EMPLOYMENT TRIBUNALS

Claimant: **Mr S Dix**

Respondent: **Neath Port Talbot College**

Heard at: **Cardiff** **On: 16, 17 and 18 June 2021**

Before: **Employment Judge Harfield (sitting alone)**

Representation:
Claimant: Ms Slarke (TU representative)
Respondent: Mr Martin QC (Counsel)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that:

- The claimant's dismissal was procedurally unfair and therefore the claimant's unfair dismissal claim succeeds;
- It is, however, 100% likely that if a fair procedure had been followed by the respondent the claimant would have been dismissed in any event such that it would not be just and equitable to award a compensatory award if that is ultimately otherwise the appropriate remedy;
- The claimant's conduct also contributed to his dismissal such that there is a 100% reduction to the claimant's basic award and there would also be a 100% reduction to any compensatory award.

If the claimant is still seeking an order of reinstatement or re-engagement the case will be listed for a remedy hearing.

REASONS

Introduction and the issues in the case

1. By way of a claim form presented on 2 January 2019 the claimant brings a complaint of unfair dismissal. The respondent resists the claim. The claim was case managed by Employment Judge S Davies on 4 November 2019 when it was listed for a liability only hearing, albeit it was also identified that the Tribunal may address matters such as contributory fault, if relevant. My understanding is that the case was principally listed for a liability only hearing because the claimant's primary remedy sought is reinstatement. The case was due to be heard on 1, 2 and 3 April 2020 but was converted to a case management hearing because of the impact of the Covid 19 pandemic. It was relisted to 14, 15 and 16 June 2021. The hearing ultimately took place as a hybrid hearing with the claimant and the claimant's representative attending before me in person and the respondent and the respondent's witnesses joining by CVP. The claimant's additional witness also joined by CVP.

2. I had a bundle of documents extending to 495 pages. I heard evidence from, and had written witness statements from, the Claimant and Mr Richards. For the respondent I heard evidence from, and had written witness statements from, (using their job descriptions at the material time) Ms Melanie Dunbar-Jones (HR Manager), Ms Catherine Lewis (Vice Principal and one of two individuals who sat on the panel who decided to dismiss the claimant), Mr Mark Dacey (Principal and one of two individuals who sat on the appeal panel).

3. I also had an agreed chronology and cast list. Mr Martin QC provided a skeleton at the start of the hearing and both parties provided oral closing submissions which I have not repeated in this Judgment but which I have taken fully into account. I was also given a series of audio clips to listen to. Some of these were also played to witnesses during the hearing for them to comment upon.

4. I did initially strive to deliver an oral judgment on the afternoon of day 3 but ultimately I was not able to complete my deliberations and deliver it in time and the parties were therefore told that Judgment would be reserved to be delivered in writing.

5. At the start of the hearing I made an anonymity order directing that the identity of the two students that feature in the factual background to this case should not be disclosed to the public whether in the course of any hearing or its listing or in any documents entered on the Register or otherwise forming part of the public record. They were referred to in the proceedings and now in this Judgment as Student A and Student B.

The relevant legal principles and the Issues to be decided

The legislation

6. Section 94 Employment Rights Act 1996 ("ERA") gives an employee the right not to be unfairly dismissed by their employer. Section 98 ERA provides, in so far as it is applicable:

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it--*
> *…*
> *(b) relates to the conduct of the employee…*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

7. Under section 98(1)(a) of ERA it is for the employer to show the reason (or the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden of showing the reason is on the respondent.

Conduct Dismissals

8. The reason or principal reason for a dismissal is to be derived by considering the factors that operate on the employer's mind so as to cause the employer to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, it was said:

> *"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*."

9. In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in British Home Stores v Burchell [1980] ICR 303. In particular, the employer must show that the employer believed that the employee was guilty of the conduct. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances.

10. The tribunal must have regard to the guidance set out in the case of Iceland Frozen Foods v Jones [1982] IRLR 439. The starting point should be the wording of section 98(4) of ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct; not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

11. The band of reasonable responses test also applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23). As part of the investigation an employer must consider any defences advanced by an employee but there is no fundamental obligation to investigate each line of defence. Whether it is necessary for an employer to carry out a specific line of enquiry will depend on the circumstances as a whole and the

investigation must be looked at as a whole when assessing the question of reasonableness (Shrestha v Genesis Housing Association Ltd [2015] IRLR 399).

12. The band of reasonable responses analysis also applies to the assessment of any other procedural or substantive aspects of the decision to dismiss an employee for misconduct reason. Any defect in disciplinary procedure has to be analysed in the context of what occurred. Where there is a procedural defect, the question that always remains to be answered is did the employer's procedure constitute a fair process? A dismissal may be rendered unfair where there is a defect of such seriousness that the procedure itself was unfair or where the results of defects taken overall were unfair (Fuller v Lloyds Bank plc [1991] IRLR 336.) Procedural defects in the initial stages of a disciplinary process may also be remedied on appeal provided that in all the circumstances the later stages of the process (including potentially at appeal stage) are sufficient to cure any deficiencies at the earlier stage; Taylor v OCS Group Ltd [2006] EWCA Civ 702.

13. That case also importantly reminds me ultimately the task for the tribunal as an industrial jury is a broad one. I have to ultimately consider together any procedural issues together with the reason for dismissal. It was said:

> "*The two impact upon each other and the ET's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss. So for example, where the misconduct which founds the reason for the dismissal is serious, an ET might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the ET might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee."*

14. Disparity in treatment by an employer between how it deals with employees in comparable situations can be a relevant consideration. However, whilst an employer should consider truly comparable cases of which it is known or ought reasonably to have known, the employer must also consider the case of each employee on its own merits which includes taking into account any mitigating factors. The tribunal should ask itself whether the distinction made by the employer was within the band of reasonable responses open to the employer or so irrational that no reasonable employer could have made it. The tribunal should again not substitute its own views for that of the employer (London Borough of Harrow v Cunningham [1998] IRLR 256 and Walpole v Vauxhall Motors Ltd [1998] EWCA Civ 706 CA).

Findings of Gross Misconduct

15. A finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Generally to be gross misconduct the misconduct should so undermine trust and confidence that the employer should no longer be required to retain the employee in employment. Thus, in the context of section 98(4) it is for the tribunal to consider:

    (a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct; and

    (b) Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, matters such as the employee's length of service and disciplinary record are relevant as is his attitude towards his conduct.

The relevant background /findings of fact

16. I do not need to reach findings of fact on every issue raised by a party. I need only reach findings of fact necessary to decide the issues in the case. In reaching findings of fact I applied the balance of probabilities. References to numbers in square brackets [ ] are references to the page numbers in the bundle.

17. This part of my judgment provides an overview of what happened in this case. I return to some of the constitute elements in more detail below in my discussion and conclusions.

18. The claimant was employed by the respondent as a Mechanical Engineering Lecturer. He had 22 years' service. He had a clean disciplinary record prior to his dismissal.

19. On 7 February 2018 the claimant was with a group of students in an engineering workshop and another group was present in the other section of the workshop with Steve Amphlett (an instructor) ("SA"). The classes started at 9am and finished at 10:30 am. Student A and Student B were in SA's class.

20. There are no contemporaneous records available of the initial complaint. Christine Davies ("CD"), Director of Studies subsequently explained in an interview on 13 March 2018 [104-108] that she believed another Director of

Studies, Eira Williams, had taken a phone call from the foster carer of Student A who had complained that he "had been subject to something being thrown at him during the class." CD said it had been identified that the member of staff involved was the claimant and there was a technician in the class.[1] CD also said in interview she understood Student A had also told his foster carer that he had been "mistreated." CD explained in interview that she was not the original recipient of that information from the foster mother, who had spoken to, she thought, Catherine Rawlins and Eira Williams. CD said that she had also been told that the foster mother had said previously (not to her) that the foster mother would have to pursue it with social services if the respondent did not act on it.

21. CD explained that she became involved because Eira Williams was at a dental appointment and so had contacted CD asking her to investigate. CD also said (again this was later in the interview on 13 March) that she went to speak to the claimant and when his class ended she sat with him and SA. Her account in that later interview was that SA had explained that student A had come into class without his PPE and so was given work to write up by the claimant and asked to sit at the side of SA's class. She said that SA had told her that the student put his head in his hands, his hood up, and then his head on the desk and was observed by SA for about 10 minutes. She recorded being told by SA that SA said "he has to be asleep" and SA had called the claimant and had pointed it out. CD said as to what she had been told at the time:

> *"Steve watched or observed the student for a couple more minutes and then he placed on the head and shoulders a, its almost like a placemat in size, it's one of the instruction sheets that they have in the workshop".*

22. At a later point in the same interview she also said:

> *"I spoke to the two Steve's together and the technician explained or confirmed the information that Steve had given me…*
>
> *That the lad had fallen asleep and that he had… he'd come without his PPE, he'd fallen asleep and that this was then thrown, placed upon him and it was his head and shoulders because he had his head down on the desk*
>
> *Okay. You say there thrown or placed. What was the word? Can you remember the exact words?*
>
> *You know, chucked was the exact word.*

[1] The technician referred to was SA. He is in fact an Instructor not a Technician but he is sometimes referred to in the paperwork as a technician.

Chucked, was it? That was the word used by the technician?

No, by Steve… Steve Dix

So , Steve Dix said that he chucked the board at the lad's head and….

Across the desk, that he had leaned across the desk and chucked it onto his shoulders and the technician confirmed that there was no force used. It wasn't… It was tossed rather than thrown with force.

Right, okay. So, it wasn't malicious

No."

23. CD went and spoke with Stephanie Rees in HR ("SR"). At 12:33 that day SR emailed Eleanor Glew ("EG"), Vice Principal [42]. She recorded that CD had told her:

- *"The student turned up to class with no PPE*
- *The student then sat at the desk and seemed to fall asleep*
- *Steve Dix approached the student and "plonked" a sign on his head to wake him.*
- *Steve Amphlet was also present.*
- *The student left and went home. The carer contacted the College and asked to speak to the Head of School."*

24. SR told EG that CD had done a brief report and had spoken to the claimant and SA and that SR had asked CD to send her report through. At 12:49 CD then emailed SR to say she had received details of the complaint against the claimant from "cluster". She wrote:

"I have spoken with Steve Dix and Steve Amphlett, technician, concerning the reported incident.

- *The student… came to class without the appropriate PPE*
- *He was, therefore, tasked with "writing up" as he could not be allowed full access to the workshop floor.*
- *Steve Amphlett observed that the student had put his head down on the desk, with his hood over his head which was resting on his folded arms.*
- *Steve Amphlett observed the student for approximately 10 minutes and was convinced he was completely asleep.*
- *Steve Amphlett reported this to Steve Dix.*

- *Steve Dix observed the student for a short while – approximately 2 mins – and then lent over the work service[2] and lightly threw a task board onto the head and shoulders of the student to rouse him."*

25. EG decided to suspend the claimant pending an investigation. CD telephoned the claimant asking him to see EG at 1pm. The claimant asked CD whether he should take a trade union representative with him and says CD told him it was fine. CD says she told him he did not need a representative at that stage. In his approach to the office the claimant saw CD and she asked him if he wanted her to go in with him. The claimant says that because she had said he did not need a trade union representative he assumed he was just going to be asked some questions, so he declined her offer. CD says the claimant told him he did not need her to go in with him and everything was fine. He was then told by EG that he was being suspended pending an investigation due to the issue that CD had investigated. EG passed the claimant an envelope that had a suspension letter in it [44]. EG said the process would be concerning to anyone and the claimant asked her if he would lose his job. The suspension letter said:

> "*I have been made aware of an incident that took place today between yourself and a student and given this I feel there is no alternative other than to suspend you from your duties whilst the investigation takes place,*
>
> *In the course of these investigations, the College will need to consider the following:*
>
> - *Whether or not you have displayed serious unprofessional, unacceptable or irresponsible conduct particularly towards a member of staff or student.*
> - *Whether or not you have displayed violent, dangerous or intimidatory conduct,*
> - *Whether or not you have acted in a manner that could bring the College into disrepute.*
> - *Whether or not you have violated the Collage's rules, policies or procedures."*

26. According to Ms Dunbar-Jones she decided to appoint Fran Green ("FG") as investigating officer. FG is an Assistant Principal. Ms Dunbar-Jones says she emailed FG on 15 February 2018. On 26 February 2018 FG wrote to the claimant inviting him to an investigation meeting on 8 March 2018 [56a]. The invite used the same four bullet points as above, summarising what the College would be

[2] Probably surface

considering in the investigation. On 7 March 2018 the claimant asked to postpone the meeting as neither Bev Wilson nor Chris Jones from UCU were available as union representatives. He also asked if his union representative had to be from College or whether he could be represented by another union representative not associated with the college. He said "I *know someone who is a union rep for PCS who may potentially be willing to step in tomorrow if you cannot arrange anything with Bev Wilson and Fran Green in the short term*" [487]. Ms Dunbar-Jones responded to state that the representative had to be a union that he was a member of and that someone from PCS would not be able to represent him if he was not a member but that he could bring a work colleague as an alternative if he wished. She said she would look for an alternative date and do her best to accommodate dates that had been supplied by Ms Wilson. The claimant confirmed he was a member of UCU and said "If you can re-arrange the meeting then please do, the sooner the better." Ms Dunbar-Jones then offered 12 March instead [56b].

27. Before meeting the claimant FG undertook some other investigations. On 7 March 2018 she interviewed Student A [86-92]. Student A said various things the claimant disputes, but on the crux of the matter Student A said:

> "*I put my arms on the table and my head on my hands for about, for about 20 seconds, maybe like 30, not a minute, no longer than a minute. And I felt something, like, hit my head, like well the top of my head, about there. And I thought it was one of the boys in the class, his name's [ ],cause he's like, he'll hit you and then act like he didn't do it, and then, like, see is someone else, see if you'll blame someone else. So I ignored it, and then I felt something else hit my head then, in about the same place, and it was a bit harder. And I looked up and I was, like, wound up about it, and Steve… well I didn't look straight ahead, I looked to my right, 'cause its like a, bench, and its next to, like a little wall thing."*

28. He also later said:

> *"… went home, and that's when, well, my parents, well, foster carers were wondering why I was early. I explained it to them, and then they phoned Social Services, and the college. I like him, like, but he shouldn't be doing that… He set, well, he should be setting an example, and if he's throwing stuff at my head, just saying, he could throw stuff at other people's head.*
>
> *"…I put my head down and he just threw stuff at my head. I don't know what it was, though.*
>
> *Okay, Was it, how did it feel on your head?*

> *I don't know, like, the first one wasn't, like, hard. I don't know. It was, like, a bit hard, you could feel it a bit… the first one was like that, and I and I had my hood up; so, and I just ignored it, 'cause I thought, as I said, I thought it was [ ] like, doing what he does, hit you and then just act as if it wasn't him. So, and then the second one was a bit harder, and then that's when I looked up and found out it was Steve."*

29. That same day FG also interviewed Student B [93-97]. Again, Student B said things that the claimant disputes but in relation to the crux of the matter Student B said that SA had gone to tell the claimant that Student A was asleep and that the claimant had asked him if Student A was asleep and that he had told the claimant "no." Student B then alleged that the claimant had got pieces of cork or corkboard or something like that which were used for sketches of diagrams and that the claimant, if he remembered correctly, threw 3 of them. He said they landed "*on the top of [Student A's] head, on the back of his head to be precise. 'Cause he had his head down at the time.*" Student B also said:

> *"Yeah, one was thrown first and then I believe the other two were thrown after, 'cause one of them bounced off him and fell onto the floor, and then the other two."*
>
> *"Okay. So they fell, all, all of them fell on the floor, then, afterwards?*
>
> *Yeah. ' Cause he was, as he was down they kind of bounced off him over his shoulder."*

30. Student B also said he thought he may have seen 4 items but he was more certain it was 3.

31. On 12 March FG interviewed the claimant [109-128]. At the outset she said that the guardian had made an allegation that the claimant had assaulted a student. She also reiterated again the four bullet points. The claimant was then asked to explain in his own words what had happened on 7 February. He read out a pre-prepared statement [129-132]. This included:

> "*At approximately 10:15am Mr Amphlett approached me to say that he had noticed that Student A had been sleeping for the past 15 minutes with his hoodie over his head and face down on the table.*
>
> *I approached the low level wall separating the two workshops and saw Student A sitting at the table behind all the students' bags and coats with his head on his arm and hoodie over his head. I called out his name but I had no response. I called out his name again (this time slightly louder) but still there was no response. Being mindful of the fact that no physical*

contact is permitted between a lecturer and pupil I looked around for a means to alert him. I spotted the engineering drawings that we use in the workshop. These are made from a lightweight board and are A4 in size.

Whilst remaining on the other side of the partitioning wall to Student A, I leaned forward and dropped the drawing onto the bags in front of him, taking care to ensure that they did not touch him in any way. He didn't stir. I picked up another drawing and dropped this on top of the first in an attempt to make more of a noise. A few seconds later he slowly raised his head bleary eyed as if he had been sleeping…

As I am unaware of the nature of the allegation being made against me, given that the letter of suspension states four generic bullet points, I can only speculate upon the alleged "offence" that Student A has reported…

If he has stated that these boards have "hit" him, he did not complain at the time or ask as to what had just happened when he woke. Instead, he awoke slowly and drowsily a few seconds after the second board had landed on top of the first, showing no sudden movement or reaction as if being hit by something…"

32. Later on in the interview FG described the allegation as "… *the college received a telephone call from his guardian, who made the allegation, saying that you had assaulted Student A by throwing and hurting his head, by injuring his head, through the, the force of the board being thrown. And that was the allegation that that, that was the injury was caused through that."* Ms Dunbar-Jones then added that it was a verbal allegation to the complaints officer. She later also said "*And the remit of the investigation is looking at whether the board made contact with the student, whether the student was hit by the board, that's really, because that's the allegation that's been… that's been made."* The claimant confirmed his account was that the boards did not touch Student A in any way and that just two boards were thrown which landed on the bags well away from Student A.

33. CD's initial email account was put to the claimant in interview. The claimant said that neither him or SA had told CD in initial interview that the claimant had thrown the board onto the head and shoulders of Student A to rouse him and that it did not happen. Ms Dunbar-Jones accepted in the interview it was not clear from CD's email which Steve had allegedly said what. The claimant was told at the end of the interview that he would be sent the transcript to check and sign. He was told other witnesses had been or were being seen and that when all the signed transcripts were back FG would complete her investigation report. The claimant was told if it proceeded to a hearing he would get the report and the transcripts.

34. On 13 March SA was interviewed [98-103]. He said, again about the central point,:

> "*So Steve then walked inside his workshop, which was the other side of the four foot wall. I looked at him going up and I could see him shouting to Student A to wake him up, calling "Student A, Student A." The boy wasn't moving. He picked up what look like some, some papers, and he put it in, and it fluttered and it fell down and he didn't wake. Then he picked up one of those drawings there…*
>
> *And he, he went over the four foot wall, over the four foot wall and he went like that to Student A. He woke up, but he, I was looking at him; I couldn't see, there was bags by, by Student A, whether it, Student A or hit the bag, I couldn't see from the angle I was looking at. But Student A did wake up straight away, and Steve told him to go…"*
>
> *First of all, you mentioned about that Steve had sort of, had tossed loosely, I think was the way that you have describe it, some papers?*
>
> *Yeah, I couldn't see the first thing, it looked like papers…*
>
> *That fell on the floor?*
>
> *…and it just fluttered*
>
> *…It looked like from where I was, I was about 12 yards away, or more, and they seemed to flutter, and then he picked up one of these and he just lobbed it at him like that.*
>
> *Okay, when you say "lobbed", was it..?*
>
> *There was no force, he just purely… purely went like that*
>
> *… Of course, he, he is the other side of the wall, and he has leant like that at him*
>
> *… No, no great force. He leant over the wall, the four foot wall, and he purely lobbed it, he didn't hurl it, he purely lobbed it at him, like that.*
>
> *… Like an underhand throw, then?*
>
> *Yes, yeah, yeah, yeah, exactly, like that*

… He did wake straight away, but I couldn't swear whether it him first or bag first, I couldn't see, 'cause I was looking at that angle... and I came there, that side of him.

So you don't know where, where on his body it struck him?

I couldn't see if it struck him or not. It seemed to go back and fall off the bag, and he woke up like that straight away.

… I saw him wake straight away."

35. That same day FG also interviewed CD [104- 108].

36. After his interview the claimant wrote to FG [133-136]. He said again that neither he nor SA had told CD in their initial meeting that the boards hit Student A's head and shoulders. He said that CD had asked if the drawing boards had hit Student A on the head or shoulders, as this was what Student A was claiming. He said he had told CD the boards hit the bag in front of Student A and that SA had then demonstrated how the claimant had dropped the boards onto the bags. He said that CD had advised them to type up some bullet points about the incident and that she had said "*you know that the college will always come down on the side of the student."* The claimant also raised some points about why he disputed Student A's account and questioned Student B's credibility on several grounds.

37. On 21 March 2018 FG then reinterviewed CD. CD said her initial report was a "blow by blow account" of what had been said between them. She said she told them the claim from Student A and "*that's exactly what they confirmed, or that Steve Dix confirmed. That he had lent across and he had… In fact, his word was "chucked" the board onto the neck and shoulders of the boy. So that leads me to believe that it did actually hit the young lad*." It was also put to CD that the claimant had said that the boards hit the bag in front of Student A and that SA had demonstrated how the boards had been dropped on to the bag. CA said that no one at any time mentioned a bag and "*Steve did not demonstrate to me how it could have landed on a bag. There was no discussion around that at all*."

38. On 27 March 2018 FG then reinterviewed SA. He had been unavailable on sickness absence in the period 19 to 23 March. FG said the need to reinterview SA arose out of a letter that the claimant had written after his own first interview. SA said he thought the claimant did demonstrate to CD what he had done by using a board and showing CD. SA was asked if he remembered anything about a conversation with the claimant and CD of where the claimant said the boards landed. He said he did not think he remembered the claimant saying that. He said he just remembered him explaining what he had seen and the claimant saying how it threw it. He said again he could not remember the claimant saying where it had

landed. He said when CD left she said she had to go to HR and hand it over. About the actual incident itself SA said:

"he picked the drawing up and he lobbed it at him like that and had a lob at him here

So it landed there?

It seemed to, like, bounce off the bags or hit him, sort of, I'm looking at that angle and all I can see was

Yes, I can see, and you've got a four-foot wall in between you?

Yeah, and it landed on the table and then Student A got up, like that

Okay, so the board actually landed there?

Yeah around there I'd say, yeah. And there was bags here, and Student B, the other student was right in there.

…. I couldn't see if it hit him or the bag or off the bag onto him, I couldn't really make it out, you know it all happened in an instant."

39. SA also said that CD had said "*something like, they usually take the student's point of view, or something like that."*

40. There was a process of transcripts being typed and individuals approving and returning their interview transcripts. SA did so on 29 March, CD on 5 April, the claimant on 10 April, Student A on 18 April, CD again on 18 April, SA again on 19 April and Student B on 19 April. The Easter break was also between 30 March and 9 April 2018.

41. At some point in May 2018 FG then produced her investigation report [46-152]. Section 2 of her report refers to the nature of the allegations and says:

"*CD received a telephone call on 7th February 2018 from a foster parent alleging that Student A had been subject to something being thrown by Mr Stephen Dix (SD) at him during his class.*

During the course of this investigation, NPTC Group of Colleges will need to consider:

- *Whether or not SD has displayed serious unprofessional, unacceptable or irresponsible conduct particularly towards a student.*

- *Whether or not SD displayed violent, dangerous or intimidatory conduct.*
- *Whether SD acted in a manner that could bring the Group into disrepute.*
- *Whether or not SD has violated the Group's rules, policies or procedures."*

42. Within the report FG noted that she had received additional information from the claimant about Student A and Student B and about his performance as a tutor. She said that the documents were not seen by her to be relevant to the specific incident and so had not been considered.

43. Within the report FG provided a summary from her perspective of the different accounts. She then said:

"*To summarise there is some dispute over whether the board was thrown towards Student A or at Student A. In the initial investigation CD noted that SD stated the board was thrown "lightly onto the head and shoulders of the student to rouse him." However, SD when interviewed in this investigation and his letter to the investigating officer denies himself or SA making such a statement. Student A describes feeling something hit the top of his head and Student B's version of events is in agreement with Student A's stating that they landed "On the top of his head, on the back of his head to be precise, Cause he had his head down at the time." SA stated that "I couldn't see if it hit him or the bag or off the bag on to him." Therefore on the balance of probabilities I believe that SD threw the board and that it landed on the head and shoulders of the student. I cannot say whether this was intentional or accidental, however the drawing board was thrown at the student with the intention of waking him up and therefore it could be reasonably expected it may hit him."*

44. FG then recorded her opinion that there was a case to be answered on the four bullet point allegations. She said she believed the claimant had conducted himself in an unprofessional, unacceptable and irresponsible way. She referred to the fact that the claimant had said he was mindful of the fact that physical contact was not permitted between a lecturer and pupil and therefore he should have been aware that it would be inappropriate to throw any objects in a classroom. She said SD's actions contravened the Staff Code of Conduct which contained clear expectations and that "*A plausible explanation as to why SD first considered then used the task board has not been forthcoming."*

45. FG stated she believed the actions were intimidatory rather than violent and that the terms used such as lob, toss, and chuck were not words that described violence. She said "*However these actions could be seen as dangerous, if Student A had moved when the work board was being thrown, it could have injured his face/eyes, it was in effect lucky he stayed in the same position."*

46. FG said that in light of the transcripts and response received in the investigation she found that the claimant had potentially brought the College into disrepute with members of the public, the foster parent community and social services. She said that any action such as they may have reached a wider audience through social networks via the students in the workshop.

47. Finally, FG said she believed the claimant had violated the Group's Values and Employee Standards and Code of Conduct, specifically by failing to treat the student with respect. She said "*Also the possibility that he could have potentially harmed a student and that his behaviour could be construed as threatening or aggressive. In addition I believe the Group's rules and procedures regarding Health and Safety have been violated by throwing objects in an enclosed space, very near to students and machinery."* She recommended that a disciplinary hearing be held.

48. On 13 June 2018 the claimant was sent a letter requiring him to attend a disciplinary hearing on 26 June 2018. The letter said that potential disciplinary action (including up to dismissal) was to be considered as against the 4 bullet points already set out above. The claimant was told of his right to be accompanied and that if he wished to table any evidence such as witness statements or character references they should be forwarded at least 3 working days before the hearing.

49. On 25 June 2018 the claimant submitted a 26 page report with his comments on the report prepared by FG [156- 181]. It made various complaints of errors, omissions, contradictions, bias, and speculation and also set out questions he considered the disciplinary panel should ask of FG, CD, Student A and the Foster parents. There were appendices attached including a character reference from engineering staff.

50. The claimant's disciplinary hearing took place on 26 June. The transcripts are at [199 – 262]. The claimant was accompanied by Ms Wilson who was UCU Branch Secretary and an English lecturer. Ms Lewis and Sian Jones were the disciplinary panel. Ms Lewis explained at the disciplinary hearing that when reaching a decision they did not look just at the disciplinary report but all the documentation collated. She confirmed that they had read the report the claimant himself had submitted. In relation to SA the claimant agreed that he generally found SA to be honest and trustworthy. He also explained that he did not entirely agree with SA's account, particularly in relation to the description of the claimant having used papers, albeit SA had been some distance away. Ms Lewis also put it to the claimant that SA had described the claimant waking up straight away the second time something went over whereas the claimant had described Student A as waking up slowly. The claimant said that Student A had woken up straight

away in many respects but that he had been half asleep with blurry eyes, which SA could not see from his position.

51. Ms Lewis also put it to the claimant that SA described the claimant lobbing the boards but that the claimant had described it as a placement of something. She said, in effect, she thought there was a difference between a placement and a lob, which was the mechanism of a throw. The claimant said he would agree with the description of a lob. It was then put to him that he had said quite a number of times that he had placed it but was now saying that he lobbed it. Ms Lewis said she would say that a placement is "*you've got control, you've placed it*." The claimant said that it was not that, it was a lob, and agreed the board had left his arm with a little bit of motion if nothing else to get it over the wall.

52. Ms Lewis also asked the claimant what he had thought the incident was with Student A when CD had first come to speak to him about it. The claimant said that he thought it was either the fact that after Student A had woken up the claimant had told him that he would not receive his EMA payment (which had led to a verbal exchange between the claimant and Student A about whether he had been sleeping, and with Student A initially refusing to leave the class.) Alternatively, he said he thought it could have been the fact that he had used the boards. Ms Lewis pressed the claimant on why he would have thought that was an incident at the time if he said that he believed the boards had not touched Student A and whether he had in fact had a concern that the board may have touched Student A. The claimant denied having a concern that the board had touched Student A at the time but explained that it was in his mind at the time of speaking to CD that Student A may have thought the claimant had been throwing the boards at him. Ms Lewis then said to the claimant:

"*Right okay. And you certainly did lob it at him, as you've said already*

Oh absolutely, yeah, yeah.

Okay, so it could be well as they've described, that one of them did make contact with him

No

Okay

No they were a good, I, I, my, my eyes you know, there was a good four, four to five months ago now, they were, they were about six inches from him."

53. In the course of the disciplinary hearing the claimant also described the use of the boards to try to wake Student A as being a "minor thing" and that at the time

he saw it as "exceptionally minor." He was asked how lobbing a board at somebody that had not made contact could be a minor incident and the claimant said "Well the potential for, for a cause of injury maybe, the fact that he didn't appreciate me doing that to try to wake him." He was then asked if he accepted it could be reckless if indeed the board had potentially hit Student A. The claimant agreed and agreed that potentially the judgement of lobbing the board at somebody was potentially the wrong judgement call. He said if he could turn back time, he would not have used them, and may have shouted louder or walked round the other side.

54. At the disciplinary hearing the claimant was told that his questions for SD, FG and Student A would be taken back to them but that they were not prepared to interview the foster parents. He was told that they did not as a matter of rule speak to parents, foster or not in these situations. He was told they would find out what happened in relation to the phone call to the compliance officer, potentially Heather Swinnerton, and what was exactly said in the first phone call.

55. On 5 July 2018 the disciplinary panel then interviewed Ms Dunbar-Jones [263-265] and EG [266- 270]. EG said that when suspending the claimant she had told him that CD had done an investigation and discussed with him, about the throwing of the board, and so because of the potential seriousness of that matter he would be suspended. She said she had stated to the claimant the whole process would be concerning to anyone and that the claimant then asked her whether he was going to lose his job. She said she was not aware of the withdrawal of Student A's EMA and the focus in her discussion with the claimant was the throwing of the board. She said that staff did not have the right to be accompanied at a suspension meeting.

56. The disciplinary panel interviewed Student A again on 12 July 2018 [271-274]. He said there had not been contact between Student B and him, including on social media. He was also asked why he had not questioned the claimant when the board allegedly hit him on the head. Student A said he had asked the claimant why he did it with the claimant having said that Student A had been sleeping. He was asked why he did not immediately check his head for injuries and Student A said "pissed off." He added that the claimant should not be doing it, "Well, if he's doing it to us then… he should be setting an example." CD was also reinterviewed again that day [275-281]. She said her email was not a verbatim word by word account but an outline of the incident relayed by the claimant and SA. Her position remained that during the initial discussion with the claimant and SA she had been told that the board had been chucked at the student and that it landed on the head and shoulders of the student. She said she did not use the word chucked in her initial email as she was trying to phrase it in a more professional way. CD said she was not told or demonstrated to by either the claimant or SA that the board hit the bag. She denied saying that the

respondent would always side with the student. CD also confirmed telling the claimant that he did not need a trade union representative for his meeting with EG and that she had offered to accompany him in. She said that it was the claimant who told her she was not needed and it was "fine".

57. The disciplinary panel also met with SR on 12 July [279- 281]. She said EG had told the claimant he was being suspended, pending an investigation, in relation to a board being thrown at a student. The panel also met with FG [282- 309]. The claimant's questions were put to FG. FG accepted that there was a mistake in one part of her report where she said that the claimant had admitted to having thrown the board, it hitting Student A and going over his back. She accepted that she had misattributed that statement to the claimant. In relation to the original complaint from the foster parent she said her understanding was that it came into Catherine Rawlings and not the compliance officer, but that she did not have a written record of it. She also said that she used the word assaulted as a general term and she had not used "mistreated" in her report as she did not know if that was the correct word that had been relayed. She said assault was something physical (unwanted physical contact with the student) whereas "mistreated" was a bit more abstract. In relation to whether the claimant had given a plausible explanation, she said that "*he's very clearly aware that he shouldn't, you know, you don't physically touch a student, you know, wouldn't go and knock a student. Why has he, why did he at that point chose to throw something, however non-maliciously, however innocently, why did he throw anything?"* FG said that was the explanation that she wanted, what was in the claimant's mind, which she felt was not forthcoming.

58. FG also accepted that Student A had said his foster parents had phoned social services whereas CD said the mother had said they would pursue it if the respondent did not act. She said that for her the fact that possibly social services may have been contacted is a concern. FG also said that she did not feel that the action by the claimant was undertaken in any malice or violent of aggressive form. She also said, however, that she felt she had to record in her report that it maybe that if someone else had seen or heard of the incident it could have been construed by them as being those things. In relation to the documents the claimant had provided about Student A and Student B she confirmed that she had read them but that she had been told by HR that they could not be used in any way to do with the particular incident and that her findings could not be based on them. She said she had used the word "altercation" to just describe two individuals having a discussion or a disagreement but that it was not meant to describe something noisy.

59. FG said that in her opinion the claimant's actions had been unprofessional, unacceptable and irresponsible but that "serious is perhaps where it was too far" so that she had left out "serious" in her report. She said that the fact Student A

said that he woke up, looked to his left and his right, and then saw the claimant standing over him, and that he was trying to remain calm when he wanted to kick off, inferred to her that possibly Student A had felt a little bit intimidated by what was being said. She also said that Student A in his interview had indicated that he had felt the object slide off the top of his head onto his shoulder. She also said it was her belief that with a distance of 3 feet, it could mean that it could reasonably be expected to hit Student A. She said that the claimant should have been aware that you do not throw anything and that there was a risk of a potential injury. She said throwing something at a student is not respectful.

60. The claimant signed his transcripts on 28 August 2018. On 31 August 2018 [318a] he was sent a copy of all the additional transcripts. The claimant then prepared an updated version of his report [319 – 343].

61. The disciplinary panel had a discussion and Ms Lewis produced a draft decision approved by Ms Jones on 10 September 2018. The written rationale is at [346 – 351]. The findings acknowledged the misdescription by FG of one account in her report. The panel said that having looked at all the evidence they did not find FG's report or recommendations slanted and saw no reason to question the findings of the investigation or any recommendations in it. The panel said they had decided to accept the investigation report and to act on its recommendations accordingly. They also referred to their own investigations.

62. The panel also said:

"*The Panel identified key points. The first is that Stephen Dix in his interview with them confirmed that he did lob the Board and not place it as he had asserted throughout the process until that date. Secondly, that Stephen Dix confirmed that Steve Amphlett was an honest and trustworthy colleague leading the Panel to the view that Mr Amphlett's recollections were correct and truthful. The third point is that Steve Amphlett confirmed the recollections of Students A and B and that whilst he did not see where the boards landed he confirmed that Student A woke straight away as Student A described and not as described by Stephen Dix. Fourthly, leading from this Student A said he felt he was struck by something which Student B said he witnessed. The fifth point is that when called to the suspension interview Stephen Dix asked if he would lose his job which he explained at a later time related to the threat of the withdrawal of the EMA, which upon the Panel's investigation it is noted that the EMA issue was never mentioned at the suspension meeting. This lead the Panel to conclude that on the basis that Stephen Dix albeit some months after the event and the investigation stage, admitted that he lobbed the boards at Student A, this was in the forefront of his mind at the suspension meeting and that on the balance of probabilities of the evidence gathered these boards did hit Student A, whether or*

not it was Stephen Dix's intention to hit Student A, he was reckless as to the outcome of his actions.

The Panel could not find any reason why Student A and Student B would wish to maliciously cause trouble for Stephen Dix. It is now an irrelevant point in any event due to Mr Dix's admission that he did lob the boards but as this was raised a number of times by Mr Dix it is appropriate for the panel to comment on this point in addition to the information that it reviewed and gathered."

63. The Panel concluded there were reasonable grounds for believing the claimant had displayed serious unprofessional, unacceptable or irresponsible conduct towards staff and students. They said "*Stephen Dix admitted that he lobbed the boards at Student A. At best he was reckless as to where those boards landed and Student A said that it hit him and after reviewing the evidence he is to be believed. This illustrates that there was no appreciation and/or self-awareness of behaviour and a lack of professionality required in the role."* The Panel also concluded in their written rationale they were of the opinion the claimant had displayed violent, dangerous and intimidatory conduct. (Ms Lewis said in evidence that it should have read "*or* intimidatory conduct"). It was said "*he was in a position of authority and is a member of respected profession. Mr Dix knew that he should not make physical contact with a student and he was reckless as to the outcome of his actions*." The Panel also said it was their belief that the claimant's behaviour could bring the College into disrepute. Finally they said that the claimant had violated the College's rules policies or procedures.

64. The rationale went on to say it was their opinion that there had been gross misconduct and that the appropriate sanction for that gross misconduct should be the termination of employment. The rationale was sent to the claimant under cover of a decision letter dated 18 September 2018 [345] saying the decision was summary dismissal with effect from that date. The claimant was given the right of appeal.

65. The claimant's appeal is at [352]. The appeal letter said the boards made no contact with Student A and that he was concerned that Students A and B were believed over him. He referred to his unblemished work history and said that the decision to dismiss was unduly harsh. The claimant's appeal was heard on 19 October 2018 by Mr Dacey, Chief Executive Officer, and Ms Judith Williams, Deputy Chief Executive Officer. Mr Dacey is Ms Lewis' brother in law. The claimant prepared some written grounds in advance of his appeal [355-356] and [357- 362]. One of those grounds was that he considered he had been treated differently to another lecturer who had faced an allegation from Student A and who had not been suspended or formally investigated and instead Student A had been removed until able to prove his fitness to study. He also raised that he had not received information from the College's transition team despite Student A's

complex needs. He also said that at the previous hearing his union representative had not had the opportunity to set out his mitigation.

66. The appeal hearing transcript is at [364-465]. The claimant at this hearing was accompanied by Ms Slarke. She confirmed that there had been opportunity at appeal stage to set out mitigating circumstances. In the appeal hearing Mr Dacey questioned the claimant about whether the incident could be seen as dangerous saying "*You don't, you don't know how its going to end. There's a student in front of you, the student's sleeping, why is the student sleeping? I don't know, what did he go through the night before."* The claimant said if he had thought it was going to do any damage he would not have thrown it. It was pointed out that the board was lightweight with no sharp edges and it was not a dangerous manoeuvre on the basis there was an assured landing position, because of the limited distance, and the claimant's height and arm reach. Mr Dacey was saying his thinking was that if something leaves your hand you do not know what is going to happen; it could hit the bag, it could turn, it could catch somebody. Mr Dacey also said he was particularly interested in the claimant's thinking behind his actions. The claimant in answering said that "*I cant believe we are here over this, I really cant, but it is what it is."* He said that it was a silly decision that was spur of the moment, that there was no force, it was a limited distance and that "*everything was calculated, you know, that it was, not going to, going to be no harm."*

67. Mr Dacey also said during the appeal hearing that for him the case centred around a conscious decision to pick something up, to lob it at the student, to not wake the student up, to pick something else up and lob that at the student. He said again that his interest was in the decision-making process and whether it was done as a quick "*oh my God*" or whether it was a conscious decision to look for something that was not a piece of steel and to then lob it at the student. Ms Slarke pointed out that it was not at the student and that the claimant wanted to put it on the bag to make a noise. Mr Dacey noted that SA and the students had said it was at the student and that there was a disagreement with the claimant about this. The claimant then said "*You could have said I threw it towards… towards the student. At the student, towards the student, they're both very, very similar terms."* Ms Slarke pointed out the difference was that the claimant had not wanted to make contact with Student A. Mr Dacey said, in effect, he could see there were issues about a second dispute as to whether the board struck the student. He said that the two things for him that he wanted to get to the bottom of were the conscious lobbing of the boards and whether or not they made contact.

68. In relation to the assertion that the disciplinary panel had not given proper consideration to whether the allegation was malicious, Mr Dacey posited the question that if Student A had gone to his foster parents and said he had come

home because the lecturer had thrown something at him, what would be malicious about it. He said it was all agreed that had happened. Ms Slarke said it was because Student A could not go home and say he fell asleep and his lecturer tried to wake him up. She said it was better for Student A to have said his lecturer threw something at him and it hit him on the head, so that his foster parents would be on his side. She said it was the alleged embellishment of the story which it was being said was malicious.

69. There were other matters discussed at the appeal as set out in the interview transcript and the claimant accepted in evidence he was given the full opportunity to put across the points he wanted to on appeal. Ms Slarke closed the appeal hearing with a submission that the sanction applied was a little harsh and that a warning would be justifiable in the circumstances. By agreement the appeal panel were given an extension from 5 to 10 days to provide their decision.

70. The appeal panel ultimately decided they did not need to reinterview anyone. They did however undertake some investigations as to the claimant's training records in respect of being able to access student's personal information such as that relating to being a looked after child. On 1 November 2018 the claimant was sent a letter confirming that there were "*no substantive or procedural grounds for overturning the decision to dismiss you from your employment*" [471]. There is a written appeal panel rationale albeit it was not sent to the claimant at the time [472-473].

71. The rationale concluded that there were two central issues in the case. The first was expressed to be whether the claimant was reckless in consciously lobbing two drawings boards at Student A. The appeal panel said that they believed the claimant's decision was not undertaken in a fit of haste as the claimant had consciously considered what to lob at the student. They said the claimant consciously took that decision with a disregard for student welfare, and it was a mistake made consciously on two occasions. The appeal panel said the claimant could not have been entirely certain where the object would end up or what damage it could do and as the claimant consciously did this on two occasions it was reckless behaviour. The second issue was identified as whether the boards made contact with Student A. In relation to sanction the rationale said that the student teacher relationship was a fiduciary one and that teachers hold a unique position of influence and trust and they were required to exercise their powers in good faith and for the benefit of the student. They said that the claimant's actions went against the expected norms of an experienced and professional teacher.

72. Mr Dacey said in his written witness statement that once it was established that the boards had been lobbed by the claimant, the secondary question of whether they actually hit Student A took on much less relevance, if any at all. In his

written witness statement he again referred to the reasoning for the appeal decision being the claimant's admission that he had lobbed the drawing boards, and that it was a conscious decision on two occasions, and not of haste. He also said that the appeal panel believed the claimant still did not appreciate the seriousness of his conduct in having questioned why they were there over the incident. Mr Dacey also said he believed the claimant had received training about accessing safeguarding information on the respondent's systems, but that in any event safeguarding training was irrelevant. He said that if the claimant was saying he would have thrown the boards at a student he considered to be more robust than Student A then it suggested to him that the claimant still had not appreciated that the claimant's conduct was very serious irrespective of student circumstances and that it was simply not appropriate for a teacher to throw a board at any student.

Discussion and Conclusions

The reason for dismissal

73. The focus in an unfair dismissal case is primarily on what was operating in the mind of whomever made the decision to dismiss; here the disciplinary panel. Having considered all the documents and the evidence before me I am satisfied that Ms Lewis and Ms Jones genuinely believed, and their reasons for dismissing the claimant were:

(a) the claimant had lobbed two boards at Student A;
(b) whether or not it was the claimant's intention for the boards to hit Student A, the claimant was reckless as to the outcome of his actions in lobbing the boards;
(c) on the balance of probabilities the boards did hit Student A;
(d) throwing the boards and being reckless as to where they would land amounted to serious unprofessional, unacceptable or irresponsible conduct towards a student;
(e) the claimant's actions were dangerous;
(f) the claimant had acted in a manner which could bring the College into disrepute;
(g) the claimant's actions violated their values and policies such as the Employees Standards and Code of Conduct and the Health and Safety Policy.

74. In my judgement, the main thing operating on the mind of the panel was the lobbing of the boards. It was that action which they considered reckless in terms of the potential consequences, was serious unprofessional conduct, and dangerous. The panel did also look at the issue of whether the boards actually hit Student A and concluded it was likely that the boards did make contact. They also did not reach a finding it was the claimant's intention to do so. However, their findings in terms of the rationale for dismissal largely centred not on the board making contact but on the lobbing of the board. As I have said, it is that action which was considered reckless, unprofessional, and dangerous in terms of the inherent risks. The reason for the claimant's dismissal was conduct and a potentially fair reason for dismissal.

Were the disciplinary panel's beliefs based on reasonable grounds?

75. It is important to bear in mind here that I have to primarily look at what information was before the disciplinary panel at the time they made their decision. I cannot therefore decide these issues for myself on the basis of the evidence presented before me afresh at the tribunal hearing.

Lobbing two boards at Student A

76. I am satisfied that the disciplinary panel had reasonable grounds for believing that the claimant had lobbed two boards at Student A. The claimant accepted at his meeting with the disciplinary panel that he had done so. It was within the range of reasonable responses for an employer in that situation to proceed on that basis. It was also the same description that SA had given and which, in that regard, the claimant again had not disagreed with.

Being reckless in the action of lobbing the boards

77. The claimant at the disciplinary hearing agreed with the assertion that "*it could be reckless if it indeed the board had potentially of hit him."* The claimant agreed, with hindsight, that potentially the judgement of lobbing the board at somebody was potentially the wrong judgement call. At other times he asserted that he had conducted a measured and considered action, and that lobbing the lightweight boards from such a short distance, with such little force and with a cushioning effect of surrounding bags meant the risk was negligible. He said he was a trained risk assessor. FG had previously commented that "If *Student A had moved when the work board was being thrown, it could have injured his face/eyes, it was in effect lucky he stayed in the same position."*

78. I do not find that it was outside the range of a reasonable employer in these circumstances to find that the claimant had been reckless in his action of lobbing the boards. It was within the reasonable range to have formed the view that the claimant had conceded this. But even without such a concession it would have been reasonable for the disciplinary panel to have reached that view on the evidence before them. It was within the reasonable range to reach the view that whatever the claimant's intentions there would have still been an element of risk as to what could potentially happen when the boards left his hand. The claimant accepted it was not a placement of the boards and that they left his hand at least with sufficient force to get over the wall. As dealt with below, some of the key evidence also suggested that there were boards bouncing around which would again connote a sense of a potential lack of complete control. It was also within the reasonable range to consider there was scope for the boards, however lightweight, to cause injury. They were lobbed towards a sleeping recipient. There is ultimately no way of knowing what the intended recipient will do.

Whether the boards hit Student A

79. As I have said, I accept that this was a lesser issue for the respondent in terms of the decision to dismiss. Here the disciplinary panel had before them competing accounts. In terms of potential eye-witness accounts, they very clearly had before them the claimant's denial that the boards had made contact with Student A. They had Student A's account that he had felt two unknown objects hit him on the head. They had Student B's account that he thought the claimant had thrown one board, and then another two together that had landed on the back of Student A's head (or possibly he had seen four boards on the floor). They had SA's account that he thought the claimant had initially thrown some papers which had just fluttered down, and then the claimant had lobbed the board at Student A. They had SA's somewhat mixed account in terms of impact, in which he sometimes said he could not see if the board struck Student A or not and others where he said that it seemed to bounce of the bags or hit the student, sort of, or that he could not say whether the board hit the student first or the bag first (which would imply some contact with Student A even if secondary and connotes the sense of SA in the very least as having seen items bouncing around). Certainly SA did not rule out the possibility of the boards having struck Student A, even if on a rebound.

80. The panel also had before them the more difficult situation with regard to the fairly contemporaneous account of events allegedly taken on the day by CD. The claimant denied saying those things to CD. On interview CD was equally adamant the claimant had.

81. Ms Lewis identified in the panel's written decision and in her witness statement that in weighing up the evidence and deciding it was likely the boards had made contact with Student A, they took particular account of the fact that the claimant had confirmed that he considered SA to be an honest and trustworthy colleague, that they saw consistency in the evidence of SA, Student A and Student B. She also identified that SA had confirmed Student A had woken straight away (i.e., on impact) which they considered was consistent with what Student A had described and was contrary to the claimant's assertion as to how Student A had awoken.

82. The claimant in effect complains that the disciplinary panel's weighing of the evidence on this point was outside the range that a reasonable employer would undertake in the circumstances. He says that SA and the students' recollections do not match regarding matters such as the landing position of the boards, the number of boards used and whether or not Student A was asleep. He says that Student A did not in fact say he woke up straight away and that the panel disregarded his own explanation about the speed in which Student A woke up as opposed to the movement of Student A's head. He complains that his other evidence about the credibility of the students and their accounts was not properly weighed.

83. I do not find that it was outside the band of reasonable responses for the disciplinary panel to have concluded it was likely the boards had made contact with Student A. The disciplinary panel had to take the claimant's version of events and his points of dispute into

account, and I am satisfied that they did. But the panel was not bound to accept the claimant's account over others. It was their responsibility to weigh the competing evidence and reach a decision. To do so and to prefer one version of events over another is within the reasonable range open to a reasonable employer in the particular circumstances. Whilst there were differences between the accounts of Student A, Student B, and SA, it was within the reasonable range to take the view that they were consistent with a central theme of the boards making contact with Student A, even if having rebounded from the bags. Whilst Student B and SA's accounts are not identical, they both give a sense of the boards /or the items they saw being thrown as bouncing around and making contact with Student A. Student A said he felt that contact. In relation to how Student A woke up, again the disciplinary panel were not obliged to accept the claimant's account, only to take it into account. There was a reasonable basis for them to prefer the view that Student A had woken up straight away. It was how SA described his impression and Student A, whilst denying he had been asleep (as opposed to having his head on his arms) had said he looked up after he felt the second item strike him, having decided to ignore the first.

84. The claimant also alleges that when weighing credibility issues the panel unfairly diminished his credibility compared to other witnesses by asserting that he had changed his story from placing the board to lobbing the board. I address this further below, however in my judgement the key concern here for the disciplinary panel was in fact in ascertaining quite what the claimant was admitting and that he understood the seriousness of it, given to the potential serious implications in the panel's minds of the claimant admitting he had lobbed the board.

85. I am also satisfied that the disciplinary panel did take into account the credibility issues that the claimant raised about Student A and Student B and why he should be believed that the boards did not make contact with Student A. Again, the disciplinary panel was not obliged to accept that analysis. It was their job to weigh the evidence and reach a conclusion. They decided based on all the evidence they were not satisfied that the students had maliciously exaggerated their accounts to allege the boards had made contact. I am satisfied that on what was before them their conclusion was within the reasonable range.

Serious unprofessional, unacceptable or irresponsible conduct towards a student

86. In my judgement it follows from the above that it was within the reasonable range for the disciplinary panel to have reached the view that throwing the boards and being reckless as to where they would land amounted to serious unprofessional, unacceptable or irresponsible conduct towards a student. That FG had conceded on reinterview she did not view it as "serious" conduct did not bind the panel; they were entitled and indeed it was their role to reach their own view. FG's role was to decide if there was a disciplinary case to answer. The disciplinary panel's role was to, for themselves, make a decision on the allegations before them and make a decision as to sanction.

87. The claimant had conceded he knew teachers were not to make physical contact with students. It was a board thrown towards an apparently sleeping student in the claimant's pastoral care in class and who would have been unaware of the looming object. Once they had reached their primary conclusions it was therefore not outside the reasonable range for the panel to view the claimant's conduct as being seriously unprofessional, unacceptable or irresponsible.

88. The panel in their written decision referred to the claimant having no appreciation or self-awareness of behaviour and a lack of professionality required in the role. They also referred to being satisfied that the lobbing of the boards had been at the forefront of the claimant's mind in the suspension meeting and not the withdrawal of Student A's EMA. The claimant says the panel were unfairly criticising him and misunderstood his point that the EMA was the underlying reason for Student A's complaint/ or the exaggeration of Student A's complaint. He says he was not attempting to deflect from the usage of the boards and he has never done so.

89. In my judgement, the disciplinary panel did form a sense that the claimant may not be viewing his actions of lobbing the board as being particularly serious. He described having seen it at the time as a minor thing. The panel had an exchange with the claimant about that, playing devil's advocate with him as to why he would see it as minor, which related to how the claimant saw the EMA issue. It was within the range of reasonable responses for the panel to form the view from what the claimant was saying that the claimant did not appear to have sufficient appreciation or self-awareness of the appropriateness of lobbing a board at a student. That fed into their assessment that the claimant had displayed serious unprofessional, unacceptable or irresponsible conduct. It was not outside the reasonable range to make that assessment.

Dangerous action

90. For the reasons set out above in relation to recklessness, it was also within the range of reasonable responses for the disciplinary panel to have viewed the claimant's actions as dangerous.

Potential disrepute

91. I also consider it was within the reasonable range for the disciplinary panel to have considered that the claimant lobbing a board towards a student could potentially bring the college into disrepute, as identified by FG within her report. It was an identification of potential disrepute, not actual disrepute. Whether or not Student A's foster parents had in fact contacted social services or not therefore did not determine whether there was *potential* disrepute.

Violation of the respondent's Values and Employees Standards and Code of Conduct and the Health and Safety Policy.

92. Likewise, I consider that the disciplinary panel had reasonable grounds on which to conclude the claimant's conduct violated their values, employee standards/code of conduct and their health and safety policy, as set out by FG in her report. I have therefore found that there were reasonable grounds for the respondent's misconduct conclusions.

Reasonable investigation? / Complaints of procedural unfairness

93. I turn next to the question of whether the respondent's conclusions were reached having followed a reasonable investigation (in the sense of being within the reasonable range). This also overlaps with the claimant's allegations of procedural unfairness.

The initial investigation

94. I do consider when conducting the initial investigation that CD undertook, a reasonable employer would have ensured that a more accurate record was kept of the initial discussion with the claimant and with SA, to show more precisely who said what/who demonstrated what. This was even more important in circumstances in which CD decided to interview the claimant and SA together, and where they both shared the same first name. Whilst the respondent says the purpose of the initial investigation is a risk assessment to inform a decision as to what happens next, it is also important that its records are accurate as it is one of the most contemporaneous accounts given by those involved of what happened. The respondent's own disciplinary policy notes this. It records that initial necessary investigations are to establish facts promptly before memories of events fade [188].

95. The respondent ended up in a situation in which CD was saying that the claimant/SA had given a version of events, on the actual day, of accepting the boards making contact with Student A, and with the claimant saying that he did not do so. I do consider that CD's initial report was confused and confusing as to exactly what was discussed, who said what, who demonstrated what and what was or was not admitted. It had the potential to disadvantage the claimant. It did not go to the point of whether the board was lobbed by the claimant but the relevance or otherwise would not have been known at the time. The respondent did try to remedy the defect by interviewing and reinterviewing CD. She maintained her account and the claimant likewise did to the contrary. Both sides of that evidential dispute were then before the panel. The evidential dispute could have been avoided if better records had kept, even if it was not being recorded.

96. I do also consider that a reasonable employer would have ensured that a written record was kept of the initial complaint made by the student's foster parent. Again, it cannot be known at the outset of a complaint what is and is not material, and what is likely to end up in dispute. Sometimes the most contemporaneous accounts can potentially end up being important evidence. It was never explained why this was not available or why there was a

lack of clarity about who the foster parent had originally spoken to. That said again ultimately it would not have been relevant to the allegation of the lobbing of the boards.

97. Both the claimant and SA recalled CD making a comment to the effect that the college would always come down on the side of the student. I did not hear evidence from CD, but in her interview for the disciplinary process she denied saying it. On the balance of probabilities, it seems likely that CD did make a comment to that effect given SA said she had. It appears to have been said in the context of advising the claimant and SA to make an early note of their recollection of exactly what had happened. It seems born of a sense on CD's part as to the potential seriousness of the claimant's position and her trying to impart that to the claimant. I would add that it also imbues a sense that there was some awareness on CD's part of a conflict in the story being told by the student and by the claimant. With hindsight it was not a sensible observation to have made in the way that it was as it could reasonably leave the recipient with a sense that the dice were loaded in favour of students. However, I do not consider that this means that the outcome in the claimant's case was pre-judged or pre-determined in some way. CD was not involved in the process other than her initial investigation and her subsequent accounts then given as part of the investigation process. In my judgement there is no evidence of her being involved in the decision-making process or that the disciplinary panel or the appeal panel did not genuinely consider for themselves the case against the claimant. I also do not consider there was anything inappropriate in CD telling the claimant that he did not need a trade union representative for his meeting with EG or that it was fine to attend alone (albeit she offered to go in with him). It was a meeting at which the claimant was to be informed of his suspension. It was not an investigatory meeting or a disciplinary hearing. If the claimant's union wished to challenge or appeal the suspension they remained able to do so.

Suspension

98. The Acas Code of Practice on Disciplinary Procedures says that where a period of suspension with pay is considered necessary, the period should be as brief as possible, should be kept under review, and it should be made clear that suspension is not considered a disciplinary action.

99. The claimant says the respondent could have arranged for him to not teach Student A but otherwise be in work and that it would have helped his mental health. He also says that his suspension was a knee jerk reaction based on a flawed initial investigation. I do not, however, consider that it was outside the range of reasonable responses to suspend the claimant, considering the nature of the allegation being investigated against him, rather than making lesser arrangements. Even if he disputed it, EG had before her an allegation that the claimant had lobbed a board at a student and had made contact with the student. It was on the face of it a serious complaint.

100. The claimant complains that he was not told that he could appeal against the decision to suspend him as per the respondent's policy. The claimant however had trade union representation, who would have been familiar with the policy, who would have been able to guide him on such matters if the union considered it merited. The claimant could also have looked into it himself.

Trade Union representation

101. The statutory right to be accompanied does not apply to investigatory meetings. The respondent's policy, however, gives the right to be accompanied by a representative of a trade union or a workplace colleague at any stage of the formal disciplinary process [185] which includes a formal investigation [188]. The policy does not say that the staff member has to be a member of the union concerned or that it has to be a recognised trade union. On a literal application of the policy, it therefore appears to me that there should not have been a bar to the claimant taking Ms Slarke (his sister) with him as a trade union representative even though he was not a member of PCS. However, the exchange that the claimant had with Ms Dunbar-Jones about Ms Slarke does have to be set in context [487]. The claimant mentioned a possible PCS rep that may be able to step in on 8 March 2018 "if you cannot arrange anything with Bev Wilson and Fran Green in the short term." The claimant was, in effect, presenting it as a back up arrangement. He was not saying that being accompanied by Ms Slarke was his preference. He was expressing willingness for the meeting to be re-arranged, albeit the sooner the better. It was then re-arranged with Ms Wilson from the UCU for 12 March. I consider that re-arranged date to be within the meaning of "short term". The claimant was therefore not deprived of trade union representation or denied his first choice, or subject to serious delay. He was able to attend with his initially chosen representative, who had the benefit of also working in the organisation. The rationale for Ms Dunbar-Jones' response may not have been technically correct, however, I do not consider that the claimant was actually subject to prejudicial treatment in the particular circumstances. His primary wish, to be accompanied by Ms Wilson, was accommodated.

FG's investigation, report and recommendations

102. I turn to the complaints about FG's investigation. I do consider that any reasonable employer would ensure sufficient accuracy was used when putting an allegation to an employee in a disciplinary investigation. It was not appropriate for FG to tell the claimant in interview that the allegation was that he had hurt Student A's head and had injured it through the force of the board being thrown without there being evidence in support of the allegation. There is nothing before me to say where FG would have got that particular allegation from. The respondent was unable to explain it to me at the hearing (I did not hear from FG herself). Hearing such an allegation out the blue would no doubt have been very concerning to the claimant. That said Ms Dunbar-Jones did take steps to immediately confirm that the allegation was about whether the student was hit by the board. The allegation of injury was never made again during the disciplinary process. I

do not accept that the claimant could have reasonably continued to consider that the allegation (or part of it) was about actual injury to Student A.

103. I also do not consider that it was appropriate for HR to tell FG that she should not take into account the evidence the claimant wanted to put forward about the credibility of Student A and Student B. It was FG's role to weigh the evidence before her and take it into account if she considered it relevant. I do, however, accept that the evidence was considered at the disciplinary panel stage albeit it became of smaller significance for the panel once it was clear the claimant was admitting lobbing the board. I also do not consider it likely that the evidence would have affected FG's fundamental analysis that there was a case to be put before a disciplinary hearing to assess. It was not in dispute that the claimant had used the boards, which would have, in my judgement likely have led to a disciplinary hearing in any event.

104. The claimant complains that Student A was not re-interviewed by FG. I do not consider this takes FG's investigation outside the reasonable range. She was seeking to take Student A's account of the index events and considered she had gathered these. That was in the reasonable range. The points the claimant wanted taking back to Student A were in any event undertaken by the disciplinary panel. The claimant also says that various inconsistencies should have been put to Student B by FG and/or the panel such as the fact that Student B was wearing a headphone, the length of time Student A had his head down, the landing position of the boards, and the claimant raising Student's A EMA. These are, however, points that the claimant was able to make to the disciplinary panel and the appeal panel for them to weigh into the equation. I do not consider that it was outside the range of a reasonable investigation not to reinterview Student B again. Ultimately the claimant admitted lobbing the board at or towards Student A. Reinterviewing Student B was not going to alter that. Furthermore, the standards to be applied to an employer conducting a disciplinary investigation are not the standards of court litigation. Student B had given a relatively clear account of what he said he had seen in terms of the boards striking Student A and where they landed. It is difficult to see how putting the kind of points the claimant raises was likely to have fundamentally changed Student B's position in that regard. There were differences in witness accounts that the claimant was able to draw to the attention of the disciplinary panel. Moreover, differences in witness accounts are not unusual when different witnesses recount common events, due to the widely recognised fallibility of human memory and the fact people recount their experiences from their own perspective. Importantly, there were also some consistencies in the central theme such that it was not outside the reasonable range for FG (and thereafter the disciplinary panel) to draw upon them. Ultimately, the investigator and the decision makers had to weigh this all up and reach their respective decisions. I do not consider the procedural steps they took in gathering evidence to allow them to make their decisions was outside the reasonable range in this regard.

105. The claimant also complains that FG's report misrepresents SA's account in interview. He says that FG wrote that SA had said "it seemed to bounce off the bags or hit him, sort

of." The claimant observes that this did not record SA's subsequent comment that "all I can see was it landed on the table" or SA's other statements that he did not have a clear view or whether the board hit student A, or hit the bag or went from the bag onto Student A. I do not consider that FG's report fundamentally unreasonably mischaracterised SA's accounts. As observed above, they do give a sense of a board bouncing around, with the potential that it may have hit Student A, albeit with a degree of uncertainty being attributable to SA not having a clear view. The claimant also says that FG recorded SA as saying he could not see where the board landed when that was something he did state he had. However, the conversation about the landing place, was a continuing one because of the sense SA was giving about the board bouncing around before reaching its final resting place. Moreover, and more importantly, ultimately all of the interview notes were before the disciplinary panel and the appeal panel, were read by them, and the claimant was fully able to draw attention to any aspects that he wished.

106. The claimant complains that FG did not ask CD about having said that the College would always support the student's point of view. It was not, however, central to her tasks and in any event was put to CD by the disciplinary panel. The claimant complains that the panel then did not question CD sufficiently about it. However, I do not see that it was central to the disciplinary panel's own decision-making process about what they thought happened and what the appropriate sanction should be. I do not accept that they acted in a prejudged manner that automatically preferred the account of CD, or that they in some way were influenced by CD to prefer the account of students.

107. The claimant complains that FG conducted a site visit but did not take him with her and did not ask him to give a demonstration of what he said happened. I do not consider FG's actions to be outside the reasonable range. Only FG and MDJ went, because FG wanted to make sure she saw the space. It was within her discretion as an investigator. The claimant was able to give her (and the panel thereafter) an account of what he says he did. Both stages took care to understand from the claimant's perspective what he said he had done/what had happened.

108. The claimant also complains that FG (and the panel thereafter) did not interview the foster parent or gather evidence as to the detail of the initial complaint. I have dealt with the initial record taking above. I do not consider it was outside the reasonable range to not interview the foster parent. The claimant says it was relevant to reputational harm, but FG (and the panel's) assessment of reputation harm was on the basis of potential reputational damage not actual reputational damage. It was not relevant to the lobbing the boards. The claimant says the details would be relevant to the consistencies/inconsistencies in account and credibility and his assertion Student A was exaggerating his complaint by saying he had been hit. But the claimant knew from the outset that the allegation was the boards had made contact with Student A which could only have sensibly come via the foster parent. It was reasonable to suppose the evidence of the foster parents was tangential and would add little to what was gathered from Student A, Student B, SA and the claimant. Likewise, Ms Lewis said that ultimately

she did not consider it necessary to interview the original recipient of the call because the evidence did not go to the lobbing point. At the time the disciplinary panel made that decision, knowing then what they knew, I accept it was within the reasonable range.

109. FG's report did include an incorrect assertion that the claimant had admitted to a board hitting Student A and it going over his back. When interviewed by the disciplinary panel she thought it was in fact Student B. I agree with the claimant that this error should not have happened. However, I also accept it was an error; FG did not think and was not intending to suggest that the claimant had made that admission. Furthermore, at paragraph 5.10 of her report she then went on to get the attribution correct and identified that SD had denied saying what CD said he did. Procedurally the claimant was able to draw attention to the error. The disciplinary panel report specifically noted this misdescription in the first line of its written report before it went onto make its other conclusions. I accept the panel were aware of the misattribution and that it did not affect their deliberations in the case.

110. The claimant asserts that FG made other errors in her report and that following reinterview by the panel she significantly changed her responses on 4 allegations. I have already addressed the "serious" point above. It was something that FG and the panel were entitled to reach different views about. The claimant refers to FG initially stating that the claimant's actions were in her view intimidatory rather than violent and could be seen as dangerous. He refers to FG later saying that if Student A were asleep he would not know whether he was being intimidated or not and that she stated "I have…said where it was not intimidatory and it was not malicious." FG's views had always been clear that she did not consider the claimant had acted maliciously or violently. To the extent it could be said that FG resiled from saying the claimant's actions might be viewed as intimidatory that appears to her being reflecting upon what the claimant has said to her in response. That reflection would be a reasonable thing to do (albeit it is not clear to me why technically someone lobbing an object at a sleeping individual could not be seen as potentially intimidatory even if the intended recipient is unaware of it at the time). Based on my findings of fact the disciplinary panel's focus was ultimately, in any event, upon viewing the claimant's conduct as being dangerous conduct, something which FG had herself had also couched (and in any event it also being serious unprofessional, unacceptable or irresponsible conduct). As already stated, that conclusion was within the reasonable bounds open to the panel. I do not see that FG's analysis of the concept of intimidation is something that ultimately affected or reasonably should have affected the panel's analysis or is of any great procedural significance in my judgement.

111. The third point that the claimant focuses upon is FG's reference to the claimant's actions potentially bringing the respondent into disrepute. I have already dealt with that above and the significance of the point that FG (and the panel) were dealing with the concept of potential disrepute, not actual disrepute. The fourth point the claimant asserts is that FG changed her view from saying the claimant's behaviour could be construed as threatening or aggressive to saying "I do not feel that it was aggressive. However, I felt

that I did have to put that down." What FG was doing here, however, was drawing the distinction between what she thought and how others might potentially view it. She was explaining that she did not consider the claimant's actions to be aggressive but that she did consider that if somebody else had seen or heard about it they may view it that way. It was within the reasonable range for FG to make that assessment. She did not change her view on that point.

112. Other complaints are made about FG. It is said that FG in her report changed the foster parent's complaint from one of mistreatment to assault. I accept that the purpose of this change was to try to make the substance of that complaint a clearer one – i.e., that the boards had made contact with Student A. I do not consider that to be unreasonable. I return to the issue of whether the respondent set out the allegations to the claimant or changed the allegations separately below.

113. It is said that FG displayed positive bias towards Student A and Student B. I do not agree that she did. She was seeking to obtain their central accounts of what happened. She was not conducting court litigation. Moreover, achieving a fair handed investigation is not necessarily about asking questions of different witnesses in exactly the same way or style. That an educational establishment might question its students in its care in a different manner or style to questions asked of its lecturers in a disciplinary process does not make it an unfair or unreasonable investigation. It is a process that does reasonably need to be tailored. The claimant says that FG was also biased towards the students in her written report. He says it was written in a way that accepted their accounts over matters he disputed such as how many write ups Student A had completed (to make Student A look good) or that Student A was not asleep. I do not consider the written report was outside the reasonable range. FG was recording what they had said. These was ancillary scene setting to the important point of the action that the claimant had taken on the day. Furthermore, all of the interview transcripts were before the panel, the claimant could make his points to them and it did not go to the issue of the lobbing of the boards.

114. The claimant says that interviews were conducted unfairly and inconsistently. He says that only he and SA were subject to what amounted to cross examination and lengthy interviews and not the Students or CD or anyone else. He says CD was not pressed on matters. I do not consider FG conducted interviews inappropriately or unfairly. What SA said he saw or did not see required some careful covering with him. There was inevitably more ground to cover with the claimant and it was also important he was able to say what he wished to say (which he did). The students accounts and CD's accounts were taken. Again, this was not court litigation. FG was simply seeking to obtain witnesses accounts and put to them what she thought needed to be. Her approach was within the reasonable range.

115. The claimant complains that FG used inflammatory language in her report, such as describing the board as a potential projectile or saying the claimant and Student A had a

short verbal altercation, or criticising her use of the words throw and throwing the board at the student. He says the vocabulary used implies the incident was marred with aggression and intimidation. I do not agree that she did use unreasonable inflammatory language. I think this is more demonstrative of the claimant, and those assisting him, having a tendency at times to somewhat forensically examine individual words and phrases used in written reports and transcripts to identify as many matters as possible to complain about and distract from the core features in the case. In relation to the point of the lob/throw, and whether it was at or near the student these were matters discussed at length at all the various meetings where the claimant was fully able to give his account. In my judgement FG actually went to extensive efforts to try to accurately understand from the claimant what he said his actions on the day were and she was always clear that she did not personally consider that the claimant was being aggressive or violent.

116. The claimant complains that FG said the claimant had not explained the reasons for his actions whereas he says he tell her why he threw it and what was on his mind. I accept, however, that the point FG was seeking to make, is similar to that made by Mr Dacey at appeal stage. The point was not about the claimant thinking Student A was asleep and wanting to rouse him. That much was evident. It was about why the claimant embarked upon his particular course of action in that context and why he would think it was an appropriate action for a lecturer to take.

117. The claimant also alleges that FG did not take into account or mention other evidence such as the fact he had wanted to call his manager in on the day of the event, or him saying Student A did not complain about being struck on the day, or the short distance the board was being lobbed from. I have dealt with above the credibility issues the claimant raised. Thereafter, I do not consider it established that the factors FG considered or mentioned were outside the reasonable range. FG's perspective was that the manager point was of limited significance because the manager was not ultimately called. That perspective was in the reasonable range. Moreover, the claimant had the opportunity to draw attention to that which he did at the disciplinary hearing and appeal stages. I have dealt with above the allegations about errors in the report. But in general I do not find that FG's report was peppered with errors, inconsistencies, was speculative with exaggerated language or had evidence of bias towards Student A. I also do not agree that she collated evidence without analysis. I consider she did analyse the case before making recommendations. That the disciplinary panel itself undertook further investigations does not mean FG's investigation was outside the reasonable range. The disciplinary panel were doing what they could reasonably be expected to do procedurally rise; listen to the claimant's concerns and act accordingly. It is also said FG did not look for evidence in support of the claimant's case. Again, I do not accept this.

118. The claimant says that if FG had got the matters he raises correct the first time it would have changed her recommendations. I do not agree. I consider it likely that FG baseline assessment about what she thought had happened, and that it was inappropriate would

have always led to her concluding there was a disciplinary case to answer. It then became a matter for the disciplinary panel.

Length of time of the process

119. Looking at the individual timescales of the investigation process and thereafter the disciplinary panel and appeal process, I do not consider that the length of time the process took was outside the reasonable range in the circumstances. Part of the delay over the summer in particular lay with the delay in the claimant returning his signed transcript, because he wanted to discuss it with his trade union representative. There is no evidence of evidence being lost or not remembered because of delay.

Length of suspension and reviews of suspension

120. Mr Dix complains that his suspension was too long and that it was not subject to regular reviews. I do not consider the length of the suspension was unreasonable. It was allied to the length of the disciplinary process. In relation to reviews of the claimant's suspension, I accept the evidence of Ms Dunbar-Jones that whilst there are no documents relating to formal reviews, HR did generally monitor the situation on an ongoing basis and that nothing material arose that changed the assessment of a need for suspension in the claimant's case. That was within the reasonable range.

The conduct of the disciplinary panel hearing

121. The claimant complains that the tone of the disciplinary hearing was combative, and that Ms Lewis interrupted the claimant and stopped him giving explanations. Parts of the hearing's audio recording were played. Both Ms Lewis and the claimant were speaking very quickly on the audio recording and to an extent, as often happens in human interactions, ended up speaking over each other at times. It seems to me that in general Ms Lewis speaks quickly. My assessment of the audio recording and the transcripts, however, is that the claimant was engaging with and responding to what was being put to him. I did not consider that the style or tone was outside the reasonable range. Ms Lewis was putting to the claimant to comment upon issues that had occurred to her that she wanted the claimant's response about, such as what the Acas Code said, or the potential discrepancy between the claimant and SA as to the speed with which Student A woke up. I did not consider that the claimant was unable to put his account across or make the points he wished to make, whether at the disciplinary panel stage or appeal stage.

122. Mr Dix alleges that Ms Lewis spent considerable time questioning him about the verb used for the action of using the boards and suggesting that the claimant had changed his word from "placed" to "lobbed." He says that she implied he had sought to mislead the respondent as to his action, whereas he had always accepted the board had left his hand and had initially used the word "dropped" to describe this. In my judgement, what Ms Lewis was fundamentally exploring with the claimant at the disciplinary hearing was the

degree of control he was saying he had over the movement in question. She had understood that the initial description given by the claimant was one of, in effect, more or less complete control over the action of the board, in it being dropped down in a controlled way, or placed to use the language adopted by FG. She now understood that the claimant was accepting SA's description of the claimant having lobbed the board. She thought that connoted a lesser degree of control and therefore more risk. In my judgement what Ms Lewis was doing was exploring with the claimant whether he understood that and giving him the opportunity to be clear as to what he was agreeing to or describing. Given the potential implications for the claimant it was proper to do so.

123. The claimant also complains that Ms Lewis was combative with him and trying to trip him up about whether the boards had made contact with Student A or not. He says she was asking him how he could have at the time considered there to be an "incident" with Student A if he was saying that the boards never touched Student A. Similarly, she challenged the claimant as to why he would have said he wanted to call his manager to deal with Student A, if the claimant did not think he had done anything wrong. The line of questioning would have been uncomfortable for the claimant and he says he was left feeling that however he answered it would be twisted against him. What Ms Lewis was doing was exploring with the claimant what he thought as at the time of the events. Her suspicion was whether the claimant had potentially thought at the outset there was a chance the board could have struck Student A, even if he had not intended it or at least he had appreciated what had happened may be serious. She was exploring with him, albeit in a devil's advocate style, whether he thought it was an incident at the time because in his heart of hearts he thought the board may have inadvertently struck Student A. Similarly, she was putting it to him that he may have suggested calling in his manager because he actually thought something had gone wrong in his heart of hearts. The claimant on the other hand was explaining he considered it an incident because of how Student A had reacted to what had happened, the risk that Student A could take it further, and what had happened about Student A's EMA. He was making the counter point that if he genuinely thought he had struck Student A, why would he suggest calling in a manager that would draw attention to it. Fundamentally, if these were some of Ms Lewis' considerations then she had to put her analysis to the claimant. Looking at the transcript I am satisfied that the claimant was able to put his own counter analysis back to the panel. Ultimately it was the disciplinary panel's job to weigh up all the evidence before them.

124. Mr Dix also alleges that the disciplinary panel did not give proper consideration to whether the complaint against him by Student A, supported by Student B was vexatious and the evidence he put forward in that regard as to, for example previous run ins with the students. I have already set out above that I am satisfied the panel did take the claimant's points into account. They ultimately rejected his argument and found it likely the boards made contact. The panel's weighing of all the evidence was not outside the reasonable range.

125. It was said that the disciplinary panel had given FG a list of questions in advance that was outside the agreement with the claimant and his UCU representative. I accept the evidence of Ms Lewis on this point that FG only had access to what had been agreed with the UCU she would have access to.

126. The claimant also complains that the disciplinary panel said that they saw no reason to question the findings of FG's investigation or any of the recommendations contained in her report and decided to accept the report and act on the recommendations [350]. I am satisfied however that the panel properly noted where there were any errors in FG's report (for example the misattribution of a statement to the claimant) and they did ultimately consider and assess for themselves the case before them. This included taking further investigative steps. I find that fundamentally what the disciplinary panel were saying was that they ultimately agreed with FG's overall analysis.

127. The claimant also complains that the disciplinary panel either failed to take into account or did not properly weigh the matters he identifies at paragraph 62 of his witness statement. I do not agree. I consider the panel did have those matters before them and did take them into account. However, the panel ultimately reached conclusions on the issues before them that were within the reasonable range.

128. The claimant says the panel if accepting SA as a truthful witness they should also have accepted SA's statement about CD saying the college would come down on the side of the student. I do not consider it was, however, a material point. What the disciplinary panel was concerned with was their acceptance of SA's account of what happened with the lobbing of the board which was the central allegation; not what CD said or did not say to the claimant when leaving the room. Whether the panel accepted CD said that had no bearing on their decision if they themselves were considering the matter independently, which I am satisfied that they did.

129. The claimant also asserts that if the panel accepted SA as a truthful witness then the panel should have rejected the evidence of the students because of contradictions between SA and the students' accounts. It is said the panel should not have preferred the students' account and did not properly analyse inconsistencies. Again the point is not relevant to the lobbing of the boards rather than the issue of contact. But I do not accept the panel fell into error. As already stated, I accept they did analyse the evidence. There were also consistencies between SA and the students and the conclusions reached by the panel were within the reasonable range.

130. It is said that the panel were not concerned about the changes FG made to her responses when they should have been. I have dealt with FG's investigation report and subsequent interview by the panel above. I do not accept that there were changes that fundamentally and reasonably should have changed the panel's approach to the case. The panel's job was to consider the matter for themselves. I also do not accept that the

panel had to re-do the investigation. They looked into matters that the claimant raised. It is part of a reasonable disciplinary process to do so.

131. The claimant says that he did not get to put his mitigation to the disciplinary panel. It was accepted however that he had been able to do so at appeal stage. I am satisfied that the claimant was given fair opportunity to say what he wanted to at the disciplinary stage. He had also put forward written documents. Ms Lewis raised the claimant's character witnesses with him.

<u>The framing of the allegations/ moving the goalposts?</u>

132. The Acas Code of Practice says that if it is decided there is a disciplinary case to answer, the employee should be notified of this in writing and the notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary hearing. The claimant says that the allegations made against him where not clear and shifted throughout the process. He says that initially FG recast the foster parent's complaint from mistreatment to assault. He says the investigation meeting was unclear as to the scope of the investigation, with FG referring to an allegation Student A had been injured by a board but MDJ then stating it was about whether the board made contact. The claimant says he was led to believe that the allegation he was facing what that the boards made contact. He says that likewise during the disciplinary hearing the scope of the hearing was about whether the boards made contact with Student A and that he could not have sensibly known the case he was being asked to meet was about just usage of the board irrespective of the question of contact. The claimant says that Ms Lewis said herself if the board did not make contact it was a non-issue. He says that at appeal stage Mr Dacey then said that whether the boards made contact was a secondary question to the initial lobbing of the boards and that in relation to the lobbing of the boards it was about the claimant's conscious decision making and thought processes. The claimant says that was a new area of assessment.

133. The investigatory stage is just that: an investigation so that an assessment can be made of whether there is a disciplinary allegation to be met and if so to frame the charges. What matters, as the Acas Code of Practice makes clear, is that once the decision is reached the alleged misconduct in question is sufficiently clear. FG's report sets out the nature of the allegations she was investigating at paragraph 2 [48]. It says:

"*CD received a telephone call on 7th February 2018 from a foster parent alleging that Student A had been subject to something being thrown by Mr Stephen Dix (SD) at him during his class.*

During the course of this investigation, NPTC Group of Colleges will need to consider:

- *Whether or not SD has displayed serious unprofessional, unacceptable or irresponsible conduct particularly towards a student.*

- *Whether or not SD displayed violent, dangerous or intimidatory conduct.*
- *Whether SD acted in a manner that could bring the Group into disrepute.*
- *Whether or not SD has violated the Group's rules, policies or procedures."*

134. At paragraph 5 of her report FG summarised her views which included her assessment it was likely that the board had landed on the head and shoulders of Student A but she could not say whether it was accidental or intentional. She noted that the board was thrown at the student with the intention of waking him up and that it could be reasonably expected it may hit him. In paragraph 6 of her report FG expressed the opinion there was a case to be answered regarding the terms of reference allegations. She referred to her view that the claimant should have been aware that it would be inappropriate to throw any objects in a classroom. She said that the actions were in her belief intimidatory and could be seen as dangerous and it was lucky that Student A had not moved whilst the board was being thrown. She said the actions had potentially brought the college into disrepute. She said she believed the standards of conduct had been violated by the claimant in failing to treat the student with respect, the potential harm to the student and that the behaviour could be construed as threatening or aggressive. She also referred to the throwing of objects in an enclosed space.

135. The invite to the disciplinary hearing [153] simply referred to the investigation undertaken by FG and relisted the same 4 bullet points that had been used throughout.

136. In my judgement it would have been sensible for the disciplinary invite letter to have clearly set out the factual allegation that we being made as well as the bullet points about how, in effect, that alleged conduct was being potentially viewed. I do not, however, consider that the claimant could not reasonably have appreciated the allegations he was being asked to answer at the disciplinary hearing. The allegations he was being asked to answer are those set out in FG's written report. He was aware the allegation related to the throwing of an object at a student, that it was being said it was inappropriate to throw any object in a classroom, and that it was being said his actions could be viewed as intimidatory and dangerous etc. I accept it is likely that the claimant's tendency was to focus on the issue of whether a board or boards had made contact with Student A. This appears to have be borne of the fact the claimant's perspective appears to have been that he considered the lobbing of the board to be pretty much a risk-free action and not a big deal. This may well have led the claimant to think, again from his own perspective, that there was only really a risk to him and his employment if a finding was made that the boards had made contact. If so, however, that was his analysis and that of those around him not that of the respondent. I do not consider that the claimant was misled prior to the disciplinary hearing as to what was being put to him. MDJ's comment in the interview was about making clear there was not allegation that a board had

injured Student A but that it had made contact with the claimant. She was not saying that he was not being investigated from other perspective. As I have said, what was ultimately key was what FG's written report said.

137. I also do not consider that the claimant was misled at the disciplinary hearing by the panel. The disciplinary panel thought the claimant was coming to them saying that there was nothing much wrong with his usage of the boards, as he was saying that he had such a high degree of control over how the boards were used. The claimant then agreed with SA that the boards had been "lobbed." In a sense that did change the direction of the disciplinary panel but only because there was greater clarity as to what the claimant was admitting in relation to the usage of the boards and from the panel's perspective he had made some acknowledgement of the risk that brought/ that it may not have been a good judgement call. In the minds of the disciplinary panel that conduct was serious. They saw and always had seen the potential use of the boards to try to rouse a sleeping student, whether or not they actually made contact, as being potentially inappropriate and reckless conduct of a lecturer. From their perspective once they thought the claimant was making an admission as to the exact usage of the boards, whether the boards actually struck Student A then took on a lesser importance. They saw the usage of the boards in the circumstances as being serious enough. But that was not the disciplinary panel recasting the allegations against the claimant. It was them responding to a development in how the claimant put his case, as they saw it. The allegation was always there.

138. I also do not consider that the claimant was misled by Ms Lewis at the disciplinary hearing as to how serious just the usage of the boards would be viewed. The references to it being a "non-issue" where part of a long discussion between the claimant and Ms Lewis where Ms Lewis was in effect being devil's advocate and pressing the claimant on what he had actually thought at the time and whether he had really initially thought at the time what happened was not serious. She cannot reasonably have been understood to be saying she actually considered it to be a "non-issue." The claimant says that 5 of the key points identified by the panel in their written decision related to whether the boards made contact and therefore that must have really been the central allegation against the claimant. However, the panel's first key point was the fact they understood the claimant to be admitting to the lobbing of the board and that it accorded with SA. If so, the admission would not require further analysis. The ultimate conclusions of what amounted to gross misconduct, largely related to the lobbing of the boards.

139. Turning to the appeal stage, again I do not consider there was a moving of the goalposts of the allegations against the claimant or that the appeal was judged by a different set of criteria. Mr Dacey was picking up the situation from the point of the disciplinary panel's conclusions. He was saying that whether the boards

made contact was a secondary point because that is what had happened in the panel's deliberations. He was exploring with the claimant why the claimant had gone down the path of the action the claimant took in lobbing the boards because he was simply seeking to understand why the claimant would do that and what was going on in the claimant's mind at the time. Given it related to the central reasoning for the panel's first conclusion against the claimant it was a perfectly legitimate avenue to explore, whilst the disciplinary appeal panel assessed for themselves the seriousness of what had happened. It was not an area of enquiry that took the appeal panel outside of the reasonable range or one that was procedurally improper or unfairly ambushed the claimant in some way. Indeed the claimant says Mr Dacey did not probe the topic sufficiently far with him (which in itself is not a point I would agree with the claimant on).

The conduct of the disciplinary appeal hearing

140. The claimant alleges that the appeal panel was not fair-minded. He says that they were not interested in his point that he wanted to show the disciplinary panel were incorrect when they said that the claimant had changed his story. He says that the appeal panel's own rationale then repeated that the claimant had changed his description of his action when using the boards. The claimant says that both the disciplinary panel and the appeal panel alleged that the claimant had first used the word "placed" but in fact that word had been firstly used by FG. The claimant says his appeal was not upheld based on an erroneous belief about what he had said.

141. In my judgement this circles back to a point already addressed above. The issue for the disciplinary panel and the appeal panels ultimately were about the quality of the conduct the claimant was admitting and not fundamentally about choices of descriptors. The disciplinary panel thought the claimant ultimately admitted before then a less controlled action described as a lob, than the original descriptor given connoting more control. The appeal panel said it could be considered that the claimant had changed what he was admitting to, but that ultimately what was important to them in reaching their decision was what actually the claimant was admitting to in lobbing the boards towards the student and the appropriateness of that. I do not agree that the appeal panel's findings were based on an erroneous belief about the claimant changing his story. They were focussing centrally on the quality of the conduct the claimant was admitting to.

142. The claimant also says there was a reticence to accept his and his representative's answers at the appeal hearing or explanations as to why particular aspects of the case were relevant and that they were cut off or Mr Dacey showed a lack of understanding. The claimant sets these out at paragraph 72 of his witness statement and thereafter. I have carefully considered the

appeal hearing transcript. In my judgement what the appeal panel were doing were trying to understand the relevance of the points that the claimant and his representative were making. They were proactively exploring that with them. The appeal panel ultimately concluded that much of it was of tangential relevance because the claimant had admitted lobbing the boards in a particular way, and like the disciplinary panel they saw that as being a critical and serious admission. The appeal panel however let the claimant and his representative put their points to them. They considered them but they ultimately focussed on the conduct of the claimant in lobbing the boards and whether there was sufficient mitigation for that. The disciplinary panel's approach was within the reasonable range. I do not consider that their focussing ultimately on what they saw as the key elements showed a lack of fairmindedness, or a lack of a reasonable investigation or an unfair procedure. They were trying to strike a balance of ensuring they explored with the claimant what was troubling them, whilst letting him also have the opportunity to say what he wanted to say.

143. It is said that the appeal panel did not reinterview witnesses when they had said they would look into it. I accept the appeal panel decided not to do so because they considered it was not necessary once they had reached their views relating to the claimant's admission of lobbing the board. I find such a decision was within the reasonable range.

Disparate treatment

144. The claimant says that he was treated disproportionately to how a colleague was treated. He says that during his suspension he was told Student A had made an allegation about another member of the engineering department, CH, when the member of staff touched Student A's hood to alert him to its flammable properties. He says this led to a complaint from social services but that his colleague was not subject to even an initial investigation against the staff member concerned. He states that instead a decision was made to remove Student A from the engineering course and meetings were arranged, including the lecturer, to discuss the situation with social services. He says the social worker commented that Student A was having thoughts of harming people in the workshop and was hyper-sensitive and that ultimately a decision was made to exclude Student A from the college with a need to undertake a fitness to study process. He raised the point at appeal stage. I return to this point when looking at sanction below. However, in terms of procedural fairness, the claimant's representative told the appeal panel that its relevance was in terms of access to transition data. The panel went on to look at the transition data point. I therefore do not consider there was a failure to look at the issue in the way actually presented at the appeal hearing.

Independence of the appeal process

145. The claimant complains there was a lack of independence in the appeal process because Mr Dacey and Ms Lewis are brother and sister-in-law. The Acas Code says that an appeal should be dealt with impartially. The respondent says that Mr Dacey was able to look at the appeal objectively and that this is demonstrated by the fact he has overturned Ms Lewis' decisions in the past. It is said that it is also relevant that both panels are made up of two individuals and that the claimant did not object to Mr Dacey's appointment at the time and nor have the unions raised an issue.

146. It was said in Adeshina v St George's University Hospitals NHS Foundation Trust [2015] IRLR 707 [3]that the strict rules regarding apparent bias applicable to judicial processes are not applicable to internal disciplinary processes although actual bias giving rise to a breach of natural justice may have fundamental relevance to the question of fairness. The Employment Appeal Tribunal said:

"whether there is an appearance of bias may be a relevant factor in an unfair dismissal case; it will be something that will go into the mix for the Employment Tribunal to consider as part of fairness as a whole, as will the question whether the panel did in fact carry out the job before it fairly and properly, … the only thing that really matters is whether the disciplinary tribunal acted fairly and justly…"

147. I do not consider it was established before me that the appeal panel exercised actual bias through a loyalty to Ms Lewis or a desire not to overturn her. I am ultimately satisfied, having looked at and heard the evidence I did, that they did genuinely consider the matter for themselves. However, I do understand why the claimant was concerned. He had been at an appeal hearing where he had spent a considerable amount of time discussing and challenging what Ms Lewis had said at the disciplinary hearing with Mr Dacey, her brother-in-law. He then received a short letter telling him there was no substantive or procedural grounds for overturning the decision but otherwise giving no rationale. It is understandable he may think, in that context, he did not get an impartial hearing before an impartial body.

148. In my judgement a reasonable employer in the respondent's situation would not have had a system in place whereby a brother-in-law and sister-in-law would sit in a case at disciplinary stage and appeal stage. A fair minded, informed observer would in my judgement consider, when faced with that proposed structure, that there was a risk of an appearance of bias or potential lack of impartiality because of the familial relationship. A reasonable employer in this employer's situation would wish to avoid the risk of

[3] The case went on appeal to the Court of Appeal but not on this point

appearance of bias/impartiality that such an arrangement could bring. This is a large employer and I consider that they should have been able to make arrangements, if considered with sufficient foresight at the start, such that they would have potential disciplinary panel and appeal panel lined up that did not have such a familial arrangement. This is an educational establishment not a small family run business. I also weigh into the equation this was a case where from the outset the claimant was facing allegations of gross misconduct with the potential for dismissal and ensuing professional consequences given the nature of the allegation made. Where the consequences are so serious the importance of having a robust and impartial, and seen to be impartial, appeal structure is of fundamental importance. It was not said to me in evidence that it was not possible to make an alternative arrangement. That both panels were made up of two individuals does not change my assessment. Ms Lewis and Mr Dacey were in effect heading up the respective panels and led them and their decision making. This is a procedural defect that goes into the mix when assessing overall fairness.

Sanction of Dismissal

149. I have got no real evidence before me as to what the disciplinary panel or appeal panel knew or should reasonably have known about CH's situation. Ms Lewis was not cross examined about it. The point was put to Mr Dacey at the appeal hearing in a different way i.e., relating to access to transitions data. He was not cross examined about CH.

150. In any event, the written summary that CH gave the claimant by way of text message was that he considered his situation to be a different scenario to the claimant's as there was no official complaint made, just an enquiry as to why Student A was upset after CH had told him off. He says there was no formal investigation because there was nothing to look into because there was no complaint. The claimant says that CH has changed his story and had been warned with disciplinary action if he discussed college business. The respondent denies this. CH later told MDJ that he had not told anyone that he had been told by HR that if he gave evidence he would be disciplined. The difficulty is I did not hear from CH. On what is before me I cannot conclude on the balance of probabilities that this was a truly comparable situation. CH appears to be clearly stating it was not.

151. It was not outside the range of reasonable responses to consider the claimant's conduct as found as amounting to gross misconduct. The respondent's disciplinary policy identifies potential grounds for summary dismissal as including violent, dangerous or intimidating conduct, serious unprofessional, inacceptable or irresponsible conduct particularly towards a member of staff or student and violation of the college's rules, policies or procedures [194]. In my judgement it was reasonable on the part of the respondent to characterise the claimant's actions as gross misconduct. The respondent had concluded that the claimant had made a conscious decision to lob boards towards a sleeping student as an attempt to rouse him and, notwithstanding the boards' lightness that it was a reckless, and potentially dangerous action even if the claimant did not intend for them to actually strike the student. The claimant was a lecturer and the student a

young person in his pastoral responsibility at the time. The claimant knew physical contact with students was not appropriate, as it was a reason he gave for using the boards. Given the claimant's status and responsibilities it was a serious matter and readily could be classed, in the least, as serious unprofessional, unacceptable or irresponsible conduct towards a student and amounting to gross misconduct.

152. I then have to consider whether the sanction of dismissal itself was a reasonable sanction. It is not an automatic consequence of any act of gross misconduct and a fair employer must still consider whether that is the appropriate sanction even once gross misconduct has been established. I am satisfied that the disciplinary panel and the appeal panel did weigh into the equation the points made in the claimant's mitigation: including his long, unblemished service, character references, the use of a lightweight board over a short distance, that the claimant did not intend to strike the student before they concluded dismissal was the appropriate sanction. The disciplinary panel weighed this against the inherent nature of the conduct they had found established, that the claimant was in a position of authority in a respected profession where highest standards of conduct could be, in their view, expected and the potential disrepute his actions could cause. They were troubled, particularly bearing in mind the claimant's length of service, as to his apparent lack of awareness of the seriousness of his actions. Ms Lewis also said to me in evidence they concluded they could not consider lesser sanctions as they did not consider that any amount of training could modify or change the behaviour concerned because it was so serious. Put another way, she was saying she did not consider it a modifiable judgment call by the claimant. They were all legitimate considerations.

153. The claimant says that a lack of clarity over whether the boards actually made contact with Student A should have weighed in favour of a lesser sanction. The point is, however, that the respondent's primary concern lay with the actual lobbing of the boards and the choice to do so. Whether they made contact with the student was a secondary issue. It was the lobbing of the boards towards a sleeping student that was the primary consideration as being serious unprofessional, unacceptable or irresponsible conduct, reckless, and dangerous.

154. The claimant also says that the fact he was not given information or access to information about Student A being a looked after person should have been taken into account. He says he only found out by chance and that he may have chosen to act differently if he had known more. It was a point only made at appeal stage after the disciplinary panel had raised whether the claimant had been given information by the transition team and Ms Lewis had commented as to whether the claimant had checked that the looked after person was ok. It led to investigations being conducted as to whether the claimant had attended training and what access to information he had. Those points remain a factual dispute between the parties that I do not see I need to determine. As it happened the claimant knew the student was a looked after person but still chose to act in the way he did. Furthermore, in my mind, the ultimate analysis by Mr Dacey was a legitimate one

and within the reasonable range. His stance was that he considered it inappropriate to throw an object at *any* student. For the claimant to impliedly suggest he may not make that choice for a looked after or vulnerable student, but would potentially do so for a student the claimant considered more robust, circled back to the point Mr Dacey did not consider that the claimant appreciated the innate seriousness or inappropriateness of his conduct. In turn that favoured the sanction of dismissal.

Overall conclusion on fairness

155. I therefore have to take step back and look at matters in the round (including those of procedural fairness) and assess whether the claimant's dismissal was fair or unfair, having regard to the reason shown by the respondent, and depending on whether in the circumstances (including the size and administrative resources of the respondent) the respondent acted reasonably or not in treating it as sufficient reason for dismissing the claimant. It is to be determined in accordance with equity and the substantial merits of the case. I am particularly mindful of the guidance in Taylor v OCS Group Limited.

156. I have found conduct was a fair reason for dismissal and that the respondent formed a belief in the claimant's misconduct based on reasonable grounds. I have found some defects in the process such as CD's handling and record keeping for the initial investigation, recording keeping for the initial complaint, CD's comment to the claimant and SA, FG's misattribution of a statement in her investigation report, the direction by HR to FG about the claimant's credibility evidence, FG's comment about injuring Student A, to a limited extent the drafting of the disciplinary invite letter, and then the make-up of the disciplinary panel and appeal panel. Much of it was remedied as the process went on and/or given the claimant's admission about lobbing the board diminished in importance. But I have remained particularly troubled about the record keeping of CD's initial investigation meeting with the claimant and SA. As it turned out it was not central to the lobbing allegation but that might not have always been the case and it caused a fracturing of witness evidence that remained polarised and need not have occurred. I have also remained particularly troubled about the constitution of the disciplinary panel and the appeal panel and the ensuing lack of appearance of impartiality it gave rise to. It was unnecessary and I am particularly mindful of the fundamental importance of an impartial appeal in a disciplinary process that is responsible for deciding allegations of gross misconduct within a profession which could have career wide implications. Weighing that with equity and the substantial merits of the case I conclude that due to the procedural imperfections the respondent did unfairly dismiss the claimant. However, I do have to go on and consider what difference those procedural irregularities made under the Polkey assessment.

157. I should add that in my deliberations I have tried to focus upon, as I was invited to do in the claimant's closing submissions, the matters raised in his witness statement and the closing comments themselves. I have strived to deal with the points, but I should add that there was nothing else that was raised within the bundle or evidence before me that

altered my general conclusions in any way. I should also observe that the claimant was also alleging that witnesses he wished to rely upon were put off by alleged pressure from the respondent. The point however, as I understood it, related to witnesses in the Tribunal proceedings not witnesses in the disciplinary proceedings and therefore could not have affected the fairness of the disciplinary process itself. The respondent denies any pressure or wrongdoing and neither CH nor DR ultimately attested to it. I did not consider the allegation as being of any great assistance to which I actually had to decide. However, on the balance of the evidence before me I would be unable to find it established, on the balance of probabilities that any such wrongdoing had occurred.

Just and equitable reduction

158. There are two matters relating to remedy which fell to be dealt with at the liability stage. Firstly, under Section 123 of the Employment Rights Act 1996: "*the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."*

159. It has been established since Polkey v AE Dayton Services Ltd [1988] ICR 142 that where an employee has been unfairly dismissed due to procedural failings, the Tribunal may reduce the compensatory award to reflect the likelihood that the employee would have lost their job in any event even if a fair procedure had been followed. There is no need for an all or nothing decision. If the tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his or her employment. Although this inherently involves a degree of speculation, tribunals should not shy away from the exercise. A similar exercise was also required by what was then section 98A(2) (part of the now repealed statutory dispute resolution procedures), and the guidance given by the Employment Appeal Tribunal in paragraph 54 of Software 2000 Limited v Andrews [2007] IRLR 568 remains of assistance (although the burden expressly placed on the employer by section 98A(2) is not to be found in section 123(1).)

160. A deduction can be made both for contributory conduct and *Polkey.* But when assessing those contributions the fact that a contribution has already been made or will be made under one heading may potentially affect the amount of the deduction to be applied under the other heading.

161. This exercise requires me to assess whether, had there been a fair investigation and procedure, it would have been within the band of reasonable responses to dismiss the claimant for these matters rather that impose a lesser disciplinary punishment and, if so, how likely that outcome was. I have to consider not a hypothetical fair employer, but the actions of the employer before me, on the assumption that the employer would this time

have acted fairly. Could this employer have fairly dismissed and, if so, what were the chances that it would have done so?

162. In my judgement it is inevitable the claimant would have been dismissed in this case even if a fair procedure had been followed. If the claimant is correct, and he always denied to CD that the boards had made contact with Student A, the respondent would still have regarded the lobbing of the boards, as admitted by the claimant, with the same degree of seriousness. The same applies to the other procedural concerns I have found such as the keeping of the initial complaint from the foster parent, FG's misattribution to the claimant of the boards making contact, CD's statement about coming down on the side of the student, FG being told not to take into account by HR the claimant's questioning of the students credibility (albeit corrected at the disciplinary hearing itself) or if the disciplinary hearing invite letter had included the factual allegation from FG's report. None of these fundamentally affected the allegation of the lobbing of the board. The claimant accepted that he lobbed it. I am unable to see any sensible basis on which it could be said that if this respondent had conducted itself procedurally properly there is any prospect of it having made a difference to the panel's conclusions about the seriousness of the claimant's admission and thereafter the decision to dismiss.

163. In terms of the makeup of the appeal panel, I likewise am unable to see any plausible basis on which to conclude there is any realistic prospect that an appeal panel made up of individuals completely independent to those who sat on the disciplinary panel would not have upheld the decision to dismiss the claimant. The claimant was a lecturer and in a position of authority and trust. It is clear the respondent had a known policy that physical contact would not be made between staff and students. Those in the respondent organisation who had some dealing with the allegation had all dealt with it as a serious allegation including CD who had said some words of warning to the claimant, EG who decided to suspend him, FG who decided there was a disciplinary case to answer (even if she ultimately questioned whether it was *serious* unprofessional or unacceptable conduct) and thereafter the disciplinary panel. The claimant had admitted lobbing the board and that it was a conscious decision to do so. The thrust of his appeal was really about trying to convince the panel that the boards had not made contact and therefore that the conduct that had occurred (the lobbing of the boards) in its particular context was not so serious to justify dismissal, and to pursue points in mitigation. In my judgement, in the circumstances, I consider it implausible and unrealistic that a different, wholly independent appeal from within the respondent would have granted the appeal and imposed a lesser sanction. I consider it inevitable the admitted conduct would have been viewed seriously and a decision reached it was not appropriate to continue to employ the claimant.

164. Were there to be a claim for a compensatory award, I would find that there was a 100% chance that if a fair procedure were followed the claimant would still have been dismissed. This would reduce any compensatory award to nil.

Contributory Fault

165. The second remedy related issue before me was whether the claimant was guilty of "contributory fault" justifying a reduction under section 122(2) for the basic award and section 123(6) for the compensatory award.

166. Section 122(2) of the Employment Rights act says:

> *"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."*

167. Section 123(6) supplements section 123(1) to say:

"*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."*

168. For the basic award there is no requirement for a causative relationship between the conduct and the dismissal. The compensatory award does require a causal connection. The employee's conduct need only be a factor in the dismissal; it need not be the direct and sole cause. In Steen v ASP Packaging Ltd [2014] ICR 56 the Employment Appeal Tribunal suggested the following should be assessed:

(a) What is the conduct which is said to give rise to possible contributory fault?

(b) Is that conduct blameworthy? The tribunal has to assess as a matter of fact what the employee actually did or failed to do (not what the employer believed).

(c) Did any such blameworthy conduct cause or contribute to the dismissal to any extent (this is only relevant to the compensatory award)?

(d) If so, to what extent should the award be reduced and to what extent is it just and equitable to reduce it? Here the EAT noted that "*A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so."*

169. In Nelson v BBC No 2 [1980] ICR 110 it was said:

> *"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But is also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should*

not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."

170. When assessing contributory fault, I have to directly assess the claimant's conduct for myself based on the evidence before me and applying the balance of probabilities. On the day in question I consider it likely that the claimant was disappointed and somewhat annoyed with Student A. Student A had seemingly fallen asleep in class in circumstances where the claimant had made an effort to allow the student to stay in class and do writing up when Student A had forgotten his safety boots. He felt Student A had let him down and embarrassed him. The claimant shouted at Student A to wake him up to no avail. The claimant was not prepared to leave Student A there sleeping. The claimant was the other side of the low-level wall to Student A and so thought about what means he could deploy to wake him. The claimant told the appeal panel that he had looked for objects to deploy and rejected use of metal objects. I would observe that in doing so that rejection implies some awareness of some risk of a lobbed object making contact with the student and that even if it all happened rather quickly, it was a considered move on the claimant's part.

171. The claimant saw the lightweight drawing boards and decided to lob one. I do not consider it likely that the claimant had a definite plan and absolute knowledge that the movement was under such control that the board would definitively land on a bag next to the student. If his plan was to make a noise to wake the student, it does not seem obvious to me that a lightweight board landing on bags would inevitably achieve this. Likewise, I do not think the claimant engaged in some kind of forceful throw where he was deliberately trying, for example, to forcibly strike the student on the head or indeed to injure the student in any way. I consider it likely the claimant was acting out of frustration and was somewhat reckless in what he was doing in lobbing the board towards the student in some anticipation that the sense of movement itself may rouse the student, or that there would possibly be some noise in the movement or impact, or that the board in some way may nudge the claimant awake, but likewise in the knowledge that given the board was so light it was unlikely to cause any harm even if it did make contact. The first lob did not achieve its aim and so the claimant lobbed a second board.

172. Whilst I appreciate the claimant's denials, considering what is before me in the round, on the balance of probabilities, for what it is worth, I think it more likely than not that at least one of the boards made contact with Student A in some way, even if by way of a nudge on a rebound.

173. I do consider this action of the lobbing of the boards to be culpable and blameworthy conduct. The claimant was an experienced lecturer. He knew he was in a position of trust and that physical contact with students was not

permitted. Whatever his frustrations he consciously chose to take that particular course of action and indeed do so twice. I do not consider it an appropriate action for a lecturer to take towards any young person. But this was also a looked after child. Even if Student A was complex and even if the claimant did not have access to transitions team data, the claimant knew, even if by chance, that Student A was a looked after child. As Mr Dacey commented to the claimant at the appeal hearing, how could he have known why Student A was asleep or what Student A had for example gone through the night before or how Student A was going to react. How would you know how any student may react to wake and find that their lecturer had been lobbing things towards them to wake them in class? As I have also already stated I do not consider the action was risk free in terms of where the boards would ultimately end up, how the student may react, or indeed what would happen if the student moved or woke up mid manoeuvre, however light the boards were. The claimant was reckless as to these possibilities. It is conduct that if it came to light could well reflect poorly on the respondent in the minds of parents/carers and other stakeholders in the community. I do not consider it likely that parents/carers would consider it an appropriate action for a lecturer to take, to lob an object, however light, towards a young person to wake them in some way even in circumstances where their own child was wrongly asleep in class.

174. I consider that this blameworthy conduct did cause or contribute to the claimant's dismissal. It was the fundamental conduct for which he was dismissed. In terms of mitigating factors, I note the claimant's long, unblemished career. However, I also bear in mind it was action he consciously decided to take. It was not the fault of anyone else, other than it could be said Student A. But in that context dealing with challenging behaviour was part of the claimant's job and there is nothing to say this was out of the order, extreme challenging behaviour. It was not an emergency situation or where the claimant was, for example, in fear of harm to himself or someone else. There were other ways the claimant could have dealt with it. The claimant acknowledged it was the wrong judgement call to make but he also throughout the process sought to minimise the seriousness of his actions, and indeed before me expressed it was not really different to a teacher dropping or lobbing a textbook on to a student's desk when they are just out of reach. I do not accept that analogy. For one, there is no sleeping student, it is not being used as a way to wake them up, and it does not reflect the totality and reality of the evidence. I was left with the impression that the claimant still does not consider that his actions were particularly inappropriate. I do not consider that any difficulties the claimant may have had with accessing transition data was a materially mitigating factor in any way. He knew enough about Student A's circumstances, and he should have known enough not to have engaged in the action of lobbing the boards for any student. As Student A himself observed, it was the claimant's responsibility to be a role model.

175. Looking at it all in the round I would consider it appropriate in the circumstances to reduce the claimant's basic award and any compensatory award by 100%. I have taken into account I have applied the same factor under both Polkey and contributory fault, but I do not consider in the circumstances that the outcome is unjust or inequitable or that the claimant is being inappropriately doubly penalised for the same factors.

176. In conclusion I find the claimant was unfairly dismissed for procedural reasons. I decline to award a basic award on the basis of a 100% deduction for contributory fault. In terms of a compensatory award, the claimant is seeking reinstatement/re-engagement but if there were to be a claim for a financial compensatory award, whether in full or in part, I would apply a 100% deduction on the basis that if a fair procedure had been followed the claimant would still have been dismissed. Alternatively, I would apply a 100% deduction for contributory fault.

177. My conclusions mean that there can be no financial award for the claimant at a future remedy hearing. The claimant needs to consider whether he is maintaining his request for reinstatement/re-engagement bearing in mind the findings in this judgment. If he is doing so, he should notify the Tribunal within 28 days as a remedy hearing will need to be listed to consider that application.

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Employment Judge Harfield
Dated: 17 September 2021

JUDGMENT SENT TO THE PARTIES ON 20 September 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche