**

In opening comment, in summary, the claimant referenced a 2018 Validation of the Programme which commended a strong team ethos among staff members providing a supportive environment, academically and pastorally. She indicated that this testified to the

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nature of the learning environment provided under her leadership and objected to the use of the word “*presiding*”.

116. **Allegation a.** By using a process of Check-In which was found by the review team to be “unsafe”. The review team questioned that application of Check in as part of the programme. “*An urgent review of Check-In to ensure safeguarding of students is strengthened was a major recommendation of the review team*”.

In response, the claimant asserted that check-in is widely used and respected. She criticised the Independent Review Team as “*uniformed... and disrespectful of*” the claimant’s experience in suggesting that check-in was not used safely. While she indicated that she would be content to explain this (area of) work “*but to have it challenged from a position of ignorance and for it to be suggested in my suspension letter*” that her expert practice be deemed as gross misconduct was unacceptable and asserted that she “*would robustly defend*” her academic freedom and that of her staff.

117. **Allegation b.** Based on both number and volumes of documentation presented to review team reflected their belief that CPP was in November “*in a time of crisis*” and they observed what they felt was a “*deeply divided community*”. *In their view – and based on the feedback they received – the* claimant “*was a major factor in the development of the culture of CPP- both positive and less positive*”

In response the claimant set out, that she was unclear what this allegation was.

118. **Allegation c.** As found by the original investigation, the claimant had stated “*in a meeting with a group of students from each year on the Conference Room that one of the students present was on a ‘cocktail of drugs’ and that the group should know that this student ‘was on some very strong meds right now*”

5 **In response** the claimant in substantive denied the allegations, referred to her comments in relation to *“the original investigation”* and set out that she would be *“content to provide the names of witnesses should you require this in your investigation”*. In the Note of the February 2019 Dignity at Work Investigatory meeting, the claimant in her revised column that a *“student had disclosed her situation informally at the end of a weekly Programme Meeting to staff and students (staff were already in receipt of detailed email about the ... current health issues which related to a back issue and that the medication for that was on top of existing anti-depressant medication). At the Programme Committee Meeting which immediately followed”* the claimant *“may have repeated the students’ words during her introductions but as the student had used them herself she did not consider this a breach of confidentiality or inappropriate in any way”*.

15 119. **C. Bringing the Conservatoire into disrepute**

120. *“Reputational damaged caused by negative press interested caused by your alleged action.”*

121. **Allegation a.** Facebook and press interest caused the respondent immense reputational damaged, particularly in relation to the effective running of a programme and the respondent commitment to Equality and Diversity and the provision of a safe place for learning.

25 **In response** the claimant set out that; as she was not responsible for the Facebook posts she *“cannot be held responsible for the subsequent press interest”*. She described that *‘going public’* was caused by the respondent’s failure to, in her view, appropriately handle the original complaint and attributed the direct cause to the respondent’s subsequent inaction in relation to the outcome recommendations and delay in communication.

122. **Allegation b.** The *“impact of this negative publicity”* was said to have led to a reduction in student recruitment to the CPP programme, with

consequential impact on the RCS finances and standing with the Scottish Funding Council.

5 **In response** the claimant asserted in summary that it was impossible to evidence “*whether there had been a reduction in students and if and how this related solely to ‘negative publicity’*”.

123. The claimant’s June 2019 response set out the remaining elements of the claimant’s response;

124. The Independent Review, with subheadings;

10 4. The Process and the Remit; setting out her views and criticisms including; her position that the Facebook open letter on 28 October 2019 “*garnered 64 comments only 9 of which were from CPP students or alumni (2 positive, 7 negative)*”, criticising what she considered to be a failure by the respondent and the Expert Review Panel to “*discern between fact, allegation and evidence*”, and setting out her understanding from the meeting with Ms Russell on Friday 15 November 2019 that people “*could write whatever they wanted and I asked if that is what I should communicate that she said yes*”.

15 5. Framing Effect and Negative Bias; setting out her views including that the External Report “*dismisses and diminishes the positive submissions by saying that they are ‘sincerely made but...’*”

20 6. Statistics; the claimant noting that 131 written responses were received, of those 101 were in relation to CPP and the claimant commenting that there was no mention of the other 30. The claimant set out her view that the External Review described, of that 101 “*40% were ‘extremely critical’* of which 62% were graduates, and taking the lifespan of the programme “*25 written submissions equate to 6% of the all students. I would contend therefore that 94% of students were satisfied with the programme and its*

leadership over its 21 years. This is a very high statistic of satisfaction by any academic measure”

7. Response to Recommendations, and

8. Factual Accuracy.

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125. **The Handling of the Period of Suspension**, with subheadings; the Length of the Suspension, Communication during the Suspension, Personal Impact of the Suspension and Publicity Surrounding this Matter, Personal Impact of the Suspension and Professional Impact of the Publicity Surrounding this
10 Matter.

126. **Way Forward**, setting out the claimant’s position including that *“despite recent difficulties, I remain resolute in my wish to work positively with senior management to discuss how we might find a way forward that would constitute a satisfactory outcome for both the RCS and myself”*.

15 127. **Appendices A** (Timeline to date), B (The Pedagogy of CPP), C (A Guide to the [CPP] Practice of Check-In), D (Draft Performance Ethics Policy), E (Mainstreaming Equality Report by the claimant March 2019), F (the claimant’s CV), and G (Outcome of Complaint letter July 2019).

20 128. On **Monday 29 June 2020** Ms Russell acknowledged receipt of the claimant’s written response at 17.08.

25 129. On **Tuesday 30 June 2020** Dr Fitch, having cleared her diary of all other matters, considered all the documentation including the claimant’s June 2020 response. It was Dr Fitch’s evidence that she approached this exercise with an open mind and rejected any allegation of bias. Having reviewed the documentation she reached her conclusions in relation to all allegations as set out and concluded that termination of employment was appropriate.

130. **At 12.41 pm on Wednesday 1 July 2020** the Dr Fitch issued her written findings to the claimant (Dr Fitch's July 2020 Outcome Letter), setting out each allegation followed by her conclusions;

131. **A1 Bullying**

5 **(a):** As found by the original investigation, in March 2018 the claimant grabbed a student by the scruff of the neck, pulled them away from their friends and criticised them for critiquing one of the claimant's 1st year's project which they and been invited to do by a fellow student (page number provided).

10 **Conclusion by Dr Fitch.** This allegation was upheld "*after due consideration of the respective evidence*" and constituted misconduct in terms of the respondent Disciplinary and Dismissal policy and procedure.

15 **(b):** As found by the original investigation, the claimant took a student to task for reflecting upon a professional placement experience that they felt inspired by seeing work by children that was not something which they had been exposed to within CPP "bubble" (page number provided)

20 **Conclusion by Dr Fitch.** This allegation was upheld "*after due consideration of the respective evidence*" and constituted misconduct in terms of the respondent Disciplinary and Dismissal policy and procedure.

25 **(c):** As found by the original investigation, the claimant had strongly criticised a student for stating that they had a positive experience on an Erasmus Exchange, including a statement that they needed to considered what they trying to do on the programme and whether they wanted to be "*here at all*". (page number provided)

Conclusion by Dr Fitch. This allegation was upheld “*after due consideration of the respective evidence*” and constituted misconduct in terms of the respondent Disciplinary and Dismissal policy and procedure.

5 **(d):** As found by the original investigation, at a check in session when a student described matters around a termination, the claimant alleged specific responses including suggesting that they should get a puppy.

10 **Conclusion by Dr Fitch.** This allegation was upheld “*after due consideration of the respective evidence*” and constituted gross misconduct in terms of the respondent Disciplinary and Dismissal policy and procedure.

(e): As found by the original investigation, the claimant had advised a student on numerous occasions to split up from her boyfriend (page number provided).

15 **Conclusion by Dr Fitch.** This allegation was upheld “*after due consideration of the respective evidence*” and constituted misconduct in terms of the respondent Disciplinary and Dismissal policy and procedure.

20 **(f):** As reported to the review team in relation to “*the 33 individual reports which contained allegations of bullying/abusive behaviour.*”

Conclusion by Dr Fitch. This allegation was upheld “*after due consideration of the respective evidence*” and constituted gross misconduct in terms of the respondent Disciplinary and Dismissal policy and procedure.

25 **(g):** As claimed in statement by named person, in particular that named person asserted she was bullied and excluded and detrimentally treated by reason of her age;

Conclusion by Dr Fitch. This allegation was upheld “*after due consideration of the respective evidence*” and constituted gross

misconduct in terms of the respondent Disciplinary and Dismissal policy and procedure.

5 (h): As reported to the Equality and Diversity Officer. The Equality and Diversity Officer reported that students on the CPP were too frightened of consequences to raise issues and gave examples of perception (of forms) of discrimination. The Equality and Diversity officer reported that underpinning all the claims was a pervasive theme of bullying and intimidating behaviour by the claimant.

10 **Conclusion by Dr Fitch.** These allegations were upheld and constituted gross misconduct in terms of the respondent Disciplinary and Dismissal policy and procedure.

132. **A2 Favouritism**

a. As reported to the Review Team in relation to 7 individual reports

b. As claimed in statement by named individual;

15 c. As reported to the Equality and Diversity Officer and named person.

As above both the Equality Officer and the named person reported favouritism being shown to some students and other students suffered as a result of this.

20 **Conclusion by Dr Fitch.** These allegations were upheld and constituted misconduct in terms of the respondent Disciplinary and Dismissal policy and procedure.

133. **A3 Exclusion**

a. As claimed in statement by named individual;

b. As reported to the Equality and Diversity Officer

25 Another area of deep concern was said to be that both the Equality and Diversity Officer and named individual report exclusion felt by students.

Conclusion by Dr Fitch. These allegations were upheld and were said to constitute misconduct in terms of the respondent Disciplinary and Dismissal policy and procedure.

134. **A4 Discrimination (Protected characteristics)**

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- a. As reported to the External Review Team in relation to 15 individual reports.
 - b. As claimed in statement by named person
 - c. As reported to the Equality and Diversity Officer

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Conclusion by Dr Fitch. These matters were found to have taken place and “*as such grounds for disciplinary action in terms of the*” respondent’s Disciplinary and Dismissal policy and procedure.

135. **B. Breach of Trust**

B1. Interference with the Process

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(a) Exerting pressure on contributors (by circulating an email to individuals asking for their support, which was sent to respondent Head of Programme and which was reported to the review panel as exerting pressure on individuals to provide a positive report.

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(b) Implying the programme would close. By stating at a student meeting that the programme was in danger of closing, as verified by students to the review team.

Conclusion by Dr Fitch. These matters were found to have taken place and constituted a breach of trust and confidence and gross misconduct.

136. **B2. Presiding over an unsafe environment**

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(a) By using a process of Check-In which was found by the review team to be “unsafe”. The review team questioned that application

of Check in as part of the programme. *“An urgent review of Check-In to ensure safeguarding of students is strengthened was a major recommendation of the review team”.*

5 (b) Based on both number and volumes of documentation presented to review team reflected their belief that CPP was in November “in a time of crisis” and they observed what they felt was a “deeply divided community’. *In their view – and based on the feedback they received – the* claimant *“was a major factor in the development of the culture of CPP- both positive and less positive”*

10 (c) As found by the original investigation, the claimant had stated *“in a meeting with a group of students from each year on the Conference Room that one of the students present was on a ‘cocktail of drugs’ and that the group should know that this student ‘was on some very strong meds right now’”*

15 **Conclusion by Dr Fitch**; it was noted that the claimant gave what was described as a very detailed explanation of Check-In process, and claimed that an Investigator or Manager in disciplinary process would not really have the knowledge to criticise the process *“Can I be clear that it is the way that this process was reportedly used by you that was causing upset, in fact the Review team called it unsafe”*. These matters
20 were found to have taken place and were upheld as gross misconduct.

137. C. Bringing the Conservatoire into disrepute

C1 *“Reputational damaged caused by negative press interested caused by your alleged action.”*

25 a. Facebook and press interest caused the respondent immense reputational damaged, particularly in relation to the effective running of a programme and the respondent commitment to Equality and Diversity and the provision of a safe place for learning.

- b. The “*impact of this negative publicity*” was said to have led to a reduction in student recruitment to the CPP programme, with consequential impact on the RCS finances and standing with the Scottish Funding Council.

5 **Conclusion by Dr Fitch**; it was accepted that neither the claimant nor the respondent had sought the social media exposure, however it was set out that the impact on the programme and recruitment was evident. Although not set out in her conclusions, she had identified as a drop from slightly over 100 applications at previous March to around 40
10 applications. These allegations were upheld as misconduct.

138. **The July 2020 Outcome Letter** set out Dr Fitch’s comments regarding conclusions, mitigations and sanction. It set out that Dr Fitch found the claimant had breached the Disciplinary and Dismissal Policy by “*numerous counts of unacceptable behaviour which I consider amount to a series of acts of misconduct and gross misconduct... the totality of the case ... to fall under the definition of gross misconduct, as defined in the RCS Disciplinary and Dismissal Policy as ... Bringing the Conservatoire into serious disrepute. A serious breach of trust and confidence in the staff member by RCS A serious breach of the Conservatoires policies and procedures.*” Dr Fitch set out that
15 she had considered all options but found that the matters constituted a series of incidents of misconduct and gross misconduct; that the respondent could not and would not accept such behaviour and she had no confidence that the respondent and the CPP programme could recover with the claimant’s leadership, she had considered matters including the claimant’s experience,
20 the mitigation points in her response, a sensitive student population and metoo culture. Dr Fitch concluded that there appeared to be no acknowledgment of culpability nor self-reflection and set out that and there was no basis on which a lesser sanction than immediate dismissal could be imposed. She set out that as summary dismissal applied the claimant was
25 not entitled to any notice period. The claimant was notified of her right to appeal, in writing, to Professor Sharkey.
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139. On **Monday 6 July 2020** the claimant submitted a written appeal to Professor Sharkey, setting out 7 grounds of appeal (which are repeated below). The claimant did not direct attention to any specific passage within her June 2020 response. The grounds of appeal are set out below.
- 5 140. On **Monday 13 July 2020** Professor Sharkey, considered the appeal and then wrote to the claimant advising her that he was not upholding any of the grounds of her appeal (the **July 2020 Appeal Decision Letter**). He did not review the **claimant's June 2020 response** issued to Dr Fitch, although was aware of the claimant's rebuttal of the allegations.
- 10 141. In the **July 2019 Appeal Decision Letter** Professor Sharkey set out responses to each of the 7 grounds of appeal:
1. The allegations relating to the original complaints were "*previously investigated and disposed of following disciplinary hearing on 5 April*" with outcome notified 12 July 2019, the matters did not merit disciplinary sanction at the time and the recommendations made had not been implemented by the respondent.
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- In response, to ground of appeal 1:** Professor Sharkey set out; that it was accepted that at the time the complaints were dealt with, but it was evident that the complainants felt that they had not been adequately dealt with "*and they continued to have concerns about your behaviour, with culminated in the external CPP review which these and many additional concerns were raised.*" It was confirmed that this ground of appeal was rejected.
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2. There was no evidence that they had been any investigation into "*new allegations (following the independent review)*" and that the allegations were presented in a manner which did not allow the claimant to respond and "*no evidence was provided to me in support of these allegations*".
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In response Professor Sharkey set out; that the External Review was thorough and provided anonymity, setting out that it was "*perhaps telling that so many individuals felt they needed anonymity to*

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5 *contribute*". Professor Sharkey set out that he required to take in to account the number (33) of allegations of bullying and abusive behaviour, stating that this exceeding the number of complainants in the original complaint "and represents a significant proportion of the Review respondents" and that the External Review Panel had related to him *"that they were shocked and upset at the nature of the submissions they heard. Again, the volume and nature of the complaints cannot be but taken into account..."*. It was confirmed that this ground of appeal was rejected.

- 10 3. This outcome failed to address the fact that certain issues raised were not upheld by the respondent following a *"full investigation through your own complaints and appeals process"*

15 **In response** Professor Sharkey set out his comments including that the complaint raised was raised subsequent to the External Review and concluded that Dr Fitch had a reasonable belief that the issues raised after the External Review took place. It was confirmed that this ground of appeal was rejected.

- 20 4. The manner in which the respondent had processed her disciplinary matter had been unclear and inconsistent with its own policies and procedures from the outset.

25 **In response** Professor Sharkey set out; Professor Sharkey did not accept that the respondent had been either unclear, inconsistent or unreasonable, it was set out that at every stage the claimant had been given every opportunity to make her case, the respondent had provided extensive time and provision of additional counselling sessions. It was noted that every disciplinary procedure can be difficult. It was confirmed that this ground of appeal was rejected.

- 30 5. Dr Fitch appeared to have been focused/overwhelmed by the volume of untested allegations and subjective opinions rather than on matters of verified fact and a balance of opinion

In response Professor Sharkey set out; that it was not accepted that Dr Fitch “*appears overwhelmed*” by the allegations against the claimant. Professor Sharkey set out that it was painful; for him to hear the number and scope of the allegations against the claimant, he refuted the allegation of untested allegations and subjective opinions and set out that he could not ignore the number of allegations of bullying and abusive behaviour made in the Independent Review and that the External Review Panel found that many students and staff had to be reassured of confidentiality of their submissions. He confirmed that he did not consider that Dr Fitch had been overwhelmed nor that they were subjective opinions. It was confirmed that this ground of appeal was rejected.

6. The appointment of Dr Fitch as Disciplinary Officer was inappropriate due to her prior involvement. The claimant’s request for a new officer was refused and “*apparently taken personally*” and indicated that timescales and events surrounding Dr Fitch’s outcome letter indicate that Dr Fitch was predisposed to find against her.

In response Professor Sharkey set out; that the claimant’s suspension was enacted by Dr Fitch under the respondent’s procedures as the claimant’s line manager. It was set out that Prof Sharkey could see no evidence that the request for a new officer was refused and “*apparently taken personally*”, it was set out “*that the matter of alternative disciplining officer was considered but it was not feasible in such a small institution to substitute some else*”. It was set out that Professor Sharkey did not find that the timescales had been detrimental to the claimant and there “*had been several attempts over the last six months to arrange a meeting with the claimant*”. Professor Sharkey further referred to support provided by the respondent with additional counselling. He set out that he did not see any evidence that Dr Fitch would be predisposed to find against the claimant. It was confirmed that this ground of appeal was rejected.

7. The outcome had been designed to scapegoat the claimant.

5 **In response**, Professor Sharkey set out; making reference to the findings of the External Review Panel, “*findings of an exceptional number of complaints against you personally and ... as an academic leader...you have not in way or at any time described these complaints as vexatious and false... the students took it into their own hands ... by posting allegation on social media...*” the respondent” took appropriate and reasonable decision to commission and impartial external review of the CPP programme and the” respondent’s

10 complaints procedure. It was set out that that number and nature of the complaints against the complaint personally which was the subject of publicity. It was set out that there was “*absolutely no attempt to scapegoat you in this case.*” It was confirmed that this ground of appeal was rejected.

15 142. By **Tuesday 18 August 2020** the extended period over which the claimant had been signed off sick would have expired.

Submissions

143. Written submissions were provided by the claimant and the respondent.

The claimant’s submissions:

20 144. It is not considered necessary to repeat in full the claimant’s submissions which extend to 86 paragraphs. Reference is made to aspects of the submissions where relevant in the discussion and decision below. In summary, however it was argued that the respondent did not have a reasonable belief in relation to the matters the claimant was charged with and

25 that the respondent acted unreasonably in failing to investigate the matters with which she was charged and thus acted unreasonably in dismissing the claimant.

145. The claimant in submissions breaks the 6 allegations upheld by Ms Smith down as follows

1. Disclosure of mental health without permission. It is argued that the final allegation was different in character to that originally upheld and was never investigated, it being set out that the claimant denied the specific formulation of words.
 - 5 2. Creating a climate of fear and oppression for students inhibiting free expression. It was argued that the finding by Mr Smith was never put to the claimant.
 3. Physically pulled a student by collar and shouted at him. the claimant sets out that the student complainer who allegedly witnessed this described seeing the student out of the side of her eye and argues that
10 the no attempt was made to interview an independent witness.
 4. Reference to termination during check in and comments including “get a puppy”. The claimant argues that at the time she taught with Peter McMaster, however he was not interviewed and nor was any
15 independent student.
 5. Telling a student to split up from their boyfriend. The claimant denied the allegation, although given the identity of student she confirmed she knew who that student went out with but was not told when and in what context the allegation was said to be made.
 - 20 6. The claimant set out her position, in relation to same.
146. The claimant criticises Mr Smith as considering the matters from the view point of the complainants, despite it is argued it was known that the complainers had seen each other’s statements and been encouraged to made complaints a lead complainant. It is argued that Prof Hodgart, had grave
25 concerns about the investigation and findings, including that the lead complainant has encouraged complaints and students were likely to have colluded. It is noted that Mr Smith had not put “*climate of fear*” allegation to the claimant. It is set out that Professor Hodgart in his 12 June 2019 letter did not make clear whether he upheld them or not it being argued that he did not
30 uphold them.

147. It is argued that the claimant was unable to attending meetings offered, the clamant 's doctor clearly did not understand when the meeting was as he referred to the wrong date and the respondent unilaterally decided they could proceed without a hearing. Further it is argued that by June 2020 the respondent had carried out no investigation, it being argued that the disciplinary hearing was, as far as the respondent was concerned, in fact an investigatory meeting with the respondent offering to carry out further enquiries if reasonable and invite her to a meeting.
148. The claimant argues that the respondent failed to operate the appeal properly, in breach of its own policy and the ACAS code, they did not offer a meeting to discuss the claimant's appeal and Prof Sharkey as the appeal office only considered the Dr Fitches Outcome Letter and the Review document.
149. In relation to s98(4) ERA 1996 the claimant argues that there was a lack of investigation. In particular Dr Fitch as the decision maker made no investigation herself and relied on the belief of Mr Smith in relation to the allegations listed by the claimant submission 1 – 6 above, dismissing the views of Prof Hodgart, "*relied on a table of anonymous allegations made up by the Review*" and relied on anonymous allegations made by the Equality and Diversity Officer and the named person "*but did no investigation*".
150. The claimant criticises Dr Fitch's approach to the anonymous allegations in the External Review and that it was "*not reasonable to find as a fact that the claimant was guilty of all 55 allegations... no reasonable employer would conduct itself in that way. If an employer had concerns ... it would have been reasonable to put those concerns to the claimant and discuss how to address them. At most what could have been said is that there are allegations that are concerning and we need to discuss how to discuss how to discuss these concerns*".
151. The claimant is critical of the respondent's conclusion in relation to "*Presiding over an unsafe environment*" as being unsound.

152. The claimant asserts that the claimant ought to have attempted to meet with the claimant *“but chose not to do that and instead went down the route of written submissions”* and failed to follow the relevant ACAS code para 25 *“where an employer is persistently unable or unwilling to attend a disciplinary meeting without good cause the employer should make a decision on the evidence available”*.
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153. The claimant is critical of the appeal process and argues she had expected an *“appeal hearing”* in accordance with the respondent policy.
154. The claimant is critical in relation to an argument, said to be raised in submission by the respondent, that a reason for dismissal is for *“some other substantial reasons”*, it being argued that this was not put to the claimant.
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155. In relation to **Polkey**, it is said that if the dismissal was unfair due to procedural issues, the unfairness was so fundamental that if a fair procedure had been followed the claimant was is unlikely to have been dismissed.
156. The claimant sets out that the claimant *“accepts the Review would have need to be addressed but she was able to work with the complainers in April 2019. She was working with her staff and Dr Salt to address issues within CPP. If she had not been suspended and dismissed those students who were in their 4th year would have finished their year and moved”* on, the claimant would have reviewed the Check-In with Dr Fitch or the Principal, and could have engaged in mediation. In conclusion it is set out that the Review did not reveal any blameworthy conduct and any contribution should be minimal.
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157. The claimant sets out that they rely on **Sneddon v Carr Gomm Scotland Ltd** [2012] CSIH (**Sneddon**), **Clark v CAA** [1991] IRLR 412 (**Clark**), **Fuller v Lloyds Bank plc** [1991] 336 (**Fuller**), **Linfood Cash & Carry v Thomson** [1989] IRLR 235 (**Linfood**).
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The respondent’s submissions:

158. The respondent's submissions were set out in 5 sections including Findings of Facts; Unfair Dismissal – Substantive and Procedural Fairness; Esto, Polkey; Esto Contributory Fault and Conclusions (Esto SOSR).
- 5 159. The respondent made reference to s98 ERA 1995 setting out that is for the employer to show the principal reason for dismissal relates conduct or some other substantial reason and where the employer has fulfilled the requirement of a potentially fair dismissal the Tribunal applies the test of overall fairness set out at 98(4) ERA 1996.
- 10 160. The respondent set out the well-known passage from **Burchell** placing emphasis of the employer entertained a reasonable suspicion and the well-known three-stage, and remainder of the second paragraph of Arnold J judgement which sets out that it is not relevant for that the Tribunal shared the employer view nor for Tribunal to examine the quality of material to see whether it would be satisfied to a standard required in a criminal court.
- 15 161. The respondent argued that the relevant general principles in respect of a reasonable investigation into misconduct had been complied with and even if not "*strictly complied with, a dismissal may be fair*", and that this will be the case where a tribunal finds that the specific procedural defect is not intrinsically unfair and the procedures overall are fair.
- 20 162. The respondent argues that if the Tribunal was to find that the dismissal was not fair by reason of anonymous statements that "*this may set a precedent that no anonymous allegations can lead to a dismissal which goes against the grain of the case law.*"
- 25 163. The claimant set out that when determining whether dismissal is fair or not fair, it is not for the Tribunal to substitute its own view of the appropriate penalty, including whether a less sanction, but rather whether the dismissal was reasonable. The claimant set out that the respondent genuinely believed that the claimant, who held a position of trust and authority had bullied, excluded and breached appropriate boundaries and shared confidential student information and had shown no remorse. In particular Dr Fitch
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reasonably believed that there had been several breaches of the Dignity at Work Policy and The Disciplinary Policy and had been a breach of trust and confidence, the respondent had carried out as much investigation as was reasonable. The decision to dismiss fell within the band of reasonable responses.

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164. The claimant set out in relation to procedural fairness, the band of reasonable responses test is applied also to the procedural steps. Further, that while absence of a fundamental step such as appeal is likely to render dismissal unfair, this will depend on the circumstances and breaches, including of the employers own disciplinary policy, are merely factors to take into account the weight accorded will depend on the circumstances. That would extend to certain evidence not being made available to the claimant and that a fair appeal is capable of remedying earlier defects in the disciplinary process, the key to fairness was to consider the process as a whole.

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165. It is argued for the respondent that the procedure was fair, it was an unusual situation in a bespoke department where student careers were in a large part dependant on keeping on the right side of the claimant, as supported, in effect, by the position of the Equality and Diversity Officer that students had approached her over the years. The claimant was well aware of the allegations, specifically in terms of the first 6, the named person allegation and those related by the Equality and Diversity Officer.

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166. In relation to anonymity, it was argued that case law does not support the proposition that an employee is always entitled to cross examine a witness, not that an employee must always be shown a copy of a witness statement. Guidance on the approach indicates that statements should be reduced to writing and should include circumstantial information on why the person can remember the event and whether they bear for instance a grudge, and corroboration should be sought. Much depend on the reason given by the employer for granting witnesses anonymity and the terms, if there was a real risk of retribution this, it was argued, may point to a departure from guidance on the approach to anonymous allegations.

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167. The respondent set out that there was nothing in s98 (4) ERA 1996 to the effect that the circumstances of previous misconduct must be ignored, if a time limited final warning had expired by the time of the subsequent misconduct which was the principal reason for dismissal and that the dismissing officer may take into account the not just the record, the offence and the prediction of an equally bad future if dismissal was not applied.
168. The respondent argues that there is no case law on the particulars facts, the original allegations were upheld as part of a separate (student complaint) process, the respondent argues that Prof Hodgart *“failed in his responsibilities in not issuing adequate disciplinary outcome does not mean that the six issues were no reasonably upheld. Furthermore, it is almost certain that the six issues became part of the External investigation and so to that extent were relevant”*.
169. The respondent argues that the appointment of the external consultant *“was entirely reasonable if not admirable in the circumstances”*, it had a wide remit and the respondent was unaware of whether it would arrive at a clean bill of health for the CPP or if any allegations relating to the claimant or others would arise.
170. The respondent observes that the ACAS code provides an express obligation to attend at disciplinary hearing and it provides that a persistent failure without good cause could result in a decision being taken in the absence of the employee.
171. In relation to Polkey/question of procedural unfairness, the respondent identifies that if the dismissal was procedurally unfair, the Tribunal would require to determine if the claimant would have been dismissed in any event if a fair procedure would have been followed. It is argued that there is a very high likelihood that a fair dismissal would have followed, it is set out that that the claimant presented no evidence that there would likely have been a different outcome and argues that had a further investigator been appointed, they would have been hampered by the anonymity of the student complaints.

172. In relation to Contributory Fault (s123(6) ERA 1996) the respondent argued that there was clearly blameworthy conduct which led to her dismissal.
173. The respondent referred to **Clark v Civil Aviation Authority** [1991] IRLR 412 (CA) (**Clark**) and the passage at paragraphs 19 and 20.
- 5 174. The respondent additionally referred to **Fuller v Lloyds Bank Plc** [1991] 336, **Sainsbury's Supermarkets v Hitt** [2003] 23 (**Hitt**), **Trust House Leisure Ltd v Aquilar** [1976] IRLR 251 (**Aquilar**), **British Leyland v Swift** [1981] IRLR 91 (**Swift**), **Whitbread v Hall** [2001] ICR 699 (**Whitbread**), **Westminster City Council v Cabaj** [1996] ICR 960 (**Cabaj**), **Taylor v OCS Group Ltd** [2006] IRLR 613 (**Taylor**), **Bentley Engineering Co Ltd v Ministry** [1979] ICR 47 (**Ministry**), **Linfood Cash and Carry v Thomson** [1989] (**Linfood**), **Hussain v Elonex Plc** 1999 IRLR 420 (**Elonex**). **Ramsay v Walkers Snack Foods** [2004] IRLR 754 (**Ramsay**), **Sneddon, Diosynth, Airbus v Webb** [2008] IRLR 48 (**Webb**), **Stratford v Auto Trail Ltd** UKEAT/0116/16 (**Stratford**).
- 10

15 **Relevant Law**

175. The starting point is the Section 98 of the Employment Rights Act 1996 (ERA 1996) provides, so far as material for this case, as follows:

"98 General

- (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
- 20

(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.*
- 25

- (2) *A reason falls within this subsection if it—*

(a)

(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)*

5 (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*

10 (b) *shall be determined in accordance with equity and the substantial merits of the case.”*

176. The employer requires to show a potentially fair reason within s98(2) of ERA 1996.

177. If so in terms of s98(4) was the dismissal fair or unfair, that is

15 1. was it reasonable to dismiss, or

2. can it be said that no reasonable employer would have dismissed - there is a band, having regard to the matters set out in s98(4) (a) and (b) – whether taking into account the size and administrative resource of the employer, it acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee in accordance with equity and the substantial merits of the case.

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178. The approach as both representatives confirmed for the Tribunal is set out in the case of **British Home Stores Ltd v Burchell** [1978] IRLR 379 (**Burchell**), in which the EAT stated: *“What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, 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*

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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 upon which to sustain that belief. And **thirdly**, we think, 5 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 10 think, who must not be examined further.”

179. An employer need not have conclusive proof of an employee’s misconduct, but a genuine and reasonable belief reasonably tested.
180. The respondent emphasised the approach which it argued ought to be followed by reference to **Lees v The Orchard** [1978] IRLR 20 (**Lees**), a case 15 arising from an alleged shop till theft, in which the EAT emphasised that while not applying the criminal standard, in order to justify dismissal for suspected dishonesty an employer must show reasonable grounds for suspicion.
181. The respondent referred to **Cabaj** in which the Court of Appeal concluded that the EAT had been wrong to conclude that disciplinary code prescribed an 20 appeal by 3 rather than 2 councilors was fundamental rendering dismissal unfair.
182. The respondent referred to **Elonex**, in which an employee complained of a failure to disclose a statement relied upon in dismissing, which described an 25 appearance of headbutt but which stated they did not see actual contact and it could not be very hard. The Court of Appeal confirmed that there was no universal requirement of natural justice or legal principal that an employee facing misconduct must be shown witness statements obtained. The Court of Appeal set out that if the essence of the allegations had not been disclosed and they had not otherwise been informed of the nature of the charges, any 30 dismissal for those charges would be unfair.

183. Both parties referred to **Diosynth**, in which following a failure to carry out a safety process, the employee was disciplined and given a 12 month warning for that. After the 12 months there was a fatal explosion in the plant that led to an inquiry, which disclosed that the claimant and 18 others had failed to carry out that same process and the claimant was dismissed. The employer made clear that but for the previous warning he would not have been dismissed. The Court of Session on appeal concluded that the dismissal was unfair, as set out paragraph 24, describing that it was a contravention of the principle of fairness for an employer to put a time limit on a warning and then take it into account as a determining factor in a dismissal of an employee for a misdemeanor after the expiry date. In summary in **Diosynth**, there was just one previous warning, which had expired and which was described as tipping the balance.
184. In relation to **Diosynth**, as was identified there was the subsequent Court of Appeal decision in **Webb**. In **Webb** after an internal appeal, a summary dismissal for gross misconduct was reduced to a final written warning, expressed to remain on his file for 12 months and he was warned that further misconduct was likely to lead to dismissal. Some three weeks after the expiry of that written warning, the Claimant, together with four fellow employees, was disciplined for being away from the workplace when he should have been working. The employer found them all guilty of gross misconduct. The Claimant alone was dismissed, whereas the other employees, who had no prior disciplinary record, were given final warnings. The Court of Appeal found that an employer's dismissal of an employee for misconduct *could* be fair within section 98 ERA even though the employer in its response to the reason for the dismissal took account of previous misconduct that had been the subject of an expired final warning.
185. The judgment by Mummery LJ set out (at 47) that he could "*see nothing in the wide wording of these provisions as laying down a rule ... that the circumstance of the employee's previous misconduct must be ignored... if the time limited final warning had expired at the date of the subsequent misconduct, which was the ...principal reason... for the dismissal*".

186. In **Sneddon**, the Inner House concluded, on the facts in that case, that the Tribunal had been entitled to conclude that the employer had failed to carry out a reasonable investigation into the alleged misconduct in not returning to the single primary witness for further clarification of her position.
- 5 187. In **Clark**, the claimant had been summarily dismissed without being given any indication of the charges, nor the opportunity of making representations prior to her dismissal. She was informed of the allegations subsequently in writing, given the opportunity to make representations for appeal. Her claim for unfair dismissal was upheld. The claimant in submission, set out that **Clark**
10 describes a broad approach asking “*whether the employee wishes any witness to be called; allow the employee or representative to explain and argue the case; listen to argument from both sides upon the allegations and any possible consequence... ask the employee whether there is any further evidence or line of enquiry which he considers could help his case*”.
- 15 188. The claimant refers to **Fuller**. In that case Mr Fuller was dismissed following an incident in pub during which a fellow employee sustained facial injuries to his face. In the disciplinary process in **Fuller**, statements had been taken but were not disclosed despite specific requests. It is argued for the claimant that in Fuller the non-disclosure did not render the dismissal unfair only because
20 Mr Fuller was fully aware of the allegations.
189. In **Linfood** the EAT upheld that decision of the Tribunal that the employer had no reasonable grounds for believing the two employees were responsible for forged credit notes. The claimant in its submissions, sets out that the respondent failed to follow the guidelines can be seen on that basis that; only
25 two out of ten students’ evidence was reduced to writing, no thought or investigation was given as to why a student “*decided to encourage complaints despite the claimant providing email evidence of an ulterior motive*” (on Monday 8 February 2019), no investigation was done into the 8 students despite, it is argued , Linfood, making it clear that Dr Fitch should have
30 interviewed the informant in order to assess credibility and weigh to the evidence.

190. In **Linfood**, the EAT while hoping its comments may be of assistance set out that *‘Every case must depend upon its own facts, and circumstances may vary widely’*.
191. In the present circumstance and while the claimant had provided an email
5 Monday 8 February 2019 which indicated that some individuals were
intending to make complaints and had approach others, the Tribunal does not
accept that **Linfood** identifies that Dr Fitch required to interview the students
who had made each complaint. That is not, however, the end of matter in
relation to the question of whether the respondent can be said to have had, in
10 relation to each matter, in its mind reasonable grounds upon which to sustain
a belief in that misconduct at the material time.

Procedural defects

192. While procedural defects are in principle capable of rendering the dismissal
unfair as the EAT commented in **Whitbread & Co plc v Mills** [1988] IRLR
15 501 (**Mills**), *“not every formality of legal or quasi-legal process is required
during the disciplinary and appeal procedures. Each set of circumstances
must be examined to see whether the act or omission has brought about an
unfair hearing.”*
193. Whether a procedural defect is sufficient to undermine the fairness of the
20 dismissal as a whole is a question for the Tribunal. Not every procedural error
will do so; the fairness of the whole process should be looked at. This is part
of the ratio in **Lloyds Bank v Fuller** [1991] IRLR 336 (**Fuller**). In the more
recent case of **South Maudsley NHS Foundation Trust v Balogan**
UKEAT0212/14 (**Balogan**), the EAT explained at paragraph 9: *“the mere fact
25 that there has been a procedural defect should not lead to a decision that the
dismissal was unfair. The fairness of the whole process needs to be looked
at and any procedural issues considered together with the reason for the
dismissal, as the two will impact on each other.”*
194. I have reminded myself of the Court of Appeal decision in **Slater v**
30 **Leicestershire Health Authority** [1989] IRLR 16 (**Slater**) that for some

employers, it may not always be straightforward to avoid a situation where the same person carries out the investigation, discipline and the appeal and set out that *“it could not be held that because the person, conducting the disciplinary hearing had conducted the investigation, he was unable to*
5 *conduct a fair inquiry. While it is a general principle that a person who holds an inquiry must be seen to be impartial, the rules of natural justice do not form an independent ground upon which a decision to dismiss may be attacked”*.

Discussion and Decision.

Evidence

10 195. The Tribunal considers the claimant’s evidence as honest, although in certain areas as set out below in relation to a number of allegations mistaken, as to her recollection. Ms Franchetti was straightforward in her evidence. The evidence of Ms Russell was straightforward in her evidence, although the Tribunal does not concur with Ms Russell’s understanding of what was
15 understood by the claimant from her meeting on Friday 15 November 2019 as to communication. The Tribunal accepts the evidence of Dr Lois Fitch as straightforward, although as set out below the Tribunal does not accept in fact that Dr Fitch had reasonable grounds for certain conclusions. However, the Tribunal accepts that Dr Fitch approached her considerations on Tuesday 30
20 June 2020 with an open mind, she was not closed to the possibility that the claimant was not responsible in fact and that the conduct issues may not have justified dismissal. The Tribunal accepts the evidence of Professor Jeffrey Sharkey as straightforward, although his honest position in relation to his conclusion of the appeal, that does not alter the Tribunal’s conclusions in
25 relation to whether Dr Fitch reasonable grounds for certain conclusions as set out below.

Review Panel

196. The respondent appointed an External Review Team. The Tribunal accepts, so far as it may be relevant here, that the decision-making process of the
30 External Review Team was independent of the respondent. In consequence

of the Review Team's outcome, the respondent moved to a disciplinary process in relation to the claimant. That decision, as it incorporated allegations previously put to the claimant, requires some consideration of those previous processes.

5 **Previous processes and impact.**

197. The Dignity at Work and Study policy encompassed both student interaction with each other and employees, and employee interaction with students and employees. So far as relevant to present matters, that process relating to the claimant concluded March 2019. Its conclusion was a separate process to
10 the respondent's Disciplinary Process.

198. The respondent in submissions set out that a relevant finding in fact would be that it was clear that in the Dignity at Work and Study process Mr Munro had concurred with Mr Smith's overarching findings and that it was clear that the 6 allegations (as set out then) were upheld within that process. The
15 respondent Disciplinary and Dismissal Policy has its own procedures and does not provide, for instance, that findings of conduct within the separate Dignity at Work and Study are conclusive for the purpose of the respondent's Disciplinary and Dismissal Policy. In any event the respondent did not proceed in this instance on that basis.

20 199. The claimant, in submissions proposes as findings in fact, in relation to the July 2019 Prof Hodgart letter, that Prof Hodgart "*did not uphold the allegations*" as formulated at that point "*and took no disciplinary action*". The respondent, in submission proposes as findings in fact, that Prof Hodgart "*failed in his duties to discipline the Claimant and that may have in part have
25 been as he was very good friends with the Claimant and continued to be so until he left the Respondent.*"

200. The Tribunal's conclusion is that Prof Hodgart did not express any view as to whether he upheld or rejected any specific conduct allegations. It would have been necessary for him to have done so, in order for the claimant had
30 a practical opportunity to appeal such findings. It would have been necessary

for Prof Hodgart to have stated which, if any, allegations he upheld or rejected in order for the claimant to understand the basis, if any, any relevant disciplinary sanction and the time frame for same. If training was an intended disciplinary sanction no timeframe was provided for same and it was not implemented. The July 2019 Prof Hodgart Letter did not provide any reasonable level of clarity, as what the basis was for the letter, or indeed the outcome Prof Hodgart had concluded. There was, in effect, no relevant disciplinary outcome. There was no disciplinary sanction to expire.

201. The respondent and claimant both refer to the Inner House decision in **Diosynth**. The respondent refers, in addition, to the subsequent Court of Appeal decision in **Webb**, and EAT decision in **Stratford**. In the present case July 2019 Prof Hodgart letter offered, no relevant disciplinary outcome. In **Stratford**, the EAT set out that **Diosynth** was not authority for a proposition that, where a final warning had been given for misconduct *and* the warning had since expired, the misconduct which was the subject of the warning could *never* be taken into account by the employer when deciding whether to dismiss the employee. It set out that s.98(4) ERA 1996 was wide enough to cover an employee's earlier found misconduct as a relevant circumstance of an employer's later decision to dismiss the employee, whose later misconduct was shown by the employer to be the reason or principal reason for dismissal. The expired warning in **Webb** did not make the earlier misconduct an irrelevant circumstance under s.98(4) ERA 1996.

202. Absent findings by Prof Hodgart in July 2019 as to what, if any, of the alleged specific conduct he had either found not to have occurred or otherwise occurred; there was no bar on the alleged conduct being put to the claimant in the Disciplinary Hearing letter of March 2020. Further there was no bar on what if any disciplinary action would follow from the alleged conduct. The earlier alleged misconduct was, in any event, not an irrelevant circumstance in terms of s98(4) ERA 1996.

Use of anonymous statements.

203. The claimant asserts that no evidence was led to suggest that there was any risk of retribution and reprisal. However, the respondent's Dignity at Work Policy makes explicit the imbalance of power (including) beyond the period of study, the Equality and Diversity Officer makes express comment in her email of 12 February 2020 to students having spoken with her "*and underpinning all of these claims was the pervasive theme of bullying and intimidating behaviour*". Again, the Tribunal is conscious of the need not to fall into the substitution mindset. Taking the process as a whole, the Tribunal does not accept that the decision to consider anonymous responses was unreasonable.
204. That decision, which the Tribunal considers was reasonable in the whole circumstances, does not, however, avoid the need to particularise complaints.
205. The Tribunal does not consider that the comments in **Linfood**, in so far as they may generally be of assistance, identify that Dr Fitch was required personally interview all individuals advancing complaints. The claimant in her March 2019 response to Mr Smith identified that a number of complainants were not in the UK. She had written statements from two students and members of staff.
206. Dr Fitch, however, did not have the underpinning statements covering 103 pages from which the 55 allegations were distilled by the External Review Team. It is considered that it was not open to Dr Fitch to adopt the distillation process by the External Review Team and its characterisation of some of that number as amounting to acts of discrimination, or other misconduct, without actual specification as to what the acts of misconduct were.

Absence of disciplinary meeting /appeal meeting

207. The claimant was offered a disciplinary hearing meeting, although not an appeal hearing meeting. The claimant did not request to attend either a disciplinary hearing or an appeal. The information available to the respondent at the material time, was that the claimant was at all material times unable to attend for a meeting from early 2020. The claimant's medical absence had been confirmed by her GP from Wednesday 4 March 2020 initially for 84 days and thereafter on Tuesday 26 May 2020 until in effect Tuesday 18 August 2020.
208. The claimant provided a medical report from her GP that she was unable to attend a meeting in March 2020, which the respondent had offered would take place remotely by video. The claimant did not propose that any further medical review might have been appropriately carried out by her GP or any other physician. The claimant made reference to, and was aware of, the terms of the ACAS code.
209. The claimant in her detailed response Monday 29 June 2020 did not request a meeting. The claimant in her subsequent written appeal on Monday 6 July 2020 did not express a view that she anticipated that she the appeal would take place by way of a meeting (whether remote or otherwise), she gave no indication that the previously notified position that she was unable to attend a meeting (whether remote or otherwise) no longer applied.
210. There was no obligation on the respondent to make a request to the claimant that she seek further medical advice from her GP on whether the claimant was subsequently able to attend a remote meeting. There was no obligation on the respondent to make a request to the claimant that either the claimant consent to the provision of a report from any occupational health physician.
211. The respondent gave the claimant an opportunity to put her case before making its decision, in all the circumstances there no requirement for a meeting to take place either at the stage of the disciplinary decision nor at the appeal.

Conduct Allegations

212. The issue for the Tribunal is not whether Mr Smith, who was charged with a separate process (the respondents Dignity at Work and Study Policy), formed a reasonable belief, but rather whether, at the time of her deliberations on 30 June 2020 Dr Fitch formed a reasonable belief, after such investigations as were reasonable in the circumstances had been carried out. Dr Fitch set out in her July 2020 outcome letter that her conclusions were reached in each case “*after due consideration of the respective evidence*”, it was not suggested by Dr Fitch in her conclusions that it was open to her to simply adopt the conclusions of Mr Smith (where made) without consideration of the claimant’s responses and the material which was before her.
213. It is noted that in her June 2020 response, under the sub heading in ‘The Investigating Officers’ Report’, the claimant set out that she continued to refute the findings described in (Mr Smith’s 2019 report for the Dignity at Work and Study process) and that “*there are now many witnesses prepared to state that these allegations are simply false or deliberately misrepresented*”. She did not provide details of who those witnesses were.
214. Reflecting the approach of Dr Fitch, setting out her position in relation to each listed allegation, it is considered appropriate to consider separately each of the separate conclusions.
215. **A1 Bullying, (a) in March 2018** the claimant grabbed a student by the scruff of the neck and pulled them away from their friends and criticised them for critiquing one of her first-year student projects which they had been invited to do by a fellow student.
1. The Tribunal notes that that Dr Fitch had the anonymised statements from the two students and the claimant’s response, together with Mr Smith’s conclusions. The claimant ‘s response of June 2020 expressed the view that this matter should not be considered. She set out her response by reference to her comments for Mr Smith’s 2019 report for

the Dignity at Work and Study process. In relation to the previous the formulation of the allegation the claimant asserted: the '*corroborating*' evidence was that of another complainant and if she had been shouting, she felt sure there would be independent witnesses and it would have been reported at the time. The allegation put in this disciplinary process did not set out that the claimant had been shouting. In her earlier response in February 2019, she had characterised that this was not a complaint at all.

2. The Tribunal is conscious of the need not to fall into the substitution mindset and accepts, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020** that **she had the belief in the misconduct, had reasonable grounds to sustain the belief** and had, the respondent had carried out as much investigation as was reasonable in the circumstances.

3. The Tribunal further accepts that Prof Sharkey was entitled to uphold Dr Fitch's decision in relation to this specific particularised allegation of misconduct including having regard to the terms of the seven points set out in the claimant's July 2020 appeal.

216. **A1 Bullying (b)** the claimant took a student to task for reflecting on a professional placement that they felt inspired by seeing work by children that was not something which they had been exposed to within the '*CPP bubble*.'

1. The Tribunal notes that that Dr Fitch had documentation including the anonymised statements from two students. The claimant's response of June 2020, expressed the view that this matter should not be considered. She set out her response by reference to her comments for Mr Smith's 2019 report for the Dignity at Work and Study process. The claimant had set out her position in the February 2019 meeting as reflected in the revised notes, including

that “*the Feedback was in direct response to*” the students “*inability to acknowledge the critical field of enquiry*”.

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2. The Tribunal is conscious of the need not to fall into the substitution mindset and accepts, on the basis of the information available to respondent at the time of Dr Fitch’s deliberation on **30 June 2020** that **the respondent had belief in the misconduct, and had reasonable grounds to sustain the belief** and had, the respondent had carried out as much investigation as was reasonable in the circumstances.
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3. The Tribunal further accepts that Prof Sharkey was entitled to uphold Dr Fitch’s decision in relation to this specific particularised alleged misconduct including having regard to the terms of the seven points set out in the claimant’s July 2020 appeal.

15 217. **A1. Bullying (c)**, that the claimant had strongly criticised a student for stating that they had a positive experience on an Erasmus Exchange for inferring that it gave them something beyond what the CPP Programme had to offer. This included a statement that the student needed to reconsider what they were trying to do here on the programme and whether wanted to be here at

20 all.

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1. The Tribunal notes that that Dr Fitch had documentation including the anonymised statements from two students. The claimant’s response of June 2020 expressed the view that this matter should not be considered. She set out her response by reference to her comments for Mr Smith’s 2019 report for the Dignity at Work, although it was apparent that the claimant continued to deny the allegation; in relation to the previous the formulation of the allegation the claimant asserted: the claimant had set out in

30 Investigatory Meeting on 27 May 2019 that, during a CPP all

student meeting on a specific date it had been clear to the claimant that a specific student was not going to make a statement about the educational opportunities they were given but rather to imply their past experience was much better than their current one, the claimant asserted that she had spoken to a colleague tutor within CPP who agreed with her view.

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2. The Tribunal is conscious of the need not to fall into the substitution mindset and accepts, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020** that **she had the belief in the misconduct, had reasonable grounds to sustain the belief** and had, the respondent had carried out as much investigation as was reasonable in the circumstances.

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3. The Tribunal further accepts that Prof Sharkey was entitled to uphold Dr Fitch's decision in relation to this specific particularised complaint including having regard to the terms of the seven points set out in the claimant's July 2020 appeal.

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218. **A1. Bullying (d)**, that at a check in session when a student described matters around a termination, the claimant alleged specific responses including suggesting that they should get a puppy.

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1. The Tribunal notes that that Dr Fitch had documentation including the anonymised statements including two students. The claimant's June 2020 response of June 2020 expressed the view that this matter should not be considered. She set out her response by reference to her comments for Mr Smith's 2019 report for the Dignity at Work and Study process. However, as the claimant set out in June 2020 response, the sole supporting available statement described that its author vaguely recalling matters in response to a clear and direct question putting the allegation itself. The claimant denied the allegation. There was no alternate supporting documentation available to Dr Fitch. The Tribunal is

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satisfied that a discussion of such significance and response, in any group, would be not be “*vaguely remembered*”.

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2. While Tribunal is conscious of the need not to fall into the substitution mindset, in relation to the allegation of circumstances as surrounding termination, the Tribunal **does not accept**, on the basis of the information available to respondent at the time of Dr Fitch’s deliberation on **30 June 2020** that the respondent had reasonable grounds to sustain its belief in relation to this alleged misconduct and had carried out as much investigation as was reasonable in the circumstances.

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219. **A1. Bullying (d)**, that the claimant had advised a student on numerous occasions to split up from her boyfriend- advice which was not solicited and represents unprofessional behaviour.

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1. The Tribunal notes that that Dr Fitch had documentation including the anonymised statements from two students. The claimant’s response of June 2020 expressed the view that this matter should not be considered. She set out her response by reference to her comments for Mr Smith’s 2019 report for the Dignity at Work, it was apparent that the claimant continued to deny the allegation, the claimant asserting that the corroborating evidence was vague and comes from another complainant. Further the claimant asked why was corroboration of her statement not sought from a former member of staff cited as witness.

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2. The Tribunal is conscious of the need not to fall into the substitution mindset and accepts, on the basis of the information available to respondent at the time of Dr Fitch’s deliberation on **30 June 2020** that the respondent **had the belief in the misconduct, had reasonable grounds to sustain the belief** and had, the respondent had carried out as much investigation as was reasonable in the circumstances. It is not accepted that a further statement was required to be obtained.

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3. The Tribunal further accepts that Prof Sharkey was entitled to uphold Dr Fitch's conclusion in relation to this specific particularised complaint including having regard to the terms of the seven points set out in the claimant's July 2020 appeal.

5 220. **A1. Bullying (d)**, As reported in the review team in relation the 33 individual reports which contained allegations of bullying/abusive behaviour.

10 1. This refers to some of 55 unparticularised complaints distilled by the External Review, which it classified into 3 types of matters and put to the claimant as "*33 individual reports which contained allegations of bullying and harassment*" and "*7 individual reports*" of favouritism, and "*15 individual reports*" of discrimination. Although classified as types of behaviour there was no particularisation, in order to identify either what it is that is said to have occurred (or when) amounting to bullying and harassment, favouritism or discrimination. The claimant did not concede
15 those unparticularised complaints.

20 2. While the Tribunal is conscious of the need not to fall into the substitution mindset, **the Tribunal does not accept**, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020** that the respondent had reasonable grounds to sustain a belief of such unparticularised misconduct. Further a reasonable investigation would have including identifying the source statements upon which the External Review Team relied to distil such conclusions.

221. **A1. Bullying (g)**, As claimed in the statement by the named person.

25 1. This refers to a statement by the Named Person' February 2020 Statement. The claimant in her June 2020 response set out that those allegations came from a complainant "*who had already been heard in full by the institution and whose complaint was not upheld following an appeal.*"

2. While the Tribunal is conscious of the need not to fall into the substitution mindset, **the Tribunal does not accept**, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020** that the respondent had reasonable grounds to sustain its belief in relation to this alleged misconduct and that the respondent had carried out as much investigation as was reasonable. This would have included review to identify any documentation relating to that original complaint.

222. **A1. Bullying (h)** As reported to the Equality and Diversity officer. The Equality and Diversity Officer reported Programme (in her February 2020 email) that students on the CPP were too frightened of the consequences to allow her to raise, and had quoted to her examples of perceived (forms of) discrimination and cultural insensitivity. The Equality and Diversity Officer reported that underpinning all of these claims was the pervasive theme of bullying and intimidating behaviour by the claimant.

1. This refers to the email the Equality and Diversity Officer February 2020 email. The claimant in her June 2020 response set out, fairly, that its terms did not present the claimant with any specific evidence which she could answer.

2. While the Tribunal is conscious of the need not to fall into the substitution mindset, **the Tribunal does not accept**, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020** that the respondent had reasonable grounds to sustain its belief in relation to alleged unspecified misconduct and that the respondent had carried out as much investigation as was reasonable. This would have included identifying the individuals and specific events to which the Equality and Diversity Officers referred.

223. **A2 Favouritism (a)** As reported to the Review Team. This refers to 7 of 55 unparticularised complaints distilled by the External Review. Although classified as types of behaviour there was no particularisation. The claimant did not concede those unparticularised complaints. **The Tribunal does not accept**, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020** that the respondent had reasonable grounds to sustain a belief of unparticularised misconduct.
224. **A2 Favouritism (b)**. As claimed in the statement by the named person. It is not considered necessary to set out again the Tribunal's view in relation to the statement by the named person, beyond setting out that **the Tribunal does not accept**, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020** that the respondent had reasonable grounds to sustain its belief in relation to this alleged misconduct and the respondent had carried out as much investigation as was reasonable. This would have included review to identify any documentation relating to that original complaint.
225. **A2 Favouritism (c). As reported to the Equality and Diversity Officer**. It being indicated that both the Equality and Diversity Officer and named person reported favouritism shown to some students and other students suffering as a result. It is not considered necessary to set out again the Tribunal's view in relation to the statement by the named person, beyond setting out that **the Tribunal does not accept**, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020**, that the respondent had reasonable grounds to sustain its belief in relation to this alleged misconduct and the respondent had carried out as much investigation as was reasonable. This would have included identifying the individuals and specific events referred to.

226. **A3 Exclusion (a) and (b).** It being reported that another area of deep concern is that both the Equality and Diversity Officer and named person report, report exclusion being felt by students. It is not considered necessary to set out again the Tribunal's view in relation to the statement by the named person, beyond setting out that **the Tribunal does not accept**, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020** that the respondent had reasonable grounds to sustain its belief in relation to this alleged misconduct and the respondent had carried out as much investigation as was reasonable. This would have included review, in relation to the named person report to identify any documentation relating to that original complaint, and identifying the individuals and specific events referred to in the Equality and Diversity Officer report.
227. **A4 Discrimination (a) As reported to the review in relation to 15 Individual reports.** This refers to 15 of 55 unparticularised complaints distilled by the External Review. Although classified as types of behaviour there was no particularisation. The claimant did not concede those unparticularised complaints. **The Tribunal does not accept**, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020** that Dr Fitch had reasonable grounds to sustain a belief of unparticularised misconduct.
228. **A4 Discrimination (b) and (b)** It is not considered necessary to set out again the Tribunal's view in relation to the statement by the named person, beyond setting out that **the Tribunal does not accept**, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020** that Dr Fitch had reasonable grounds to sustain her belief and the respondent had carried out as much investigation as was reasonable. This would have included review, in relation to the named person report to identify any documentation relating to that original complaint, and identifying the individuals and specific events referred to in the Equality and Diversity Officer report.

Breach of Trust and Confidence

229. **B1 Interference with the process.** In relation the **55 List of Complaints distilled** by the External Review Team, these are divided into 3 types of matters and put to the claimant as “33 *individual reports which contained allegations of bullying and harassment*” and “7 *individual reports*” of favouritism, and “15 *individual reports*” of discrimination. Although classified as types of behaviour there is no particularisation. Dr Fitch comments in her July 2020 outcome letter that the respondent “*will not tolerate discrimination in any form*” reflecting the serious nature of such matters. The matters were not however particularised as to identify either what it is that is said to have occurred (or when) amounting to bullying and harassment, favouritism or discrimination. The claimant did not concede those unparticularised complaints. The Tribunal is conscious of the need not to fall into the substitution mindset. However, **the Tribunal does not accept**, on the basis of the information available to respondent at the time of Dr Fitch’s deliberation on **30 June 2020, the Tribunal does not accept** that the respondent reasonable belief in the claimant’s misconduct in relation to those unparticularised matters.
230. In relation to the allegations of Favouritism, Exclusion and Discrimination as claimed in the Named Person’s February 2017 Statement. It is not considered necessary to set out again the Tribunal’s view in relation to the statement by the named person, beyond setting out that **the Tribunal does not accept**, on the basis of the information available to respondent at the time of Dr Fitch’s deliberation on **30 June 2020** that Dr Fitch had reasonable grounds to sustain her belief and the respondent had carried out as much investigation as was reasonable. This would have included review to identify any documentation relating to that original complaint.

231. In relation to the allegations of Favouritism, Exclusion and Discrimination as referred to in the **Equality and Diversity Officer's February 2017 email**, those matters were not particularised, to identify what it is said to have occurred (or when) amounting to bullying and harassment, favouritism or discrimination. The claimant did not concede those unparticularised complaints. The Tribunal is conscious of the need not to fall into the substitution mindset, however, **the Tribunal does not accept**, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020** that the respondent had reasonable grounds to sustain a belief in the claimants' misconduct in relation to such unparticularised matters.

232. **B1 Interference with the process (a) Exerting pressure on contributors.** In effect, the respondent relied upon the claimant having issued a social media message on 22 November 2019. The allegation describes the issue of an email. It is not considered that any material issue arises as to whether it was an email or social media message. The process can only be read as referring to the External Review Process. There was no documented position setting out any restriction on individuals responding to the External Review. The claimant set out, in her response, her view that permission had been granted to issue that social media message by Ms Russell. No contrary statement was obtained from Ms Russell in response.

1. While Tribunal is satisfied that it had not been Ms Russell's intention to authorised such a social media message in the terms issued, equally Ms Russell had confirmed to the claimant on 15 Friday 15 November 2019 that anyone could write in and she had not expressed a restriction on how people might be prompted to do so. Ms Russell had herself sent a message on Tuesday 22 November 2019 to all staff asking for their input to the External Review. Dr Fitch had the message from the claimant. There was no requirement to copy the claimant into any response, it is not considered that a reasonable reading would be that it was exerting pressure on individuals. On any reasonable view the Social Media

Message made it clear that the claimant's request was that, simply a request.

2. The Tribunal is conscious of the need not to fall into the substitution mindset, however **the Tribunal does not accept**, on the basis of the information available at the time of Dr Fitch's deliberation on **30 June 2020** that the Respondent had reasonable grounds to sustain its belief that the claimant had interfered with the process/exerted pressure on contributors by the issue of the social media message on 22 November 2019.

10 233. **B1 Interference with the process (b) Implying that the programme would close.** (By stating at a student meeting that the programme was in danger of closing. As verified by students to the review team). The claimant denied this allegation in her June 2020 response. She set out that she was unclear when she was alleged to have stated this or why she would have suggested such a thing. The Tribunal notes that no specification is given as to who these students were, or when it is suggested that it was said. The Tribunal is conscious of the need not to fall into the substitution mindset, however, **the Tribunal does not accept**, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020** that the respondent had reasonable grounds to sustain belief in this misconduct and the respondent had carried out as much investigation as was reasonable. The Tribunal considers reasonable investigations would have included reviewing the original statements from which the conclusion is said to have been reached by the External Review Panel, identifying the students who were said to have made the statement, the circumstances in which the statement was made including the date upon which it was said to have been made.

234. **B2. Presiding over an unsafe environment (a) By using a process of Check In which was found by the External Review Team to be unsafe.**

The External Review Team questioned the application of Check-In sessions as part of the programme. An urgent review of the Check-In to ensure the safeguarding of students is strengthened was a major recommendation.

1. The claimant did not accept the position as set out. She was critical of the understanding of the External Review Team. The Tribunal is conscious of the need not to fall into the substitution mindset, however, **the Tribunal does not accept**, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020**, that the respondent had reasonable grounds to sustain its belief of misconduct here. It is not considered that Dr Fitch was in a position to adopt the External Review Panel position. There was no specification here as to what alleged misconduct by the claimant was alleged, nor the basis for any such finding.

235. **B2 Presiding over an unsafe environment (b)** Based on the both the number of people and volumes of documentation presented *to them*, the External Review Team, reflected *their* belief that the CPP programme was in their view, at the time of the review in November '*in a time of crisis*' and within the programme *they observed* what *they felt* was a deeply divided community. In *their* view – and based on the feedback *they received* – the claimant was a major factor in the development of the culture of CPP- both positive and less positive.

1. The claimant set out that she was unclear what the allegation was here. The Tribunal is conscious of the need not to fall into the substitution mindset, however, **the Tribunal does not accept**, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020** that the respondent had reasonable grounds to sustain its belief in this alleged misconduct and had carried out as much investigation as was reasonable. Dr Fitch in essence fell into error, she was not in a position to adopt findings the External Review Team here.

A reasonable investigation by the respondent would have included identifying and reviewing the documentation relied upon by the External Review Team in order for Dr Fitch to have reasonable grounds to reach her own conclusions.

5 236. **B2 Presiding over an unsafe environment (b)** By stating in a meeting with a group of students from each year group in the Conference Room, that one of the students was *'on a cocktail of drugs'* and that the group should know that this student *'was on some very strong meds right now.'*

10 1. The claimant in her June 2020 response directed to her comment in the earlier (Dignity at Work and Study) investigation and set out that she would be *"content to provide the names of witnesses should you require this in your investigation"*. In the **Note of the February 2019 Investigatory meeting**, the claimant in her revised column that a *"student had disclosed her situation informally at the end of a weekly Programme Meeting to staff and students (staff were already in receipt of detailed email about the ... current health issues which related to a back issue and that the medication for that was on top of existing anti-depressant medication). At the Programme Committee Meeting which immediately followed"* the claimant *"may have repeated the students' words during her introductions but as the student had used them herself she did not consider this a breach of confidentiality or inappropriate in any way"*.

15 2. The Tribunal is conscious of the need not to fall into the substitution mindset and accepts, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020** that the respondent believed that the claimant had committed this misconduct, had reasonable grounds to sustain the belief reflecting the claimant's response and the student statement and had carried out as much investigation as was reasonable in the circumstances. There was
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30 no obligation on the part of the respondent to press the claimant to

provide the names of witnesses which she had elected not to provide at this stage.

5 3. The Tribunal further accepts that Prof Sharkey was entitled to uphold Dr Fitch's decision in relation to this specific particularised complaint including having regard to the terms of the seven points set out in the claimant's July 2020 appeal.

237. **C. Bringing the Conservatoire into disrepute. (a) The Facebook and press interest ...**

10 1. The claimant set out the cause of the Facebook and press interest was the respondent's failure to "*appropriately handle the original complaint. The direct cause was the subsequent inaction of the institution in relation to the outcome recommendations...and delay in communication*".

15 2. The Tribunal, conscious of the need not to fall into the substitution mindset, accepts, on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020** that **the respondent had the belief** and had reasonable grounds to sustain the belief that the causal source were the actions of the claimant.

20 238. **C. Bringing the Conservatoire into disrepute. (a) The impact of this negative publicity** had led to a reduction in student recruitment to the CPP programme, with consequential impact on the RCS finances and standing with the Scottish Funding Council.

25 1. The claimant set out that it was impossible to evidence a) whether there had been a reduction in student numbers and b) if and how this is related solely to '*negative publicity*', the claimant made reference to external factors including Covid and that applications were commonly low until March.

2. The Tribunal is conscious of the need not to fall into the substitution mindset and accepts, that on the basis of the information available to respondent at the time of Dr Fitch's deliberation on **30 June 2020** that the respondent had the belief in this allegation and had reasonable grounds to sustain the belief that the claimant was the causal source. The Tribunal notes
3. Dr Fitch identified as a drop from slightly over 100 applications at previous March to around 40 applications.

Overview

239. In particular and taking the process as whole, the Tribunal's conclusion that the claimant knew of certain specific allegations, before the conclusion of the Disciplinary Hearing and before the Appeal she initiated.
240. The Tribunal accepts that in this instance the respondent formed a reasonable belief in relation to the Erasmus incident allegation, CPP bubble incident allegation and the leave boyfriend allegation, and the café bar incident and cocktail of drugs incident.
241. The Tribunal concludes as set out above that in a number of areas Dr Fitch did not have, on balance, reasonable grounds for her conclusions. That is not to say that Dr Fitch had a closed mind to the possibility that the claimant was not responsible, she did not. The Tribunal accepts that each instance, Dr Fitch considered whether the issue might not have justified dismissal. The Tribunal notes that Dr Fitch took care to distinguish between finding of misconduct applied by her in relation to the Erasmus incident allegations, CPP bubble incident allegations and the leave boyfriend allegations, and the finding of gross misconduct in relation to café bar incident. The Tribunal is satisfied that Dr Fitch did not approach her deliberation with any pre assessed position or closed mind.

242. It is not accepted by the Tribunal that Prof Sharkey had formed any view prior to concluding the Appeal. Prof Sharkey's evidence is accepted as straightforward. While, as set out above, the Tribunal does not accept that all of Dr Fitch conclusions met the relevant test for this Tribunal, it is accepted that Prof Sharkey appropriately considered the terms of the written appeal as set out and came to his conclusion reflective of that appeal.
243. In the circumstance of this case, against the background of the claimant's medical position disclosed to the respondent, there was no requirement to hold an in-person disciplinary hearing or appeal.
244. The Tribunal concludes that Appeal was as thorough as was reasonable in the circumstances, reflecting the information set out in the appeal. The Appeal, however, did not resolve those areas where, as found above, the respondent did not, at the time of Dr Fitch's consideration, have reasonable grounds for belief in specific acts of misconduct, including where the respondent had not carried out as much investigation as was reasonable in all the circumstances as set out above.

SOSR

245. In so far as reference is made to Some Other Substantial Reason, the Tribunal does not accept the respondent's submissions. The case which was set before the Tribunal and for which notice is given to the claimant is contained within the ET3, that in turn reflected the notice of termination which expressly set out that the reason in Dr Fitch's July 2020 Outcome letter was misconduct rather than any other ground, no alternate ground was set out in the July 2020 Appeal Decision Letter, the relevant Grounds of Resistance are set out in 41 paragraphs, with legal issues set out from paragraph 38.

Conclusion

246. The Tribunal is satisfied that, taking the process as whole, that it was reasonable for Dr Fitch to conclude that the alleged claimants' actions in

relation to the café bar were so serious as to amount to gross misconduct. It was reasonable to conclude that the alleged claimants' actions in relation to the cocktail of drugs incident were so serious as to amount to gross misconduct. Taken with the findings of misconduct in relation to the Erasmus incident allegations, CPP bubble incident allegations and the leave boyfriend allegations, Dr Fitch was entitled to conclude that dismissal was appropriate. At the Appeal those specific conclusions were not over turned.

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247. The respondents taking the process as a whole formed a belief in the employee's misconduct and gross misconduct; in relation to café bar, reference to cocktail of drugs, the Erasmus incident allegations, CPP bubble incident allegations and the leave boyfriend allegations the respondent's had reasonable grounds on which to sustain that belief; and at the stage at which the respondent formed the belief on those grounds had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. In such circumstances the dismissal was a reasonable response to those findings.

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248. An issue for the Tribunal, if the dismissal was procedurally unfair, would be consider what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed? (**Polkey**).

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249. Taking the claimant's position that the process was unfair, regard would require to be given to **Polkey** in relation to compensation. It would have fallen to the Tribunal to assess the possibility of a fair dismissal, had the procedure adopted been fair. That requires an assessment of whether in all the circumstances a fair dismissal could have been decided upon by a reasonable employer. In the circumstances the Tribunal is satisfied that a fair dismissal could have been decided upon by a reasonable employer.

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250. ERA 1996 s 122(2) provides in relation to basic awards that (1) *Where the tribunal considers that any conduct of the complainant before the dismissal*

(or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.”

5 251. ERA 1996 s 123 (6) provides in relation to compensatory awards that
“(6) *Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*”

10 252. In the Court of Appeal decision in **Nelson v BBC (No 2)** [1980] ICR 110 LJ (**Nelson**) Brandon stated that *“an award of compensation to a successful complainant can only be reduced on the ground that he contributed to his dismissal by his own conduct if the conduct on his part relied on for this purpose was culpable or blameworthy”*.

15 253. In all the circumstances, it is the Tribunal’s conclusion that, had the Tribunal concluded that the dismissal was procedurally unfair, the adjustment, if any, which should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed, would have been 100%. The Tribunal considers
20 that the claimants’ actions in disclosing a student’s medical position was a culpable and blameworthy act.

25 254. It is the Tribunal’s conclusion having regard to whether it would be just and equitable to reduce the amount of the claimant’s basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to Section
30 122(2) ERA 1996; and if so to what extent, that it would in the whole circumstances be just and equitable to reduce the amount of the claimant’s basic award because of blameworthy or culpable conduct before the dismissal by 100% and further in respect of any question as to whether the claimant by blameworthy or culpable actions, caused or contributed to the dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant

to Section 123(6) ERA 1996, it would be just and equitable to reduce the amount of any compensatory award by 100%. The Tribunal considers that the claimants' actions in disclosing a student's medical position was a culpable and blameworthy act.

5 255. The role of the Tribunal is to weigh the evidence before it. This involves an evaluation of the primary facts and an exercise of judgment. The Tribunal has done so applying the relevant law.

256. If there are further submissions which either party considers it is necessary, in the interests of justice, to address supplemental to their respective existing
10 submissions, they should set out their position in a request for reconsideration in accordance with Rule 71 of the 2013 Rules.

15 Employment Judge: Rory McPherson
Date of Judgment: 24 May 2021
Entered in register: 25 May 2021
and copied to parties

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