Case Number: 3334389/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr A Husbands	v	The University of Buckingham

Heard at: Watford (via CVP) **On**: 9-13 August and (in private) 2 September 2021

Before: Employment Judge Hyams **Members:** Mr M Kaltz, Mr S Woodward

Representation:

For the claimant: In person
For the respondents: Ms G Rezaie, of counsel

UNANIMOUS LIABILITY JUDGMENT

1. The claimant was not dismissed unfairly within the meaning of section 98 of the Employment Rights Act 1996.

2. The claimant was not dismissed unfairly within the meaning of section 103A of that Act.

3. The respondent did not treat the claimant detrimentally for making a protected disclosure within the meaning of section 43A of that Act, contrary to section 47B of that Act.

4. The claim of wrongful dismissal does not succeed and is dismissed.

REASONS

The claims and the issues

1 The claimant was dismissed by the respondent with immediate effect but with pay in lieu of notice by a letter dated 26 June 2018 (of which there was a copy at pages 426-429, i.e. pages 426-429 of the hearing bundle; any reference below to a page is, unless otherwise stated, to a page of that bundle). The letter stated that the claimant's contract of employment was terminated with immediate effect, but since

it was sent by email only on 28 June 2018, the agreed date of the termination of the claimant's contract of employment was the latter date.

2 The claimant's employment with the respondent started on 12 January 2015. Thus, he had sufficient continuous employment to claim unfair dismissal under section 94 of the Employment Rights Act 1996 ("ERA 1996"), and he did so. The claimant also claimed, under section 103A of that Act, that he had been dismissed unfairly because, or principally because, he had made one or more protected disclosures within the meaning of section 43A of that Act.

3 In addition, the claimant claimed that he had been treated detrimentally within the meaning of section 47B of the ERA 1996 by one or more acts "done on the ground that" he had made such a protected disclosure. Those acts were (1) suspending him on 13 February 2017 and (2) subjecting him to the disciplinary proceedings which eventually led to his dismissal. The claimed disclosures were originally five in number, but during the hearing we invited the claimant to amend his claim by the addition of one more claimed protected disclosure, and he took up that invitation. Having heard submissions in opposition to that application, we permitted the claimant to amend his claim in the manner for which we had invited him to seek permission. We did so on the basis that the balance of prejudice test described most clearly by Underhill LJ in *Abercrombie v Aga Rangemaster Ltd* [2014] ICR 209 favoured the claimant. We refer to those six claimed protected disclosures below, in the course of stating our findings of fact.

4 The claimant also claimed that he had been dismissed wrongfully. He accepted that he had received pay in lieu of notice, so his claim was not for notice pay. It was, rather, that the contractual disciplinary procedure had not been followed.

5 In what follows, we first refer to the witnesses from whom we heard oral evidence and the bundles before us. We then state our material findings of fact. We then state the applicable legal tests, after which we state our conclusions on liability.

The evidence before us

6 We heard oral evidence from the claimant on his own behalf and from the following witnesses on the respondent's behalf.

6.1 Professor John Clapham, who was at the material time the Chief Operating Officer of the respondent's Medical School;

6.2 Mr Rory Tapner, who is and was at the material time the Chair of Council of the respondent;

6.3 Ms Misty McCrory, who is, and was at the material time, the respondent's Head of HR; and

6.4 Mr John Spoerry, who (1) was at the material time employed by the respondent as Senior Lecturer and Programme Director for the Business &

Management undergraduate programme in the respondent's Business School and (2) is, and has at all material times been, a Chartered Fellow of the Chartered Institute of Personnel & Development.

7 The respondent put before us a 435-page bundle of documents (excluding its index), and during the hearing the claimant put before us an additional 108-page bundle, including two pages of submissions and cross-references to the rest of the pages of that bundle. Having read those documents to which we were referred and heard that oral evidence, we made the following findings of fact.

The facts

The parties and the claimant's responsibilities in 2015

8 The respondent is a chartered institution of higher education, that is to say, it is conducted by a corporation established by a Royal charter. It therefore has statutes under which it is governed. It is financially self-supporting in that it receives no direct public funding. Professor Clapham described it in this way in paragraph 6 of his witness statement, which was not challenged and in any event we accepted:

> "The University is the oldest of England's five not-for-profit private universities. It was founded as University College of Buckingham in 1973 and elevated to a university in 1983. The University does not receive direct state funding and its finances operate entirely on student fees and endowments."

9 The respondent's Medical School ("the Medical School") was the first new medical school to be established in the United Kingdom for about a century. Professor Clapham described it as "the very first independent not-for-profit Medical School". The Medical School opened its doors to students at the start of 2015, when the first cohort of students was admitted. A significant proportion of the students (40%) were overseas students. The procedure which led to the admission of that cohort took place in 2014. The Medical School used a relatively new technique for determining whom to admit as students: multiple-mini interviews ("MMIs").

10 The claimant is an expert in psychometric tests. He has studied for, and is working towards achieving, a PhD. He was employed at the University of Dundee before starting to work for the respondent. At the University of Dundee, he was responsible for devising and advising on MMIs and their reliability (using that word in a non-technical sense). He was employed by the respondent as a Senior Lecturer with the title "Assessment Lead". His job description was at pages 98-99. The purpose of his job was stated on page 98 in this way:

> "To be responsible for leading the development and delivery of the assessments for the MB ChB course in accordance with the Code of Practice for Assessment. The role will involve management and development of the assessment team; accountability for the day to day [co-ordination] of timely assessment processing across a broad range of assessment methods,

organising assessments, servicing Medical School and University Boards and forward planning in order to deliver an effective and reliable timetabled administration provision."

11 The "key tasks" of the role were stated on page 99 in the following way.

"The Assessment Lead will normally be a scientist qualified to doctoral level with experience of assessment in a medical or related course, and expertise in the design of assessments and their quality control through psychometric analyses.

The key responsibilities of the role are to:

- Ensure that the Medical School Assessment process is fit for purpose and that assessments are valid, reliable, generalisable and fair.
- Ensure that outcomes are assessed at appropriate points during the curriculum.
- To ensure that students receive timely and accurate guidance about assessments, including assessment format, length and range of content, marking schedule, and contribution to overall outcome.
- Ensure training, support and appraisal of examiners and assessors
- Establish and maintain appropriate systems to set standards for assessment to allow decisions on whether students have achieved the curriculum outcomes.
- Work with the Equality Lead to ensure that assessment criteria are consistent with the requirements for competence standards set out in disability discrimination legislation.
- Ensure that students receive appropriate and timely feedback on their progress.
- Maintain awareness of current trends in undergraduate medical education assessment by attendance at conferences and by appropriate training courses."

12 The claimant's line manager (i.e. the person to whom he was stated on page 98 to report) was the "Director of Medical Education", who was Professor Stewart Petersen. However, the claimant's interest in the reliability of the MMIs used in selecting students to be admitted to the Medical School led to him, with Professor Petersen's agreement, or at least acquiescence, attending the Medical School's Selection Group. The way in which that came about was described succinctly and in our judgment (as we accepted them) accurately in the following paragraphs of Professor Clapham's witness statement, which also described (as we say, accurately) the manner in which the Medical School selected persons to be admitted as students.

'**The Medical School's selection tests**

22. The Medical School's admissions process, which was also subject to scrutiny by the GMC, consists of two stages: the first stage is to submit

an application with all supporting documents. If the applicant meets the entry requirements, they are then invited to the second stage, which is a selection event.

23. Selection is not only based on academic performance as judged by exam results, but also on the softer skills around communication, rapport and other such attributes. The selection test used by the Medical School is based on the Multiple Mini Interview ("MMI"), a test developed by the well-established McMaster University Medical School in Canada and used by more than half of the medical schools in the UK. They are widely considered throughout the industry to be the fairest method of selecting students.

Adrian's interest in the Selection Group

24. The Selection Group initially consisted of David McLoughlin (Selection Lead), Suresh Menon (an anaesthetist from Milton Keynes University Hospital, one of the Medical School's partners) and me. We also received operational support from Lilian Watson (Curriculum Manager) and other members of the Medical School, as required.

25. At his own initiative and as a result of his previous interest and experience at Dundee University, Adrian [i.e. the claimant] became involved, on an informal basis, in the Selection Group. One of his former colleagues in Dundee was a pioneer of MMIs in the UK and Adrian seemed very keen to build a relationship between the Selection Group and Dundee University.

26. Adrian expressed some mild concerns about the use of MMIs early into his tenure because he considered them to be unreliable. He did, however, appear to understand and accept that this could not be changed at that time but would be reviewed, at the expected review point, in 2016.

27. In or around July 2015, the GMC conducted a visit of the Medical School and produced a report which found that it was meeting all of its regulatory obligations, including those in relation to selection. The GMC considered the Medical School's approach to be consistent with its own standards and was positive about the decision we had taken to 'blueprint' our MMI stations to attributes laid out in the GMC's "Good Medical Practice" publication.'

The situation which led to the claimant's suspension and then his dismissal

13 While the claimant's line manager until the events to which we refer below was Professor Petersen, the claimant told us that he regarded Professor Clapham as also being his line manager. Professor Clapham's evidence (which we accepted) in paragraph 28 of his witness statement was that there was "a series of instances throughout 2016 which resulted in a breakdown in the relationship between [the

claimant] and Professor Petersen". Professor Clapham's witness statement contained the following further paragraphs describing the relevant events of the first part of 2016, which in one respect he corrected in oral evidence. We accepted those paragraphs of his witness statement with that correction, which was that the 2016 selection events were altered in more than minor ways: they were altered by two of the 10 tests being substituted (as recorded in the email at pages 115-116 which Professor Clapham sent to the claimant on 26 January 2017, which we have set out in paragraph 39 below). The paragraphs in question were these:

'35. The MMIs at the Medical School take the form of 10 different tests, known as 'stations'. Adrian was concerned that some stations had poorer reliability than he felt desirable. He pressed for a major review at a time the Selection Group felt was too late for the 2016 selection events, which went ahead with only minor changes [as we say above, this aspect of this paragraph was corrected by Professor Clapham orally]. Adrian did not agree with that decision and appeared to attribute it to personal animosity of David McLoughlin, Selection Lead. This was surprising and again came out of the blue, however, I subsequently became of the opinion that it was because Adrian considered that he should have been Selection Lead.

36. On 18 February 2016, Adrian withdrew himself as a member of the selection group, which he said was in protest at the Medical School's decision to use MMIs as part of its selection process. Adrian was becoming prone to elaborate and prolix arguments and this email, at pages 140 to 143 of the Bundle, shows the hubristic and abrasive style of communication he frequently adopted from this point, in which Adrian began to question the competency of his colleagues and contemporaries. This resulted in some informal complaints being hinted at by other members of the department:

(a) "*In essence I have done a significant amount of work in selection, well above and beyond my call of duty as Assessment Lead. Apart from John Clapham, who has thanked me for my work, and who I thoroughly enjoy working with, I am unable to recall other signs of gratitude. Please do not try to debate this point... It's meaningless at this point.*"

(b) "*I commend the efforts of John, who I have worked well with throughout this process, and I believe he has a genuine interest in ensuring fair selection. I believe he has been let down by the rest of the selection group. To be honest, up until this point I thought I had a reasonably good working relationship with most individuals*."

(c) "*It therefore saddens me (mainly due to my excellent working relationship with John) to request my name is removed from membership of the selection group. I do not want my name to be associated with this kind of process, especially on formal reports that*

go to any external body. I also prefer not to attend any further selection events, and I believe I have the appropriate justifications."

38. As evidenced in the above quotes, despite his confrontational approach and tendency to take his responsibilities beyond those of his role, Adrian and I continued to enjoy a positive working relationship. In or around February or March 2016, Professor Petersen and I had a discussion with Adrian about his challenges to the selection process and the issue was temporarily resolved.

Appraisal process

39. In February 2016, Adrian raised a number of concerns with Professor Petersen about the appraisal process. While I was not directly involved in this, I recall Professor Petersen becoming frustrated with Adrian's inability to show some flexibility towards introducing a new appraisal process for his new role in the new Medical School. Adrian disputed the purpose and form of the appraisal process, despite the fact that it was approved by the Medical School and the GMC. This pointed towards an unreasonableness on Adrian's part and inability to accept different methods of doing things. I recall Professor Petersen and I considered this to be rather strange behaviour from someone who, at the time, had only been at the University for just over 12 months.'

14 Those were not the only relevant events: Professor Clapham described a number of others in paragraphs 40-50 of his witness statement. We accepted those paragraphs. While they described what were best regarded as background events, the paragraphs were relevant in that they showed (and we found as a fact) that Professor Clapham was worried that the claimant was something of what we will call a loose cannon, i.e. in this context someone who was willing to speak his mind in situations in which it could be detrimental to the interests of his employer, the respondent, to do so. Paragraphs 40-50 of Professor Clapham's witness statement also showed that the claimant and Professor Petersen had different views about the purpose of assessments of medical students, i.e. those who had been admitted to, and were studying at, medical schools. We saw that Professor Petersen had written to the claimant in the email at pages 158-161 of 26 September 2016 (at page 159):

"I need to define the relevant part of the vision and my red lines [of principle that if crossed violate the vision] as they apply to your arguments. You will then see what can happen and more significantly what cannot happen if I am to remain here.

The principal part of the vision for Buckingham that applies here is an absolute conviction that the quality of the education we deliver must always take

precedence over the convenience of the task for us. We do what is right to produce good doctors, not what is most easy or convenient for us.

Translating that to assessment is where we can, and must in my view be different. So many assessment schemes operate first to have a narrow definition of what assessment is for, and second to utilise systems which are convenient rather than truly effective. Following that practice takes us on a slope to the lowest common denominator that I saw in so many places when I led a major part of the GMC review of assessment across the sector.

My first red line, therefore, is that at all stages up to (and actually possibly including) the final examinations the principal purpose of assessment is education, not measurement. It is necessary to identify as well as is feasible those few students who should not progress, but that is not the vast majority, and for them the educational impact is what matters.

Put in assessment speak the educational impact of any assessment should have the highest weight in the overall utility equation, with the 'feasibility' not ignored, but having the lowest weight. Put another way, the construct that should be tested is the capacity to think as a doctor because that is what we want our graduates to do.

That is the driver to most of the issues you raise."

<u>The claimant's stance in regard to his role at the Medical School in the final quarter of 2016</u>

15 Professor Clapham's witness statement continued:

'51. In or around early October 2016, Adrian arranged a meeting with some other members of the Assessment Group in advance of the Away Day [which had previously been arranged by the claimant himself for the purpose of "an assessment review"]. Following this meeting, for reasons that remain unknown (as neither I nor Professor Petersen were in attendance), Adrian announced in an email of 10 October 2016 that he no longer wanted to deal with the undergraduate assessments, writing "*It is possible that [the Medical School] wanted – deep down – to recruit the post of Assessment Follower... I would like to temporarily suspend all assessment-related meetings that I have been assigned to chair. Please feel free to conduct them in my absence*" (pages 164 to 165 of the Bundle).

52. I strongly believe that the concerns raised by Adrian around the assessments used by the Medical School were never protected disclosures or tantamount to him 'blowing the whistle'. The assessments used were being frequently reviewed and, ultimately, approved by

regulating authorities. As I have explained above, the GMC had seen everything the Medical School did and had observed the selection and assessment events, along with the content of each station and test. Contrary to Adrian's alleged disclosures, the Medical School was commended by the UK's principal medical regulatory body for its practices.

...

54. Adrian followed this up with a further email on 19 October 2016, stating [and while Professor Clapham set out some of that email in his witness statement, we set it all out in the following paragraph below].

55. Adrian did not carry out any further functions on behalf of the Assessment Group from this point.

56. It is hard to overstate how disappointed Professor Petersen and I were to receive these emails from Adrian. At the time of Adrian sending them, the Medical School was compiling papers in preparation for the winter exam period, which is a critical time of the assessment year. To compound matters, this would be the first winter exam period with two cohorts: the 2015 and 2016 intake of students. Just 8 weeks before the exams sessions would begin, he had decided off his own back that he was going to let us down.

57. As set out in the job description at pages 98 to 99 of the Bundle, one of the key aspects of his role was "*accountability for the day to day coordination of timely assessment processing ... and forward planning in order to deliver an effective and reliable timetabled administration provision*" (page 98). Despite this, Adrian had unilaterally declared he was no longer prepared to carry out this role. He had not resigned, merely suggested other responsibilities he would like to do instead of those for which he had been recruited.'

16 We accepted paragraphs 51, 52, 55 and 56 of that passage, with the reservation that the email from the claimant of 10 October 2019 to which Professor Clapham referred in paragraph 51 spoke for itself, and we refer further to it below. The email from the claimant of 19 October 2016 to which Professor Clapham referred in paragraph 54 of his witness statement was not quite to the effect that Professor Clapham asserted in paragraph 57 of that statement. The email was at page 165. It was in these terms, and although it was addressed to "all", the claimant said that he had in fact sent it only to Professors Petersen and Clapham:

'Dear all,

Further to a [previous] email I would like to explain why I no longer desire to lead the delivery of the undergraduate assessments in the manner in which it was previously done. The GMC standard 5.8 states:

> "Assessments must be carried out by someone with appropriate expertise in the area being assessed, and who has been appropriately selected, supported and appraised. They are responsible for honestly and effectively assessing the medical student's performance and being able to justify their decision."

I am currently unable to justify assessment decisions. I have received no evidence to suggest the assessment system in its current format is defensible, despite multiple requests. Furthermore, I think some practices are unfair to students, such as:

- No full criterion referencing for either written or OSCEs
- Arbitrary thresholds of Excellent, Satisfactory, Borderline and Unsatisfactory
- A non-modular resit system
- Combining written and OSCE scores for QE results

I am also concerned with the lack of resources to support such a complex assessment system. It is difficult for me to proceed as per the current interpretation of my role without evidence-based justifications for our assessment processes. For this reason I prefer to evolve my participation in assessments-related activities at UBMS.

I suspect this might be a mutually beneficial opportunity. For example, I am willing [to] explore:

- Managing negotiations with Milton Keynes Trust re Phase 2 assessments on a more strategic level.
- Further developing my role within selection.
- Leading in design and delivery of postgraduate assessments, namely the masters and doctorate.

In the meantime I am also willing to facilitate the operation of undergraduate pass mark setting by, for example, sourcing an external consultant. This consultant can preside over exam board decisions. I suspect, given the potential reallocation of my time, this solution is likely to be cost-effective. This is just an idea and can be discussed further.

Your thoughts would be appreciated.

Best wishes,

Adrian"

17 While that email was a very unusual one, if it was read literally, it did not state in terms that the claimant was refusing to do his job. When cross-examined on it, the claimant said that he had chosen every word very carefully and that he was not saying that he was refusing to do his job.

18 Professor Petersen responded to that email in the one dated 20 October 2016 at the top of page 166. On the same page, there was the start of an email of 24 October 2016 from the claimant to "all", which included references to

18.1 "Ego-interference",

18.2 "Process-driven culture and an illusion of progress",

18.3 "Potential for insular, uncompetitive practice", and

18.4 "Potential GMC corruption".

19 Clearly, the claimant was not content with his workplace.

20 On 28 October 2016, Professor Clapham and Professor Petersen sent the email at pages 167-168, the first part of which was in these terms:

"Dear Adrian

Following your email, we have now had the opportunity to discuss your position and to consult with the Deputy Vice Chancellor.

We all agree that there is merit in some of the proposals you make about reallocating your responsibilities so we are writing to confirm your position from the 1st November 2016. This, being based on your own written suggestions, is not negotiable at this stage.

First, from that date your immediate line manager will become Professor John Clapham, who will be responsible for your management and appraisal in your new roles.

Second, you will assume responsibility as principal assessment advisor to the new postgraduate medical programme(s) being developed and will help to ensure that the assessments within those programme(s) meet appropriate standards.

Third, you will continue to work with the selection team for the medical school to improve the selection processes."

21 The claimant then replied on 31 October 2016 (page 168):

> "Dear John and Stewart,
>
> Thank you for your letter dated 28 October 2016. This proposal sounds appealing.
>
> However, it is unusual for an employer to attempt to change the terms and conditions of employment without written consent from an employee.
>
> Please note that I have not consented to any change of my contractual terms and conditions. I will therefore continue negotiations. I will also investigate the VC's perspective, personally.
>
> A role description would be a useful starting point, even if incomplete. I prefer written communication at this stage. We can perhaps conclude with a formal discussion or any other formalities which are customary under these circumstances.
>
> Best wishes,
> Adrian"

22 Professor Clapham responded on the same day (on the same page):

> "Dear Adrian
>
> We were simply responding positively to your own suggestion to draw back from the essential elements of the job you were employed to do. We thought we were being accommodating, what were you expecting?
>
> But do feel free to talk to the VC.
>
> Regards
> John"

23 Shortly afterwards, the claimant responded (at pages 168-169):

> "Dear John,
>
> Apologies for any misunderstanding then. Sometimes it's difficult to read between the tea leaves. And I'm very keen on the postgrad work.
>
> So I will trust everything was sent with good intentions, which is what I was hoping. Based on my feeling now, I don't think it will be necessary to talk to

the deputy VC. I'm sure we can work things through, as I'm pleased with the direction.

In the meantime could you send me a few points on how you think the role description would shape up? Doesn't have to be too extensive. Just something we can start with and evolve.

Best wishes,
Adrian"

24 There was a conflict of evidence about whether or not there was a discussion between Professor Clapham and the claimant about the situation. The claimant said that there was not. Professor Clapham said (in paragraph 63 of his witness statement) that there was and that the claimant had been "excited" about this "proposal to change his role". He then said:

> "We had a very positive conversation in which [the claimant] agreed immediately to take the position."

25 We came to the conclusion on the balance of probabilities that Professor Clapham's memory on this issue was faulty and that the claimant's was accurate. That is because of the terms of the emails which we have referred to and set out in the preceding paragraphs above, together with the following paragraph of Professor Clapham's witness statement, which was much more supportive of the conclusion that he and Professor Petersen decided to tell the claimant in response to his (the claimant's) unwillingness to continue to do his job (for that is what it was, albeit that it was not an outright refusal) that he, the claimant, had to accept the new role that was being offered:

> "58. I thought this was highly unprofessional behaviour by Adrian. He should have fulfilled his contractual obligations until after the exam diet was completed, moderated and results released. It would have been entirely appropriate for us to initiate disciplinary action against Adrian for this and we considered doing so at the time. However, as I have explained, this occurred at a critical moment in the assessment year and we simply did not have the time and resources to [do] anything other than appease Adrian and not invite further outbursts."

26 What we did accept was the evidence in the next paragraph of Professor Clapham's witness statement (i.e., paragraph 59), which was that given what he and Professor Petersen saw as the claimant's "decision not to perform these functions of the role",

(1) "the Assessment Group was quickly reorganised to be able to perform without an Assessment Lead function, with each Deputy Assessment Lead working

incredibly hard and long hours throughout November 2016, with other academic staff assisting where possible through this period."

(2) "The winter 2016 exams ran well in thanks to their supreme efforts." And

(3) "The analysis for the exams was sent to Professor Petersen after Adrian had confirmed he wanted nothing to do with them".

Issues relating to the UKCAT

27 The following period was plainly one in which the claimant in practice did not do the work that he was principally employed to do, but maintained the stance that he had not refused to do it, and was in some sort of limbo. That might explain why (but not justify the fact that) the claimant engaged in correspondence with the Chief Executive of the organisation called the United Kingdom Clinical Aptitude Test ("UKCAT"), Ms Rachel Greatrix, during January 2017, at the end of which the claimant wrote and at 08:26 on 24 January 2017 sent the email to her set out on page 176. That email was the first of the claimant's claimed public interest disclosures within the meaning of section 43A of the ERA 1996. The claimant's evidence (which we accepted) was that the UKCAT is in effect a single-purpose company whose purposes are exclusively charitable, and that he was a member of the UKCAT's board until the end of 2016. The purpose of the UKCAT company was to provide and administer a selection test for entry to medical schools in the United Kingdom. One of the aims of the company was to promote more diverse access to the medical profession. The claimant's email sent at 08:26 on 24 January 2017 needed to be read against the background of the one to which it replied (dated 23 January 2017, which we have set out below) and the three which preceded that one. All of those emails were on pages 175-176. The emails preceding Ms Greatrix's email of 23 January 2017 were (1) one dated 18 January 2017 from the claimant to Ms Greatrix, (2) one from her in reply dated 19 January 2017 and (3) the claimant's response to Ms Greatrix of the same date. In his email of 18 January 2017, which was at the top of page 175, the claimant wrote: "Currently our ratio of applicants: interviews: places doesn't support the use of the UKCAT as an academic barrier." In reply, Ms Greatrex wrote that "Membership of UKCAT does require institutions to use the test and as such I think we have no option but to discontinue Buckingham's membership of the organisation." The claimant responded by asking for (1) a copy of the signed contract between UKCAT and the respondent and (2) an explanation of "why Buckingham's membership has been revoked or suspended with reference to this contract". As we say above, Ms Greatrix responded to that email on 23 January 2017 and the claimant's response was the email sent at 08:26 on 24 January 2017. The latter two emails were as follows.

"**23rd January 2017 14:16**

Adrian

The UKCAT agreement with Consortium Members is attached. We note at 1.4 'If Medical and Dental Schools not for the time being signatories to this agreement wish to make use of the UKCAT, they will enter the Consortium at the discretion of its founder members, on terms set by the consortium and on payment of charges set by the consortium.'

Admission to the Consortium has always been on the basis that members use the test in their selection processes. Other Universities that have ceased to use the test have left the Consortium. Whilst Buckingham's position is slightly different (in that you have never operationalised usage of the test) your admission was on the basis that you would use the test. I have an email in which you state you would use the test for the 2017 intake.

We understand the issues Buckingham would have in operationalising using the UKCAT and I would hope that at some point in the future we could welcome you back to the Consortium. In the meantime as I have suggested below we are happy to continue to invite you to meetings of the Consortium.

Best wishes.
Rachel

24th January 2017 08:26

HI Rachel,
The quoted passage pertains to entry into the consortium. It does not apply to Buckingham in this case as we are already members, and therefore cannot be applied retrospectively.

We may have mentioned 2017 as the intended first year of UKCAT use. However, as you are aware, the Mathers et al (2016) longitudinal study concluded that UKCAT's ability to widen access 'remains unproven'. UKCAT has not issued formal criticisms of this study's findings or methodology.

Evidence therefore suggests that UKCAT is operating contrary to 3.6 of our mutual agreement 'To ensure that UKCAT delivers value for money'. It is possible that UBMS and other members can opt to voluntarily withdraw from the consortium and can seek to recover its membership fee, as per Supply of Goods and Services Act (1982).

At this delicate stage in UBMS's history, there are clear dangers associated with using admissions tests which have not demonstrated their merit. Our contract does not restrict UBMS in this regard. UBMS reserves the right to decide when to use the test, or apply a zero weighting to the use of its scores, until the appropriate time when it is assumed the UKCAT will fulfil its contractual obligations.

> Just to be clear, please note that Buckingham is therefore still part of the UKCAT membership. We may decide to revise our position at the appropriate time. UBMS welcomes the opportunity to discuss this issue with the UKCAT Board or fellow consortium members.
>
> Best wishes,
> Adrian"

28 The claimant did not consult with any member of the staff of the respondent before sending that email of 24 January 2017. He also did not copy it to any member of the respondent's staff. Professor Clapham was made aware of it on that day "second hand", as he put it in oral evidence. In his witness statement he said (in paragraph 72, which we accepted) that he understood that "someone on the UKCAT Board" had informed Professor Petersen about the email on that day. At the start of that paragraph of his witness statement, Professor Clapham described the email as "extremely inflammatory". We agreed. He said in oral evidence that he "was mortified by this and about [the claimant] doing this without discussing it with anyone else". We accepted that he was so mortified. Professor Clapham then at 19:40 on that day, 24 January 2017, sent the email at the bottom of page 176, which was in these terms:

> "Dear Rachel
>
> I am seriously concerned about the correspondence between you and Adrian Husbands and the tone that emerged.
>
> I want to reassure you that his views are not shared nor endorsed by the University and are entirely his. I have told him this and will speak to him tomorrow and inform him that he cannot any longer represent the University of Buckingham on UKCAT.
>
> Happy to speak to you if you feel it is necessary.
>
> Regards
> John"

29 Before the claimant sent his email to Ms Greatrex of 24 January 2017 that we have set out in paragraph 27 above, Professor Clapham and Professor Petersen had been (as Professor Clapham put it in paragraph 69 of his witness statement, which we accepted) "unsure of using the UKCAT assessment for student selection at the Medical School", although they "were interested in the Situational Judgement Tests [UKCAT] were developing."

30 Even though the claimant had not said that he was not going to do work in regard to the selection process for admission to the Medical School, the claimant did not

attend the meeting of 25 January 2017 about which Professor Clapham wrote to him on that day, in the email at page 118, which stated the significant changes agreed on that day to be made to the admissions selection procedure. As a result of making those changes, after 25 January 2017, the Medical School's selection procedure had been changed in two major ways: those to which we refer in the paragraph 13 above and those which were recorded in the email at page 118. In the final sentence of the email, Professor Clapham wrote this:

> "On another note, I have withdrawn our formal involvement with UKCAT and we will no longer be part of the consortium or board."

31 Professor Clapham explained that withdrawal in paragraph 77 of his witness statement, which we accepted, in these terms:

> "The reason for the withdrawal was simply because of Ms Greatrix's confirmation in her email to Adrian that membership of the Consortium required institutions to use the test. At the time, Professor Petersen and I were of the view that A-levels and degree results served the same purpose."

32 The claimant's responded on the following day (26 January 2017) to Professor Clapham's email at page 118; his response was at pages 116–117. It was sent at 09:25 and was in these terms (with emphasis by underlining added by us):

> "Hi John,
>
> I'm not sure this is going to work.
>
> If I understand correctly, 2 of the 10 Dundee stations were selected, plus Katherine's station, the data and numeracy station. It appears the bulk of the stations will be comprised of previous stations.
>
> The stats suggested serious problems with the MMIs. Something fundamental was wrong over three years. Objective criteria on testing standards suggested the UBMS MMIs were systematically unfair to candidates. I've mentioned before that including data and numeracy in an MMI process (1) goes against MMI content methodology of an assessment of personal qualities and (2) goes against testing standards with regards to construct validity. I demonstrated this with the stats a while ago and have spoken about this at length.
>
> <u>With regards to UKCAT membership, this is regrettable. The situation with the UBMS MMIs is actually more risky to the institution than the UKCAT situation.</u> The UBMS MMIs were knowingly allowed to persist at such a low standard despite the available expertise.

There are established criteria for these kinds of assessments. The criteria are very clear, and meeting them should be simple. I think the selection group needs to ask: Are we making things difficult for ourselves? If so, why

Decisions made yesterday suggest the selection group is not adequately qualified to make the decisions they are making. As things stand, I will not be able to support the 2017 UBMS selection as a professional in this industry. March is some time away, so I appreciate that might change.

Bw,

A"

33 We pause to say that we noted that the claimant was highly critical to Ms Greatrex about the UKCAT, but that he then wrote to Professor Clapham that the UKCAT test was a lesser evil than the MMIs actually used by the Medical School. That was surprising given

33.1 what the claimant and Professor Clapham said in oral evidence about the efficacy (as measured by the test to which the claimant referred in the second claimed protected disclosure, to which we refer in paragraph 35 below, namely the Cronbachs-alpha test) of the MMIs used by the Medical School, and

33.2 the fact that the Medical School had, as we say in paragraph 30 above, twice made substantial improvements to the MMIs about which the claimant wrote in that second claimed protected disclosure.

34 What both Professor Clapham and the claimant said about the efficacy of the MMIs used by the Medical School is best introduced by the claimant's second claimed public interest disclosure. That was an email sent to a Professor Helen Cameron, of Edinburgh University, who was engaged by the GMC to act as an inspector of the Medical School and who was part of the inspection team of July 2015 to which Professor Clapham referred in paragraph 27 of his witness statement, which we have set out at the end of paragraph 12 above. The email was sent at 06:47 on 13 February 2017. It was at pages 179-180 and was sent to Professor Cameron's Edinburgh University email address. It was not copied to anyone at the GMC or the respondent, although the claimant four minutes later (in the email at the top of page 179) forwarded it to a large number of members of the respondent's staff, including Professor Clapham and Professor Petersen.

35 The email to Professor Cameron of 13 February 2017 was headed "UBMS Selection Query" and was in these terms:

'Dear Helen,

I would like to query the GMC's published conclusion on UBMS selection.

The GMC's verdict of the UBMS selection process under Domain 4 Student Selection (TD74: Valid, reliable and objective selection processes) states "The School is currently meeting this standard.", as found at http://www.gmc-uk.org/educ.ation/26867.asp. I understand the GMC's determination followed a review of the 2015 selection report in addition to on-site observations.

According to the UBMS 2015 selection report: "The internal consistency of MMIs was measured using Cronbachs-α [i.e. alpha] co-efficient of reliability. Analysis of the results from the four MMI events show a Cronbachs-score of 0.57, while this is lower than an ideal co-efficient >0.8 the limited sample size of the data means that this is an acceptable score."

The GMC's conclusion appears to contradict published guidance, GMC guidance indicates that, in high stakes examinations, the GMC "would probably find any components with reliability below 0.80 to be inadequate" (GMC-Holsgrove, 2010). The guidance also states that the GMC expects assessments "to have a reliability coefficient of at least 0.80 (or, more realistically, >0.85)" with small cohorts of 100 candidates.

This is consistent with the GMC's more recent review on medical student selection, which states "If the reliability of a standardized test is above .80, it is said to have very good reliability" (Cleland et al, 2012). At .57, Cronbach's Alpha for UBMS's selection process was well below the GMC's threshold of .80, despite the cohort size of 197 candidates.

Typical thresholds for Cronbach's Alpha are:
α [i.e. alpha] ≥: 0.9 Excellent
0.9 > α ≥ 0.8 Good
0.8 > α ≥ 0.7 Acceptable
0.7 > α ≥ 0.6 Questionable
0.6 > α ≥ 0.5 Poor
0.5 > α Unacceptable
(DeVellis, 2012)

Cronbach's Alpha reliability as indicated in the 2015 UBMS selection report may therefore be described as 'Poor'. As reliability is a precursor to validity, this has potential consequences for how we perceive the process's overall robustness.

I would therefore like the GMC to expand on their conclusions.

Best wishes,

Adrian

Adrian Husbands
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University of Buckingham
Hunter Street
Buckingham
MK181EG
Tel: 01280827539
adrian.husbands@buckingham.ac.uk'

36 The claimant said that the numeracy and verbal reasoning tests that were used in the 2015 selection tests should not have been included in the Cronbachs-alpha test process and that they could have been kept separate. When Employment Judge ("EJ") Hyams asked the claimant what happened if those tests were excluded from the test, the claimant said that the result was at or above 0.6. He said also (and Professor Clapham gave similar evidence) that the new tests introduced into the MMIs in 2016 and 2017 caused the Cronbachs-alpha test result to increase to 0.7 or above.

The claimant's role during January and February 2017

37 In the meantime, i.e. during the period when the events which we describe above were occurring, there were further communications about the claimant's role.

38 On 9 January 2017 the claimant sent the email at pages 122-123 to a number of colleagues, including Professor Clapham and Professor Petersen. It was in these terms:

"Dear all,

Just a quick update, following queries from staff.

I was asked to discontinue my involvement with UBMS undergraduate assessments in October 2016. It was proposed that my time be allocated towards undergraduate selection and postgraduate work within the medical school.

The terms and conditions of my contract have not changed. As such, I am willing to provide assistance to the assessment group if needed. Any such assistance would comply with GMC standards on assessments as well as my professional standards as outlined in the APA Standards for Educational and Psychological Testing.

I wish the assessment group all the best for 2017."

39 In direct response to the claimant's email of 26 January 2017 which we have set out in paragraph 32 above (i.e. the one at pages 116–117), Professor Clapham sent the claimant the email at pages 115–6. That email was sent only 30 minutes after the claimant had sent his email. Professor Clapham's email in reply, sent at 09:55, was as follows:

> "Dear Adrian
>
> If you do not want to engage in the activities for which this university pays your salary nor with your colleagues can you please notify me and HR in an official capacity.
>
> If you do then please be more constructive rather than demeaning people that are highly committed to the success of this institution, often going beyond what is asked of them.
>
> Your own data, communicated to us last year, identified stations that, in your opinion, were dragging down the stats. We have eliminated 2 and combined two, adding in 3 new stations. Had you engaged more fully with your colleagues in a constructive way we wouldn't find ourselves in this unpleasant situation where you seem to make veiled threats if we don't fully comply with you. We always said we wouldn't change all 10 stations at once.
>
> From what I can see, you seem to be constantly undermining us, you did so in assessment and now it seems to me your focus is to repeat this behaviour in selection. This is not healthy for us nor yourself.
> The UKCAT situation could have been a debacle that risked the reputation of the university due to your wholly inappropriate response to Rachel Greatrix.
>
> Pleased [sic] let me know how you want to progress."

40 At 12:04 on the same day, the claimant responded in the email at page 115:

> "Dear John
>
> Thanks for the communication. I will only engage in activities for which this university pays my salary and with my colleagues, where these activities are in line with my professional and ethical obligations.
>
> These obligations can be found in GMC regulations, British Psychological Society's Standards for Occupational Testing as well as the American Psychological Association Testing Standards.
>
> These are objective criteria and I am willing to go through these with you. I have never been asked by previous employers or clients to disregard them. I choose not to do so with UBMS.

'The UKCAT situation could have been a debacle that risked the reputation of the university due to your wholly inappropriate response to Rachel Greatrix.' Please elaborate on this statement with evidence of the stated risk and how my response was inappropriate.

Evidence will show I have attempted to engage professionally, in line with my professional standards to date at UBMS. Where you believe I have not done this, please elaborate.

I am willing to discuss these and other issues with HR or anyone else. I also think we can resolve professional issues without external intervention. This is your choice.

I prefer at this stage to communicate in writing, just so we are clear.

Best wishes
Adrian"

41 On 27 January 2017 the claimant sent the email at page 119. With it, i.e. below it and included with it, was a copy of the claimant's email of 31 October 2016 which we have set out in paragraph 21 above. While the claimant's email of 27 January 2017 at page 119 was addressed to "all", it was, again, sent only to Professors Clapham and Petersen. Under the salutation, the body of the email was this:

"I have decided not to proceed either selection or postgraduate work at this time. Reasons are outlined below.

Evidence shows that selection-related QA work has not received the necessary support. Analysis demonstrated that the UBMS MMI process was severely deficient in a number of key areas, according to internationally defined testing standards. The selection group's recent decisions, as well as my assigned tasks, run contrary to these standards.

Details of postgraduate work remain unclear. I have not received a proposed role description. As three months have passed since 27-01-2016 [sic; that should probably have been a reference to 27 October 2016 and not 27 January 2016], the necessity of this role is questionable.

I will therefore continue my work as Assessment Lead, as per my employment contract. To facilitate this, I am willing to outline objective criteria that underpin the work I do within psychological testing. UBMS will therefore be aware of my professional boundaries.

I look forward to working with everyone at UBMS productively."

42 The claimant then sent the email dated 3 February 2017 at pages 121-122 to (it appeared) the same recipients as the email of 9 January 2017 set out in paragraph 38 above. The body of the email at pages 121-122 was this:

> "I have resumed my focus on undergraduate assessments at UBMS. I aim to deliver assessments with high educational impact and low staff time constraints.
>
> Professional standards are important to my work and the operations of the medical school. We are guided by the GMC's standards for assessments, as well as guidelines from the British Psychological Society and American Psychological Association. My initial work will involve a comparison [of] UBMS's current and previous assessment processes with these testing standards. This review will allow for regulators' changes to guidelines over time.
>
> My involvement in the current exam cycle has been minimal. I therefore intend to resume routine exams work after the QEs. However, I am flexible. Please let me know if you require my expertise for the current exams.
>
> Meanwhile I require an update on exams and their psychometric evaluation. I recommended UBMS obtain the services of an assessment specialist for this exam cycle. Please forward me the contact details for this individual.
>
> I am available most of next week for meetings if anyone would like to chat."

43 Later on on that day, 3 February 2017, Professor Clapham replied (page 121), copying the reply to Professor Petersen and Alistair Alcock (who, we inferred, was a member of the respondent's HR team):

> 'I am afraid that this is not a decision you can take unilaterally.
>
> You opted to walk away from your assessment lead role last year in the run up to the term 3 and 6 exams. You cited a number of reasons including the incompatibility of your "professional and ethical standards" with that of the group.
>
> As a consequence of your action the assessment group had to be reorganised and this is now running smoothly, There is therefore no requirement or need for you to participate in the recent exam diet, exams in the future or any assessment team meetings.'

44 On 7 February 2017, at 19:16, the claimant responded by email, copying it to Professor Petersen and Mr Alcock (page 121):

> "Changing the terms and conditions of my contract is not a decision that you can take unilaterally. I am therefore still Assessment Lead.
>
> If you are unclear on this I suggest you forward all previous correspondence on this matter to HR."

45 Professor Clapham and Professor Petersen had by then compiled, and at 09:54 on the next day, 8 February 2017, sent under cover of the email of that date at page 125b to Mr Alcock with a view to seeking advice about the way forward, a document setting out a series of emails sent by and to the claimant, including those concerning the UKCAT which we have referred to or set out in paragraph 27 above and the ones set out in paragraphs 28, 32 and 38-44 above. Professor Clapham's email to Mr Alcock was in these terms:

> "Dear Alistair
>
> Stewart [Petersen] and I have now completed the compilation of evidence concerning the behaviours of Mr Husbands that have the danger of becoming intolerable to staff and potentially students in the future. We have all original emails and documents if required.
>
> Regards
> John"

46 Professor Clapham followed up that email with the one dated 10 February 2017 at page 125a, which was sent to Mr Alcock and Mrs McCrory. As with the other documents whose contents we have set out in these reasons, its terms were highly material. They were as follows.

> "Dear Alistair
>
> I hope that you and Misty have had an opportunity to read in depth the substantive summary document over the events relating to Adrian, noting that by any ordinary reasonable reading there has been a clear break down in the relationship not only specifically between Medical School staff and Adrian, but more generally between the University and him. It is clear that Adrian has refused, since last November, to perform any task, let alone the key tasks under his job description as Assessment Lead and thus this surely being then a breach of a fundamental term of his contract with us.
>
> I have taken the liberty of speaking at some length with Dinesh and he has kindly volunteered his expertise (as you know he mediates/negotiates in employment matters amongst other things). His view is that whilst Adrian has acted appallingly and is potentially in breach of his contract we as the employer must demonstrate that we have done everything reasonably possible to resolve the dispute that has arisen. I should say that we attempted to do this

in November, as you are aware, without any satisfactory resolution, with him resorting to his misconduct, prior.

Dinesh has suggested that whilst the grievance and disciplinary procedures are clearly open for either party to use, there should perhaps be, to start with, an approach by us to invite Adrian to a meeting to be held by someone quite independent from these matters, permitting that in escalation ultimately matters to be heard by yourself. Dinesh recognises that because he has had sight of the materials and has been brought up to date with the issues it cannot be him but that has not precluded him in giving his advice to us.

May I suggest that you consider appointing an independent, to hold a meeting with Adrian, with a view to recording whether or not he is at all prepared to 'come into line' with the contractual terms he is obligated under and if he is not then for us to formally record why not and then to warn him of the next steps that we are prepared to take. In this way we are demonstrating to any ordinary future adjudicator (if it ever comes to it) that we set about a reasonable course of conduct to so resolve and that it was he and not us that remained intransigent and obstructive.

I very much look forward to your thoughts on this and as time really is of the essence and his misconduct is rather disruptive to the department, particularly being fearful of his next actions/inactions, perhaps you could let me know intentions by no later than say next Thursday. If it's easier do give me a ring to discuss."

Professor Clapham's reaction to being sent the email to Professor Cameron of 13 February 2017 set out in paragraph 35 above

47 The claimant's "next [action]" was to send to Professor Cameron the email of 13 February 2017 set out in paragraph 35 above. When giving oral evidence, Professor Clapham said (and we accepted) that he was "dumbstruck" when he saw the email. He said that sending Professor Cameron a genuine academic query framed in rather different terms from those of the email set out in paragraph 35 above might have been acceptable (and he indicated that it might have been acceptable only if the terms of the query had been discussed with, for example, him and Professor Petersen), but it was not acceptable at all to send the email as it was. That was in part because the GMC had approved the selection methods used by the Medical School so that what the claimant was doing was criticising Professor Cameron and the GMC. In addition, instead of writing to the GMC by using the proper channel for stating a concern, the claimant had targeted a member of the oversight team. That was a team of 8-10 people including two employees of the GMC (who were a quality assurance manager and a member of the administration of the GMC who was given the task of making sure that the inspection ran smoothly). Professor Clapham said also that

47.1 the staff of the Medical School were keen not to upset the GMC as the accreditation process for the Medical School was only half-way through, and

47.2 a lot of staff had worked very hard to achieve the good reports from the GMC which they had by then already received.

48 The claimant's response to those things when they were put to him in cross-examination was to say that he had not wanted to press what he called "the nuclear button" of making a formal complaint to the GMC.

49 The claimant was not given a chance to say that to Professor Clapham before the latter sent the claimant the letter dated 13 February 2017 at pages 181-182. That was sent by email, but the email was not in the bundle before us. The letter started:

> "**Suspension pending disciplinary investigation**
>
> I am writing to confirm that, as of the date of this letter, you have been suspended from work until further notice pending an investigation into allegations of serious misconduct. The allegations which have come to light include (but are not limited to) allegations that you have sent unauthorised and inappropriate emails to external bodies in the name of the University. In light of that, it has been decided that it is appropriate to suspend you immediately. Please note that the University reserves the right to change or add to these allegations as appropriate in the light of its investigation."

50 The letter contained the following two paragraphs:

> "You are required to co-operate in our investigations and may be required to attend the workplace for investigative meetings or disciplinary hearings. However, you are not otherwise required to carry out any of your duties and you should not attend the workplace unless authorised by me to do so. You must not communicate with any of the University's employees, contractors or students, save in connection with the meetings referred to above. However, you are required to be available to answer any work-related queries.
>
> Your email account has been suspended and you no longer have access to our computer network. You should not attempt to correspond with anyone in (or using) the University's name, must not attend any events as a representative of the University or otherwise hold yourself out as a representative of the University during your suspension."

51 The letter concluded in this way:

> "During your period of suspension, we propose to confirm that you are undertaking a period of special leave from the University and (if necessary)

> that no further details can be provided at present. Please ensure that you do not say anything which is inconsistent with this and refer any queries you may receive to me.
>
> If you have any queries about this matter or the terms of your suspension please feel free to contact me."

52 The claimant did not cross-examine Professor Clapham on his reasons for sending the letter, so we (through EJ Hyams) asked Professor Clapham for his reasons for sending it. EJ Hyams' notes of what Professor Clapham said recorded those reasons in this way (with the original text tidied up for present purposes).

(1) "We responded to the fact that [the claimant] had approached a member of the oversight team and did not go through the normal channels which, if he [had a genuine concern] it would have been a reasonable thing to do."

(2) "The Medical School would have faced up to that challenge. Instead [the claimant] targeted a member of the medical school oversight team. We felt that the consequences of that could have been critical and we were worried that he might do something beyond that."

(3) "We had at the time two major qualifying diets, which occur in February and March, and this event could not have happened at a worse time."

(4) "We had the GMC saying that they were happy with what we were doing. As a new medical school, we knew that there was room for improvement and that was acknowledged by the GMC."

53 When we asked what Professor Clapham thought the claimant was hoping to achieve by sending the email, Professor Clapham said this:

> "I thought it was a mischief as we had the email exchange between us on the return to the assessment role. I thought it was a throwing of teddy out of the pram; and it was an unacceptable teddy to throw out."

54 When asked whether it would have been acceptable for the claimant to send the email to Professor Cameron in a different form, i.e. rewritten in some way, Professor Clapham said that if the claimant had come to "us" first, then they (presumably he and Professor Petersen; Professor Clapham referred to a committee, however, so presumably others would have been involved) "would have tightly regulated it so that it did not look as if he was blaming the GMC for something". Professor Clapham also said that "the committee might have said to send it to the GMC via its website", and that the claimant should have written it in a different way. He said that the problem was that the claimant was seen to be trying to challenge the GMC's decision to approve the selection method used by the Medical School for entry to the school at the start of 2015. Professor Clapham

said that the Medical School might have agreed to the claimant writing to Professor Cameron on an academic basis, but then again, it might not have done so because she was "an individual member of the inspection committee".

55 We accepted that evidence of Professor Clapham.

Subsequent events, including the claimant's dismissal

56 On 24 February 2017, Mrs McCrory sent the claimant the letter at page 183, inviting him to an investigation meeting on 2 March 2017, to be conducted by Professor Paul Trayhurn. Professor Trayhurn was not a member of the Medical School staff and had not before then had any contact with the claimant. The claimant responded in the email of 1 March 2017 at page 190, stating in it that he had received the letter of 14 February 2017 only that morning. He nevertheless wrote that he would attend the meeting. He also asked that "all matters to be discussed, including questions and their relevant contextual information, are sent to me well in advance of any meeting."

57 Mrs McCrory did not comply with that request. Her reasons for not complying were stated in paragraph 17 of her witness statement, which we accepted and was as follows.

> "I was a little confused by this email. The purpose of the investigation meeting with Professor Trayhurn was to obtain information and gather evidence about what had or had not happened. While it was possible to establish that certain emails had been sent by Mr Husbands on certain dates, and comment on the content of them, it was important to speak with him to establish the context around them from his perspective and, importantly, why he had sent them. A set of specific questions had not been prepared, because the direction of the meeting would depend on Mr Husbands' reasoning for sending the emails and the approach suggested by Mr Husbands is not the University's normal practice. I therefore wrote to Mr Husbands on 1 March 2017, to explain that we would not be sending him any questions in advance of the meeting and asked that he confirm his attendance (page 191)."

58 The claimant then attended the meeting but after an initial, amicable exchange of pleasantries, said that he was not going to answer any questions and walked out of the meeting. After it, at 12.30pm on 2 March 2017, the claimant sent the email at pages 188-189, at the end of which he asked for these things:

> "(1) A copy of the university's policy related to an employee's inability to participate meaningfully in an investigative meeting due to his previously stated inability to prepare.
>
> (2) My full employment file at the University of Buckingham, as per employment law. This file should contain all details relevant to this

investigation, including but not limited to: (a) the large, visible collection of highlighted documents that PT referred to as records of emails sent from my university email account, (b) the written list of quotations from these emails that PT attempted to discuss (c) notes taken by MMc during this meeting and (4) [sic] any other notes relevant to this investigation as per the overall request for my employment file."

59 The respondent did not send the claimant his "full employment file". The claimant then sent the email dated 8 March 2017 at pages 194-195 to in total 28 employees of the respondent, including Sir Anthony Selden, the respondent's Vice-Chancellor. Professor Clapham, Professor Petersen, Professor Trayhurn, Mrs McCrory and Mr Alcock were also among the 28 addressees. The email at pages 194-195 had six enclosures. It was the third of the claimant's claimed public interest disclosures. It concluded in this way:

"Summary

The current scenario is summarised as follows:

1. The GMC approved and supported UBMS undergraduate selection and assessment practices, which ran contrary to their published requirements.

2. The Assessment Lead [i.e. the writer of the email, namely the claimant] informed UBMS senior management that selection and assessment practices were inconsistent with the GMC's requirements and should be discontinued.

3. UBMS senior management continued to support tests which ran contrary to the GMC's requirements after concerns were formally raised.

4. The Assessment Lead asked the GMC to comment on whether UBMS selection practices were operating contrary to published standards.

5. The Assessment Lead was suspended for 'allegations of serious misconduct' for sending 'unauthorised and inappropriate emails to external bodies in the name of the University'.

UBMS colleagues may wish to accompany me to investigative meetings as per HR's correspondence dated 24 Feb 2017. You have therefore been provided with background information.

However, employees who support other employees in these circumstances can also become targets for reprisals. Therefore, colleagues may understandably decide not to accompany me to investigative meetings due to the potential risks.

Please be aware that I can appropriately represent myself in this matter.

> There is a virtual cycle to transparency and a vicious cycle to obfuscation. I look forward to continuing my role as Assessment Lead, thereby delivering fair and defensible assessments to UBMS students."

60 On 14 March 2017, the claimant then sent to five recipients the email at page 203. The addressees were Mrs McCrory and Professor Trayhurn and the email was copied to the respondent's Vice-Chancellor, Professor Clapham and Professor Petersen. The email was in these terms:

> "I would like to formally raise a whistleblowing concern regarding UBMS selection and assessment practices. This whistleblowing complaint pertains to the actions of Prof John Clapham, Prof Stewart Petersen, as well as members of the UBMS senior management team, also known as the Curriculum Executive.
>
> As per the university's Whistleblowing policy, the grounds for this are stated below:
>
> a) failure to comply with any legal obligation or regulatory requirements (e.g. breaching the health and safety legislation)
>
> UBMS staff continued to engage in assessment practices despite being made aware that these practices were contrary to the GMC's standards.
> b) negligence
>
> This is related to failure to exercise the appropriate and or ethical ruled care expected to be exercised as individuals responsible for implementing assessments. UBMS senior management are expected to ensure medical students are selected and assessed appropriately, in the interest of fairness to students and patient safety.
>
> c) conduct likely to damage the University's reputation;
>
> UBMS senior staff consciously chose not to follow the GMC's regulations despite the formal advice of the Assessment Lead.
>
> I note the UoB whistleblowlng policy states 'Staff must not threaten or retaliate against whistleblowers in any way. Anyone involved in such conduct will be subject to disciplinary action'."

61 That email was the claimant's sixth disclosure, i.e. the one for which we gave him permission to amend his claim during the course of the hearing.

62 Professor Trayhurn invited the claimant to another meeting to discuss the "inappropriate emails" to which Professor Clapham had referred in his letter of 13

February 2017 to which we refer in paragraphs 49-51 above. The further meeting was to take place on 21 March 2017. However, the claimant did not attend that meeting. That led to Professor Trayhurn concluding his investigation without hearing from the claimant. He sent his report to the claimant under cover of the email dated 6 April 2017 at pages 252-253. In the email, Professor Trayhurn recorded that he had added one disciplinary charge. In the report, he concluded (at page 257) this:

> "It is evident from my investigation that Mr Husbands has:
>
> (1) acted without the necessary authority with regard to his dealings with UKCAT; the University had to be formally dissociated from his comments
>
> (2) contacted Helen Cameron without notifying the Medical School and his Line Manager. Any concerns he had should have followed due process, beginning with raising them directly in a meeting with his Line Manager. This is a particularly serious issue which risks the reputation of the University.
>
> (3) failed to fulfil his role as Assessment Lead, and has behaved as though he has the prerogative to engage with, or reject, the role as he so wishes. I consider that the Medical School has shown considerable flexibility in accepting his proposal of October 2016 to change role – which he then unilaterally decided in January 2017 that he would reverse. His employment contract is clear with regard to his obligations."

63 On 12 April 2017, the claimant sent his fourth claimed public interest disclosure. It was at pages 259-261 and we return to it in the following paragraph below. On 18 April 2017 the claimant sent the text message to Dr Carmen Pinon at page 301. That was the claimant's fifth claimed public interest disclosure. It was the underlined one in the following exchange (which, as can be seen, the claimant initiated):

> "Claimant: Hi Carmen how are you? Thought id say hello :)
>
> Dr Pinon: Hi Adrian. How are you? How are things?
>
> Claimant: I'm good thanks. Just having lunch in milton keynes. How are things at Buckingham? In [sic; i.e. I'm] curious about what conclusions people are coming to following my disclosures
>
> Dr Pinon: A part [sic] from seeing your last email, I haven't heard a thing about.
>
> Claimant: <u>Ok...i wonder if students are aware. Investigations by the QAA and HEFCE have begun. Overall there is evidence to suggest</u>

Buckingham was purposely set up to fail. As you know their approach is not logical.

Dr Pinon: I haven't heard anything."

64 The email of 12 April 2017 at pages 259-261 was sent to the 28 employees of the respondent to whom the email of 14 March 2017 to which we refer in paragraph 60 above was sent. The email of 12 April 2017 was also sent to four further employees of the respondent and copied to Colin Melville of the GMC, Charlie Massey of the GMC, a Lilia Bogle, and a Mr Harrison of Milton Keynes Hospital. The email was headed "Potential University of Buckingham Mismanagement" and started in this way:

> "Evidence suggests the affairs of the University of Buckingham are being mismanaged to the detriment of students, staff and patients. This relates to potentially unlawful examinations at the University of Buckingham's Medical School (UBMS), freedom of staff to raise internal wrongdoing without fear of reprisal, as well as possible implications of inappropriate assessment standards on patient care.
>
> This correspondence outlines evidence of suspected mismanagement as well as relevant legislation, and concludes with questions to the university surrounding its behaviour."

65 Mrs McCrory's evidence in the following passage of her witness statement responded to that email and stated the relevant subsequent events in an accurate and succinct way. We accepted the evidence in those paragraphs as set out immediately below.

> '33. ... The majority of Medical School staff who had been copied into this email had no responsibility for the matters which Mr Husbands was complaining about. This was a rather inflammatory email and the suggestion that the financial viability of the University might be affected was very distressing for some. ...
>
> 34. I wrote to Mr Husbands on 21 April 2017 to remind him that, to ensure confidentiality and avoid any potential interference in the disciplinary issues, he should contact only me directly during his suspension period. I explained that some of the employees who had been copied into his correspondence felt like they were being harassed by him. I concluded by informing Mr Husbands that "none of your e-mails will now get through to any of the recipients other than myself, until further notice. You have given us no choice but to take this step" (page 279).
>
> 35. Mr Husbands also raised a number of complaints regarding the fairness of Professor Trayhurn's investigation, and alleged that Professor Trayhurn

had threatened him and he had not been able to prepare because he did not know the allegations against him (see, for example, pages 198, 205 to 206, 209, 216 to 224 and 236 to 239). For the reasons I have already explained, this was completely untrue and simply did not reflect the reality of the meeting. Unfortunately, this felt like a calculated move by Mr Husbands to deliberately misrepresent the discussion, to either delay or cast doubt on the validity of Mr Trayhurn's investigation findings.

36. To be clear, we were satisfied that Professor Trayhurn had acted appropriately, however, in the interests of ensuring that Mr Husbands had no concerns about the process, and as a 'clean' way of dealing with the issues which Mr Husbands had raised, we decided to appoint an alternative investigating officer who had played no part in the process to that date.

37. In or around May 2017, John Spoerry was appointed to restart the investigation into the allegations against Mr Husbands. In his letter of 7 June 2017, John Spoerry advised Mr Husbands that his grievances about the disciplinary process ... would be investigated at the same time as the disciplinary allegations, but that his other grievances ... would be considered separately at the end of the process, when the scope of the complaints had been clarified."

66 Mrs McCrory did not say anything about the content of Mr Spoerry's letter of 7 June 2017. It was, however, important, as it stated the allegations of misconduct which were by then being considered. The letter was at pages 287-288 and in addition to stating the three things which Professor Trayhurn had stated as the alleged misconduct (as set out in paragraph 62 above, with the third one described in this way: "Your refusal to carry out your designated contractual role as Assessment Lead"), it stated this one:

> "Your failure to follow reasonable instructions to liaise with Mrs McCrory of HR and to refrain from emailing various individuals. Many staff consider that they have been subjected to harassment, as a result of which the decision was taken to block your emails."

67 The letter continued:

> "The first three allegations formed the subject matter of Paul Trayhurn's report, and I will have to consider them afresh. I have no knowledge of the investigations which Paul Trayhurn conducted into any of these matters. The fourth allegation is something which has been an ongoing issue throughout the investigation, and which I understand is considered to have worsened over time. The University has decided that it is something which should be included as part of the investigation as well."

68 Mrs McCrory's witness statement continued in the following paragraph (which we accepted).

> "38. While initially agreeing to meet with Mr Spoerry, Mr Husbands subsequently failed to engage in the investigation and once again questioned the independence of the investigator. On 25 September 2017, Mr Spoerry therefore produced his investigation report in the absence of Mr Husbands' input. Mr Spoerry concluded that there was sufficient evidence for some of the allegations against Mr Husbands to proceed to the next stage. A copy of his report is at pages 314 to 350 of the Bundle."

69 In that report, Mr Spoerry concluded (at page 319) that the third allegation, namely of the claimant's "refusal to carry out [his] designated contractual role as Assessment Lead" should not be pursued. Thus, the allegations to be considered at a disciplinary hearing concerned (as recorded at pages 319-320) (1) the email to Ms Greatrix of 24 January 2017 at page 176 which we have set out in paragraph 27 above, (2) the email to Professor Cameron at pages 179-180 which we have set out in paragraph 35 above, and (3) the fact that the claimant "did not abide by a reasonable instruction to refrain from communicating with non-specific personnel."

70 Ms McCrory's witness statement continued in the following paragraphs, which we accepted:

> "**Step 2 meeting**
>
> 39. As I have explained above, Mr Husbands was subject to the contractual Disciplinary Policy (pages 88 to 90), however, he was also subject to the Charter and Statutes, which require a Joint Committee of the University Council to be appointed, before a member of academic staff can potentially be removed from office (page 80).
>
> 40. Given Mr Husbands' repeated challenges to the fairness and impartiality of the process, an independent external consultant, Ian Creagh, was appointed to chair the Step 2 meeting with his remit limited to reviewing the accuracy of Mr Spoerry's findings. Mr Creagh was not to make any recommendation to the Joint Committee as to whether or not Mr Husbands should be dismissed.
>
> 41. Mr Husbands declined to attend the Step 2 meeting with Mr Creagh, who concluded on the papers that the findings of Mr Spoerry were fair and had been properly reached on the evidence before him. Mr Creagh finalised his report on 19 February 2018 and produced a bundle of documents which he relied upon in reaching his conclusion. This is the Internal Investigation Bundle which we have reproduced in its entirety for the

purpose of these proceedings. A copy of Mr Creagh's report is at page 379 to 382 of the Hearing Bundle.

Hearing before a Joint Committee

45. Following the conclusion of Mr Creagh's report, the next stage was for the Council to appoint a Joint Committee. In accordance with Statute 20(b) of the Charter and Statutes (page 80), as Chair of Council, Mr Tapner was appointed to chair the Joint Committee.

46. Mr Tapner wrote to Mr Husbands on 21 March 2018 to ascertain if there were any dates when he would not be able to attend a Joint Committee hearing (pages 425 [sic] to 417), however, Mr Husbands did not respond.

47. Mr Tapner therefore wrote to Mr Husbands again, on 24 April 2018, to invite him to a hearing before the Joint Committee on 14 May 2018 (pages 418 to 420). Because it was very difficult to assemble the Joint Committee, Mr Husbands was advised that, should he fail to attend, the hearing would take place in his absence. Mr Husbands was [given] a copy of the Internal Investigation Bundle with the letter and invited to submit written representations for the panel to consider, if [he] was unable or unwilling to attend in person.

48. Unfortunately, Mr Husbands completely failed to attend or participate in the hearing and, therefore, he did not take the opportunity to clarify his allegations. In deciding upon a disciplinary sanction, the Joint Committee also determined his Category 3 complaints. [These were complaints that the claimant had made about the conduct of the disciplinary process.]

49. On 28 June 2018, Mr Tapner wrote to Mr Husbands with the outcome of the disciplinary process (pages 425 to 429). The Joint Committee decided to dismiss Mr Husbands for misconduct. The letter informed Mr Husbands of his right to appeal the decision of the Joint committee."

71 In fact, the outcome letter was at pages 426-429 and was enclosed with the email at page 425. While the letter referred (at the top of page 427) to the three allegations which were pursued against the claimant, under the heading "Disciplinary Outcome" on page 428 the letter dealt only with the first and the third of those allegations: it failed to deal with the email of 13 February 2017, which we have set out in paragraph 35 above. Mr Tapner's witness statement, however, as corrected in one minor but important respect, did address that matter in detail. We (through Mr Kaltz) questioned Mr Tapner closely about the reasons for deciding that the claimant should be dismissed. Mr Tapner said that the main reason for dismissing the claimant was the fact that he had sent the email of 24 January 2017 to Ms Greatrix set out in paragraph 27 above and the email of 13 February 2017 to Professor Cameron set out in paragraph 35 above. The allegation of a failure to

follow the instruction not to contact fellow employees was, said Mr Tapner, something about which he and the other members of the committee were "more cautious". Thus, he was clear (and we accepted) that the main reason for dismissing the claimant was the sending of the two emails in question.

72 Mr Tapner was also absolutely sure that the fact that in the emails the claimant was claiming (whether implicitly or explicitly) a breach of a legal obligation by UKCAT and the GMC respectively, was not at all relevant.

73 Mr Tapner's witness statement contained the following passages about the three disciplinary allegations.

73.1 Concerning the allegation of a failure by the claimant to follow a reasonable instruction not to email other employees of the respondent, Mr Tapner said this:

> "50. Having considered the evidence, there was no plausible explanation or justification for Mr Husbands' repeated failure to comply with what we, the Joint Committee, deemed a reasonable management instruction. In the absence of any explanation from Mr Husbands, we considered it reasonable to conclude that Mr Husbands had wilfully disregarded these instructions. While we noted the content of the emails, we did not consider there to be any justification for Mr Husbands to repeatedly copy in University employees to an internal procedure and that there was no legitimate reason for him to do so. As a result, we considered that, on balance, the emails had been sent by Mr Husbands deliberately, contrary to instructions and in bad faith.
>
> 51. From reading the Hearing Bundle, I have since discovered that Mr Husbands sent a text message on 18 April 2017 (page 301 of the Hearing Bundle [i.e. the claimant's fifth claimed public interest disclosure, which we have set out in paragraph 63 above] (and, therefore, in advance of the last instruction from Mrs McCrory), and that he did not receive the email from Professor Trayhurn dated 21 March 2017. Had Mr Husbands participated in the hearing, I am sure this would have been taken into consideration. It would not, however, change the fact that he had ignored the first two instructions and was fully aware that he should not have been communicating with colleagues in such a manner."

73.2 In relation to the email to Ms Greatrix of 24 January 2017 which we have set out in paragraph 27 above, Mr Tapner's witness statement evidence was this:

> "38. As Assessment Lead, Mr Husbands did not have the authority to act on behalf of the Medical School in relation to its membership of UKCAT: this was not a decision he could take. In his emails, he had also made claims about the contractual position and threatened to sue UKCAT to seek to recoup the Medical School's membership fee (page 81 [in fact the reference should have been to page 176]).
>
> 39. The Joint Committee considered that these were extremely provocative comments which were likely to be disputed and upon which advice should have been taken in advance. The emails had the potential to cause real embarrassment for the Medical School, especially as Mr Husbands was holding himself out as acting on behalf of the University when he had threatened legal action. If Mr Husbands had concerns, the proper course would have been for him to discuss the matter internally before taking action in email correspondence, especially if adopting such an adversarial tone.
>
> 40. The Joint Committee unanimously agreed that Mr Husbands had acted without authority and risked bringing the reputation of the Medical School into serious disrepute."

73.3 Mr Tapner's witness statement evidence concerning the email to Professor Cameron of 13 February 2017 at pages 179-180 (which we have set out in paragraph 35 above) was (as corrected orally by the words in square brackets) this:

> "44. The Joint Committee noted that Mr Husbands had sent this email [to Professor Cameron's personal email address] and not copied in anybody else at the GMC, which indicated an attempt on his part to influence Professor Cameron at an individual level. This was totally inappropriate professional conduct and the Joint Committee agreed that nobody at the Medical School should have been in direct contact with a member of its regulator without broader participation of senior management. The information Mr Husbands sent was specific information about the Medical School and could have been very detrimental.
>
> 45. From reviewing all of the evidence we were provided with, the Joint Committee considered the content and timing of the email to be particularly concerning. Mr Husbands' actions had the potential to impact negatively on other staff at the Medical School and its students. The Joint Committee unanimously agreed that Mr Husbands had placed the reputation of the University at great risk and in a public way. The Joint Committee also considered the

> fact that the processes which were being implemented by the Medical School were used by other medical schools and had been approved by the regulator. There was, therefore, no need for or merit to Mr Husbands' email.
>
> 46. The Joint Committee, therefore, again agreed unanimously that Mr Husbands had acted without authority and brought the reputation of the Medical School into serious disrepute."

74 We accepted that Mr Tapner's correction of paragraph 44 of his witness statement was apt and accurate. That was because it was consistent with the following sentence in the notes of the hearing, at page 423:

> "To e-mail Helen Cameron he used her personal e-mail address, which is totally inappropriate professional conduct."

75 In fact, the email address used was Professor Cameron's work address, which was an academic email address at the University of Edinburgh. In addition, we saw that while Mr Tapner referred to Professor Cameron as being " a member of [the Medical School's] regulator", she was not in fact that: rather, she was someone who provided services to the regulator, as an inspector (appointed, it appeared clear, under section 7 of the Medical Act 1983).

76 We heard from Mr Tapner that the committee which he chaired and decided that the claimant should be dismissed had considered the content of Professor Trayhurn's report, although, as recorded in the notes of the hearing at page 423 "Whether he [the claimant] was carrying out his contractual obligations was not one of the core allegations." We saw from page 287 that Mr Spoerry was engaged to investigate "afresh" the three allegations of misconduct which Professor Trayhurn had investigated. Mr Spoerry said in oral evidence that the understanding given to him was that Professor Trayhurn's report was to be disregarded in the light of the claimant's expressed concerns regarding impartiality. As a result, we could see that making Professor Trayhurn's report available to the Joint Committee might reasonably be regarded as a procedural irregularity. We (through Mr Kaltz) put this to Mr Tapner and he said that the committee would have reached the same conclusions as those which it did in fact reach if its members had not seen Professor Trayhurn's report. We accepted that evidence of Mr Tapner.

77 Mr Tapner said (and we accepted) that he had not, before reading the hearing bundle, seen the email at page 203, i.e. the claimant's sixth claimed public interest disclosure which we set out in paragraph 60 above and which we gave the claimant permission to rely on as recorded in paragraphs 3 and 61 above.

78 Having taken all of those things (i.e. that evidence) into account, and weighed them up carefully, we concluded that the real reason for the claimant's dismissal was the

fact that he had sent the emails to Ms Greatrix and Professor Cameron which we have set out in paragraphs 27 and 35 above.

The claimant's contract of employment

79 The claimant's contract of employment was at pages 56-62. So far as relevant, it stated

79.1 on page 56 that

> "This Agreement may be terminated by the University, by giving three months' notice in writing, and without making further payment beyond remuneration actually accrued to the date of termination if, after the disciplinary procedure outlined below has been followed, performance, conduct or attendance are still not satisfactory", and

79.2 on page 61 that

> "The University has a Disciplinary procedure a copy of which may be obtained from the HR Department."

80 That disciplinary procedure was in the document at pages 88-90. The procedure was so far as relevant in these terms:

> "**Dismissal**
> If there is still a failure to improve and your conduct is still unsatisfactory, dismissal will normally result. You will be provided, as soon as is reasonable practicable, with written reasons for your dismissal, the date on which your employment will be terminated and the right [of] appeal as set out later in this document.
>
> Only in exceptional circumstances i.e. gross misconduct, will you be dismissed for a breach of discipline.
>
> lf it is decided that disciplinary action should be taken, you will be advised of the decision, which will be confirmed in writing and will usually include the following:
>
> • Details of the reason for the warning
> • Details of the necessary action the employee need[s] to take to remedy the situation and the period of review for this
> • The result of any further misconduct, for example a final warning, further disciplinary interview or dismissal
>
> In implementing the procedure the following steps will be taken:

Step 1
A written note will be issued to you, setting out the allegation(s) and the basis for it. A thorough investigation will be carried out and all the facts assembled.

Step 2
You will have the right to put forward your case at a disciplinary hearing. You may be accompanied by a colleague of your choice, a trade union official or some other person appropriate to the circumstances (this therefore will exclude a person who may be required to hear the disciplinary at a later stage). We will ask you to confirm if you wish to be accompanied on invitation to attend a disciplinary hearing.

Appropriate account will be taken of your employment and disciplinary record with the University and all other relevant facts.

You will be given a copy of all warnings together with the details of how long they will remain on your personnel file."

The relevant law

The law of unfair dismissal

The reason for the dismissal

81 In a claim of unfair dismissal within the meaning of section 98 of the ERA 1996, it is for the employer to prove ("show") the reason, or the principal reason, for the dismissal. That is the result of section 98(1)(a). In order to be a fair reason, the reason must be one which falls within section 98(2) (which by reason of subsection (b) includes "the conduct of the employee") or is some other substantial reason within the meaning of section 98(1)(b). What is the "reason" for the dismissal is the subject of some helpful case law.

82 It is often the case that an employer dismisses an employee for what could be regarded as several "reasons". In *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, [1974] ICR 323, at 330B-C, Cairns LJ said this:

> "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."

83 Paragraph DI[821] of *Harvey on Industrial Relations and Employment Law* helpfully (and in our view accurately) states the manner in which those words have been approved and applied in subsequent case law:

> "These words, widely cited in case law ever since, were approved by the House of Lords in *W Devis & Sons Ltd v Atkins* [1977] AC 931, [1977] 3 All ER

40 and again in *West Midlands Co-operative Society v Tipton* [1986] AC 536, [1986] IRLR 112, HL where the rider (important in later cases) was added that the 'reason' must be considered in a broad, non-technical way in order to arrive at the 'real' reason. In *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401, [2017] IRLR 748, Underhill LJ observed that Cairns LJ's precise wording in *Abernethy* was directed to the particular issue before the court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision – or, as it is sometimes put, what 'motivates' them to do what they do."

The fairness of the dismissal

84 Where the employer has satisfied the tribunal that the reason is a potentially fair one, the question of the fairness of the dismissal falls to be determined under section 98(4) of the ERA 1996, which provides this:

> "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."

The range of reasonable responses of a reasonable employer test

85 Section 98 of the ERA 1996 has been the subject of much case law, the effect of which can be summarised by saying that the key question when the fairness of a dismissal is in issue is whether or not it was within the range of reasonable responses of a reasonable employer to dismiss the employee for the reason for which the employee was in fact dismissed. However, particular considerations arise in relation to the different reasons falling within subsections (1) and (2).

Conduct dismissals

86 In a case where the employer relies on conduct as the reason for the employee's dismissal, the following questions arise:

86.1 Has the employer satisfied the tribunal on the balance of probabilities that the reason for which the employee was dismissed was indeed the employee's "conduct"?

86.2 Did the employer, before concluding that the employee had done that for which he or she was dismissed, carry out an investigation which it was within the range of reasonable responses of a reasonable employer to conduct? The best authority in that regard is the decision of the Court of Appeal in *J Sainsbury plc v Hitt* [2003] ICR 111.

86.3 The following statement of the applicable principles in *British Home Stores v Burchell* [1978] IRLR 379 (but bearing in mind the fact that the test at every stage is whether what was done or omitted was within the range of reasonable responses of a reasonable employer) also applies:

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

86.4 The final question which then falls to be answered is whether the dismissal for the conduct for which the employee was in fact dismissed was outside the range of reasonable responses of a reasonable employer. Normally, that question arises only when the preceding questions have been answered in the employer's favour.

Protection against detrimental treatment, and dismissal, for "whistleblowing"

87 In order to succeed in claiming detrimental treatment for whistleblowing, an employee must show that he or she made a disclosure falling within section 43A of the ERA 1996. That means a disclosure falling within section 43B of that Act that is made in accordance with sections 43C-43H of that Act. Section 43B provides so far as relevant:

> 'In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following— ...

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, ...

(d) that the health or safety of any individual has been, is being or is likely to be endangered'.

88 Ms Rezaie referred us to a number of authorities on the issue of what amounts to a disclosure of "information" as opposed to the mere making of an allegation of a breach of (for example, so far as relevant) a legal obligation. While Ms Rezaie did not refer us to it, we found the following summary of the applicable law, in the third holding in the headnote to the decision of the Employment Appeal Tribunal ("EAT") made by Choudhury P in *Simpson v Cantor Fitzgerald Europe* [2020] ICR 236, to be of particular assistance:

> "That section 43B(1) of the Employment Rights Act 1996 should not be glossed to introduce a rigid dichotomy between information and allegations; that the question in each case was whether a particular statement was a disclosure of information that the employee reasonably believed tended to show one or more of the matters specified in section 43B(1) and that it was in the public interest to disclose it; that, in order to be a qualifying disclosure, a statement had to have sufficient factual content and specificity to be capable of showing breach of a legal obligation, and that was a matter for evaluative judgment by the tribunal in the light of the facts of the case".

89 The decision of the Court of Appeal in that case, reported at [2021] IRLR 238, in no way detracted from that statement. The appeal was unsuccessful, but in the course of dismissing the appeal, Bean LJ, with whose judgment Henderson and Rose LJJ agreed, in paragraphs 50-63 of his judgment made a number of helpful observations, referring to the previously-decided case law. We took those paragraphs into account in arriving at our conclusions in this case.

90 One of the paragraphs in Ms Rezaie's closing submissions that might have been helpful was paragraph 16(d), where she said this:

> "Where the employee relies on an unspecified legal obligation as the relevant failure, it will be difficult to show that at the time of making the disclosure he/she had a reasonable belief there had been such a failure to comply with that legal obligation (*Kilraine -v- London Borough of Wandsworth* [2018] ICR 1850, CA)."

91 In that case, the claimed disclosure that was found (in fact by Langstaff J in the EAT) not to have been a protected disclosure was an allegation of "numerous incidents of inappropriate behaviour". That was in our view the best indicator of the relevant effect of *Kilraine*.

92 Of sections 43C-43H of the ERA 1996, the claimant relied at the hearing before us only on sections 43C and 43H. In paragraph number 3 on page 16, i.e. page 2 of 5 of the claimant's details of his claim, he referred to "ERA s43 G (Disclosure in other cases)", but at no time after then did he refer to that section. There were two preliminary hearings, one conducted by EJ Ord on 13 September 2019 and one conducted by EJ Johnson on 11 August 2020. In neither of the records of those hearings was mention made of section 43G and, as we indicate, the claimant did not rely on section 43G during the hearing before us. Ms Rezaie pointed that out in a footnote of her written closing submissions (it was at the bottom of page 14 of those submissions), and the claimant did not contradict that when replying to her submissions. Section 43C provides this:

> "A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —
>
> (a) to his employer, or
>
> (b) where the worker reasonably believes that the relevant failure relates solely or mainly to—
>
> (i) the conduct of a person other than his employer, or
>
> (ii) any other matter for which a person other than his employer has legal responsibility,
>
> to that other person."

93 Section 43H provides this:

> "(1) A qualifying disclosure is made in accordance with this section if— ...
>
> (b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
>
> (c) he does not make the disclosure for purposes of personal gain,
>
> (d) the relevant failure is of an exceptionally serious nature, and
>
> (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.
>
> (2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made."

94 Section 47B of the ERA 1996 provides:

> "(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. ...
>
> (2) ... This section does not apply where—
>
> (a) the worker is an employee, and
>
> (b) the detriment in question amounts to dismissal (within the meaning of Part X)."

95 In a claim of detrimental treatment within the meaning of section 47B of the ERA 1996 for making a protected disclosure within the meaning of section 43A of that Act, which is made under section 48 of that Act, it is for the employer to prove the reason for the conduct which it is claimed was detrimental. That is the effect of section 48(2), which provides that "it is for the employer to show the ground on which any act, or deliberate failure to act, was done". A claim of detrimental treatment within the meaning of section 47B is akin to a claim of direct discrimination within the meaning of section 13 of the Equality Act 2010. It is therefore necessary to apply the principles in the case law relating to the application of section 136 of that Act, and accordingly to ask whether the claimant has proved facts from which the inference that the claimed detrimental treatment was done on the ground that the claimant had made a protected disclosure could be drawn, and, if he or she has done so, then to ask whether the respondent has proved on the balance of probabilities that the treatment was not done to any material extent because of the making of the disclosure. However, here as in the context of a claim of a breach of the EqA 2010, it is possible also (applying the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337) simply to ask what is the reason why the claimed detrimental treatment occurred.

96 There will not be detrimental treatment done "on the ground" of the making of protected disclosure for the purposes of section 47B if the employee is subjected to a detriment only because of the manner in which that disclosure was made (i.e. and not to any material extent because of the making of the protected disclosure as such). That is clear from the decision of the Court of Appeal in *Bolton School v Evans* [2007] ICR 641. However, it is clear from the decision of the EAT (Simler P presiding) in *Shinwari v Vue Entertainment* UKEAT/0394/14 (12 March 2015, unreported) that the following statement of Underhill J as he then was, made in the (parallel) victimisation case of *Martin v Devonshires Solicitors* [2011] ICR 352, is applicable to a claim to rely in this context on the manner of a public interest disclosure as the sole justification for detrimental treatment:

> 'Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It

> would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle.'

97 Where an employee is dismissed for whistleblowing, i.e. the making of such a disclosure, the dismissal will be automatically unfair within the meaning of section 103A of the ERA 1996 "if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

Our conclusions

98 In the light of our above findings of fact, we came to the following conclusions on the claimant's claims.

Did the claimant make any disclosures within the meaning of section 43A of the ERA 1996?

Claimed protected disclosure number 1: the email of 24 January 2017 to Ms Greatrix

99 We did not have before us a copy of the terms of the contract between the respondent and UKCAT. The claimant's case was that his email of 24 January 2017 at page 176, responding to Ms Greatrex's of the day before which we have set out in paragraph 27 above immediately above the claimant's email of 24 January 2017, should be read as including at least an allegation that UKCAT was wrong as a matter of the law of contract in asserting that the respondent was no longer a member of UKCAT. It was incontrovertibly the case that the email was to the effect that as a result of the "longitudinal study [of Mathers et al (2016) concluding] that UKCAT's ability to widen access 'remains unproven'", UKCAT was in breach of the agreement with the respondent in that it was not "[ensuring] that UKCAT delivers value for money".

100 The first of those two assertions in our judgment was not one which at first sight could reasonably have been believed by the claimant to be a disclosure of information which it was in the public interest to make that UKCAT was failing, or was likely to fail, to comply with a legal obligation. That was because it was in our view clear that if a contract for membership requires the fulfilment of a condition, and that condition is not satisfied, then the membership will lapse automatically. The second assertion to which we refer in the preceding paragraph above was also in our judgment not easily capable of being regarded as a disclosure of information that the employee reasonably believed tended to show a breach by the UKCAT of

a legal obligation which it was in the public interest to make. That was because of the nebulousness of a contractual obligation (assuming that there was one here) to "ensure [the delivery of] value for money."

101 After careful consideration, we concluded that neither of those assertions was one which the claimant reasonably believed it was in the public interest to make and which tended to show that UKCAT had breached, was breaching, or was likely to breach its contract with the respondent. Neither of those assertions therefore satisfied the requirements of section 43B of the ERA 1996, which meant that they were not protected disclosures within the meaning of section 43A of that Act.

102 In case that conclusion was wrong and the claimant's email of 24 January 2017 at page 176 was a disclosure falling within section 43A of the ERA 1996, we considered whether the claimant had been treated detrimentally on the ground that he had made that disclosure. We state our conclusion on that issue in paragraph 118 below.

103 For the avoidance of doubt, we concluded that it could not be said that the alleged failure to comply with a legal obligation was of an exceptionally serious nature, or that in all the circumstances it was reasonable to make the disclosure, so that section 43H of the ERA 1996 did not apply.

Claimed protected disclosure number 2: the email of 13 February 2017 to Professor Cameron

104 We came to the clear conclusion that the claimant's second claimed public interest disclosure, namely the email to Professor Cameron of 13 February 2017 at pages 179-180, was not a protected disclosure within the meaning of section 43A of the ERA 1996. That was for the following reasons.

104.1 In order to qualify as a disclosure within the meaning of section 43A of the ERA 1996, the disclosure had to be made in accordance with one or more of sections 43C-43H of that Act.

104.2 The claimant was (see paragraph 92 above) arguing only that the disclosure fell within section 43C(1)(b) or section 43H of that Act.

104.3 The only natural or legal person about whose conduct the email could (in our judgment) be read as complaining was the GMC. It was not Professor Cameron herself. In that regard, we noted (as we record in paragraph 48 above) that the claimant himself said that he had decided not to "press the nuclear button" by going to the GMC itself. If and to the extent that the claimant had it in mind to assert (or thought that he was asserting) that Professor Cameron was negligent in her judgement that the selection method used by the Medical School in 2015 was acceptable, he did not say that in terms. In our view that meant that the email at pages 179-180 did not

fall within section 43C(1)(b), as it was an email to Professor Cameron and not to the GMC, to whose (i.e. the GMC's) conduct the email related.

104.4 We were of the clear view that the claimed failure to comply with a legal obligation owed by the GMC was not of an exceptionally serious nature and that it was not reasonable in the circumstances of the case to make the disclosure. Thus, the requirements of section 43H of the ERA 1996 were not satisfied here.

104.5 In addition, i.e. in any event,

104.5.1 the claimant was not stating in the email that the GMC had erred in law and

104.5.2 the claimant did not identify in the email at pages 179-180 any legal obligation which he claimed the GMC had breached. It was not necessary for him to do so, of course, but it was necessary to see what breach of what legal obligation he could conceivably be alleging. It was his case (as advanced via the list of issues at pages 36-49, at page 37) that the email was alleging "Negligence, Breach of Charities Act (2011) [and] Breach of Medical Act (1983)". In our view it could not reasonably have been believed by the claimant that there was a breach of the Charities Act 2011, or negligence on the part of the GMC, bearing in mind that the email at pages 179-180 referred to what could only be regarded as an exercise of judgement. It was difficult also to see a potential breach of the Medical Act 1983, although it might be said that the GMC had acted in breach of public law principles when purporting to exercise a function conferred by that Act. It was possible that the claimant could reasonably have believed that by stating to the GMC that its decision that the Medical School's selection process was "valid, reliable and objective" (based as it was on Professor Cameron's approval of the 2015 selection test despite it having a Cronbachs-alpha test score of 0.57) was inconsistent with the GMC's own guidance, he was making a disclosure of a possible breach by the GMC of public law principles. However, it was hard to see how a person in the situation of the claimant, with the claimant's specialist knowledge, could reasonably have believed that there was such a breach in the form of a failure to take into account a relevant factor or simple irrationality, given that the claimant must have known (we concluded) that it was at least likely (if it was not in fact the case) that there had been a careful evaluation by Professor Cameron of the selection method used by the Medical School for admissions in 2015, and a careful consideration by the GMC of her advice on the matter. Since we could see no other basis on which the claimant could reasonably have believed that there was a breach by the GMC of public law principles, we had to conclude that the claimant could not

reasonably have believed that he was making a disclosure which it was in the public interest to make of information which tended to show that the GMC had made, and was likely again to make, an unlawful decision about admissions to one or more medical schools. Thus, in our view the requirements of section 43B of the ERA 1996 were not satisfied here.

104.6 For the avoidance of doubt, if we had been able to read the email at pages 179-180 as being a claim of a breach of a legal obligation by Professor Cameron, so that it was made in accordance with section 43C(1)(b), then we would have concluded that the claimant could not reasonably have believed that in the email he was making a disclosure which it was in the public interest to make about a breach of a legal obligation owed by Professor Cameron. That was because there could have been no reasonable belief that there had been any failure to take reasonable care, given the express reference to the Cronbachs-alpha score of 0.57 being "lower than an ideal co-efficient >0.8". That showed in our view that the only allegation that could reasonably be made was of a wrong exercise of judgment: not a negligent one.

105 In case those conclusions were wrong and the email at pages 179-180 was a disclosure falling within section 43A of the ERA 1996, we considered whether the claimant had been treated detrimentally on the ground that he had made that disclosure. We state our conclusion on that issue in paragraph 117 below.

106 For the avoidance of doubt, we concluded that it could not be said that the alleged failure to comply with a legal obligation was of an exceptionally serious nature, or that in all the circumstances it was reasonable to make the disclosure, so that section 43H of the ERA 1996 did not apply.

Claimed disclosure number 3: the email at pages 194-195 referred to in paragraph 59 above

107 We doubted whether the email at pages 194-195 (including its enclosures) was a disclosure which fell within section 43C(1)(a) of the ERA 1996. That was because it was made not just "to [the claimant's] employer" but also to a large number of colleagues. That was, in our view, possibly not the kind of disclosure that Parliament had intended to be protected as a whistleblowing disclosure. However, we did not come to a firm conclusion in that regard. We saw that the email at pages 194-195 was in the main about the same things about which the claimant had written to Professor Cameron in the email set out in paragraph 35 above, and that to the extent that it was about anything else, it was about the manner in which the claimant himself was treated. We therefore concluded that it was not a communication which the claimant could reasonably believe it was in the public interest to make and which tended to show that the respondent had breached, was breaching, or was likely to breach any legal obligation owed to anyone.

108 We nevertheless for the sake of completeness considered whether the claimant had been treated detrimentally on the ground that he had made his claimed third public interest disclosure. We state our conclusion on that issue in paragraph 119 below.

109 For the avoidance of doubt, we concluded that it could not be said that the alleged failure to comply with a legal obligation was of an exceptionally serious nature, or that in all the circumstances it was reasonable to make the disclosure, so that section 43H of the ERA 1996 did not apply.

Claimed disclosure number 4: the email at pages 259-261 referred to in paragraphs 63-64 above

110 Similarly, i.e. as with claimed public interest disclosure number 3, we concluded that the email at pages 259-261 might not have been a disclosure which fell within section 43C(1)(a) of the ERA 1996. That was for the same reasons as those which we state in the first two sentences of paragraph 107 above. In fact, while the email was sent to (1) one or more of the persons to whom the claimant could have sent it and then relied on it as a disclosure within the meaning of section 43C(1)(a) and (2) a large number of colleagues, it was also copied to four other persons who were not colleagues. Thus, there was even more reason to doubt that claimed public interest disclosure number 4 fell within the scope of section 43C(1)(a). Again, however, we did not come to a firm conclusion in that regard. We did, however, conclude that the email at pages 259-261 did not contain anything more in substance than the email at pages 194-195 with the result that we concluded that the email at pages 259-261 was not a disclosure within the meaning of section 43B of the ERA 1996.

111 We nevertheless considered whether the claimant had been treated detrimentally on the ground that he had made that disclosure. We state our conclusion on that issue in paragraph 119 below.

112 For the avoidance of doubt, however, we concluded here too that it could not be said that the alleged failure to comply with a legal obligation was of an exceptionally serious nature, or that in all the circumstances it was reasonable to make the disclosure, so that section 43H of the ERA 1996 did not apply.

Claimed disclosure number 5: the text message sent to Dr Pinon referred to in paragraph 63 above

113 We concluded that the text message which we have set out in paragraph 63 above, sent to Dr Pinon, was not sent to the claimant's employer, so that it was not sent in accordance with section 43C(1)(a) of the ERA 1996. In fact, we understood the claimant himself to have acknowledged this in the list of issues at page 45, where he said that it was a "disclosure to a colleague and friend". In oral submissions, he

submitted that by sending the text to Dr Pinon he was sending it to the respondent. However, in our view that was not correct: it was a text sent to a colleague whom the claimant regarded as a friend, and it was not sent to the respondent.

114 We also concluded that it could not be said that the alleged failure to comply with a legal obligation was of an exceptionally serious nature, or that in all the circumstances it was reasonable to make the disclosure, so that section 43H of the ERA 1996 did not apply.

115 In case those conclusions were wrong and the text set out in paragraph 63 above was a disclosure falling within section 43A of the ERA 1996, we considered whether the claimant had been treated detrimentally on the ground that he had made that disclosure. We state our conclusion on that issue in paragraph 119 below.

Claimed disclosure number 6: the email at page 203, which we set out in paragraph 60 above

116 The respondent accepted (in our view correctly) that the email of 14 March 2017 at page 203 which we have set out in paragraph 60 above was a protected disclosure within the meaning of section 43A of the ERA 1996.

Applying section 47B of the ERA 1996, was the claimant treated detrimentally by any act done on the ground that he had made one or more of those disclosures?

117 Given our findings of fact stated in paragraphs 47-55 above, we concluded that Professor Clapham suspended the claimant primarily because of the manner and circumstances in which the claimant had communicated with Professor Cameron by sending her the email dated 13 February 2017 at pages 179-180, and not to any extent on the ground that he had in that email asserted in some way a breach of a legal obligation by the GMC (or, if it could be read as an allegation of a breach by Professor Cameron of a legal obligation, by her).

118 In addition, we concluded that Professor Clapham suspended the claimant also because of the email at page 176 that the claimant had sent to Ms Greatrix on 24 January 2017. However, we concluded, Professor Clapham did not in that regard act to any extent on the ground that the claimant had asserted a breach of a legal obligation by UKCAT. Rather, Professor Clapham acted purely because of the manner and circumstances (i.e. as stated by us in paragraphs 27-29 above) in which the claimant had written to Ms Greatrix.

119 We concluded also that the claimant was in no way treated detrimentally by any act done on the ground that he had sent the email at page 203 dated 14 March 2017, which we have set out in paragraph 60 above. That email played (we concluded, on the evidence before us) no part in the decision that the claimant should be subjected to a disciplinary investigation. That was in our view clear from

the outcome of Professor Trayhurn's deliberations (as recorded by us in paragraph 62 above), and Mr Spoerry's investigation (as described by us in paragraphs 66 and 67 above), during the course of which he widened the disciplinary investigation to cover the fact that the claimant had sent emails to "various individuals", meaning, we concluded from Mr Spoerry's evidence before us and the factors to which we refer in paragraphs 107 and 110 above, colleagues rather than one or more relevant managers of the respondent (including Professor Clapham). That widening occurred because the emails (which included the claimed third and fourth public interest disclosures) were sent in breach of the requirement not to contact colleagues during the claimant's suspension, and that widening occurred (we concluded) solely because of the factors referred to by us in paragraphs 66 and 67 above and in no material way because the claimant had alleged in the email at page 203 that the respondent had, acting through one or more of the persons referred to in that email, failed to comply with any of the legal obligations (or "regulatory requirements") referred to in that email. For the avoidance of doubt, we concluded that the reason for including in the disciplinary investigation the fact that the claimant had sent the third and fourth claimed public interest disclosures was that the communications which formed those claimed public interest disclosures were perceived by Mr Spoerry (in our view reasonably, but that is not determinative) to have been sent to colleagues unnecessarily and in such a way as to unnerve or discomfort them in the circumstances that (1) there was no objectively good reason for sending them to the colleagues in question and (2) the claimant had been required specifically in the passage of the letter suspending him set out in paragraph 50 above not to contact colleagues "save in connection with [investigative meetings or disciplinary hearings]". The claimed fifth public interest disclosure, namely the text to Dr Pinon set out in paragraph 63 above, was included in the scope of the disciplinary allegation purely because it was of the same sort as the emails which caused the widening of the scope of the disciplinary investigation and was in fact perceived by Dr Pinon as harassing in nature. That was clear if only from the email from Professor Clapham to Mrs McCrory dated 24 April 2017 at page 349, complaining about the text message to Dr Pinon set out in paragraph 63 above. (Professor Clapham's oral evidence was consistent with the content of that email, and reinforced our conclusion in this regard.) Thus, disciplinary action against the claimant was continued in no material way on the ground that he had sent (1) the claimed third, fourth and fifth public interest disclosures and/or (2) the sixth claimed (and in agreed actual) public interest disclosure.

120 For those reasons, we concluded that the claimant was in no way treated detrimentally on the ground that he had made any of the claimed public interest disclosures (including the sixth one, at page 203).

Conclusion on the claim of detrimental treatment for whistleblowing

121 For those reasons, the claimant's claims of detrimental treatment for whistleblowing, contrary to section 47B of the ERA 1996, did not succeed and were dismissed.

Unfair dismissal

122 On the basis of our findings of fact stated in paragraphs 73-78 above and in particular our acceptance of Mr Tapner's evidence in this regard in paragraph 71 above, we concluded that the principal reason for the claimant's dismissal was the fact that he had sent the email to Ms Greatrix set out in paragraph 27 above and the email to Professor Cameron set out in paragraph 35 above in the circumstances and in the manner in which he sent them, namely for the reasons set out in paragraphs 73.2 and 73.3 above, which had nothing to do with the fact that the claimant had made any allegation of a breach of any legal obligation.

123 Thus in the circumstances, the claimant's dismissal was for his conduct within the meaning of section 98(2)(b) of the ERA 1996. There plainly were reasonable grounds for concluding that the claimant had done the things for which he was dismissed (as they were in documentary form). The procedure followed by the respondent in deciding that the claimant should be dismissed for that conduct was in our view one which it was within the range of reasonable responses of a reasonable employer to follow, and it was within the range of reasonable responses of a reasonable employer to dismiss the claimant for that conduct.

124 For the avoidance of doubt, the fact that (as we record in paragraph 76 above) the committee of the respondent that decided that the claimant should be dismissed read Professor Trayhurn's report and was aware that the claimant had also been alleged to have done the third thing set out in paragraph 62 above, namely "failed to fulfil his role as Assessment Lead, and has behaved as though he has the prerogative to engage with, or reject, the role as he so wishes", while a flaw in the procedure, was not such as to make the procedure unfair, i.e. put it outside the range of reasonable responses of a reasonable employer.

125 Also for the avoidance of doubt, we rejected the claimant's contention (stated in numbered paragraph 3 on page 18) that the "disciplinary process was procedurally unfair" because the "disciplinary outcome letter, sent six weeks after the disciplinary hearing, said [that he] was being dismissed for two counts of serious misconduct" and not the three that had been decided on by the committee. That contention was based on the proposition that that factor showed that "in the six weeks intervening weeks [sic], new information came to light to suggest [that the claimant] was not guilty of one of the counts of serious misconduct [that he] was found guilty of and dismissed for". We rejected that proposition because the letter contained the omission to which we refer in paragraph 71 above with the result that the proposition was not well-founded on the facts.

126 Thus, the claimant's dismissal was not unfair, and his claim that it was unfair (including within the meaning of section 103A of the ERA 1996) did not succeed and was dismissed.

Wrongful dismissal

127 We also concluded that the claimant's contract of employment had not been breached by his dismissal "contradict[ing] UoB's disciplinary procedures and [his] employment contract" (as claimed under the heading "Wrongful dismissal" on page 19). That was because in our judgment, all that was required to comply with the claimant's contract of employment was to follow steps 1 and 2 as stated in the extract set out in paragraph 80 above, and those steps were indeed followed.

128 The claimant put it to several of the respondents' witnesses in cross-examination that section 20(b) of the respondent's governing statutes, at page 80, was breached. Even if that were the case, it would in our view not have meant that the claimant's contract of employment was breached, if only because we did not regard that contract as requiring the respondent to act only in accordance with its statutes when dismissing the claimant. Rather, in our view, if there was an obligation to comply with the respondent's statutes, then it was enforceable only by way of an application for an injunction or (if the Administrative Court entertained the claim) a mandatory order. However, in our view there was no breach of section 20(b) on page 8 as the Joint Committee which Mr Tapner chaired was in our view appointed in accordance with that provision.

129 Accordingly, the claim of wrongful dismissal did not succeed and was dismissed.

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Employment Judge Hyams

Date: 4 September 2021

JUDGMENT SENT TO THE PARTIES ON

27 September 2021

FOR THE TRIBUNAL OFFICE