EMPLOYMENT TRIBUNALS

Claimant: **Mr J Taylor**

Respondent: **Grwp Llandrillo Menai**

Heard at: **Cardiff (by CVP)** **On: 8, 9, 10 and 11 March 2021**

Before: **Employment Judge R Vernon**
Ms L Bishop
Ms P Humphreys

Representation:
Claimant: Miss R Barrett (Counsel)
Respondent: Mr J Duffy (Counsel)

RESERVED JUDGMENT

Introduction

1. By an ET1 Claim Form presented to the Tribunal on 4 September 2019, the Claimant presented complaints of unfair dismissal, wrongful dismissal and disability discrimination. The ET1 Claim Form was accompanied by detailed grounds of complaint setting out the facts alleged by the Claimant and the basis on which he pursues his four complaints.

2. On 3 October 2019 the Respondent presented its ET3 Response. The Respondent denies liability for all of the Claimant's complaints for reasons set out in the detailed grounds of resistance which accompanied the ET3.

3. A preliminary hearing took place before Employment Judge Michell on 11 December 2019. By that time, the Claimant had voluntarily provided further and better particulars of the complaint of disability discrimination. The Claimant asserted that the Respondent had committed unlawful disability discrimination against him on two bases: a) discrimination arising from disability contrary to section 15 of the Equality Act 2010 and b) failing to make reasonable adjustments contrary to sections 20 and 21 of the 2010 Act.

4. At that preliminary hearing, EJ Michell ordered the Claimant to file a re-drafted version of the further and better particulars to provide some further additional detail. The Claimant subsequently did so on 18 December 2019.

5. It was agreed with the parties at that preliminary hearing that the claim would be listed for final hearing with a four day time estimate. That hearing was originally due to take place in the early part of 2020. However, as a result of delays caused by the Covid-19 pandemic and after further efforts were made to consider and make arrangements for the final hearing in light of the difficulties caused, the final hearing took place over four days from 8 to 11 March 2021.

The hearing and evidence

6. The hearing took place remotely with all parties, witnesses, representatives and the Tribunal attending by Cloud Video Platform. The hearing was not without its difficulties with a number of participants experiencing connection problems during the hearing. However, notwithstanding those issues, the hearing proceeded and all of the evidence was heard and submissions were concluded on the morning of day 4 of the hearing. Regrettably, that did not leave sufficient time for the Tribunal to deliberate and deliver an oral judgment. Judgment was therefore reserved.

7. The Tribunal was satisfied that, despite the technological issues referred to above, the final hearing was conducted appropriately and fairly to both parties with both having a full opportunity to present their evidence and submissions.

8. The Tribunal received the following evidence:

   8.1 A bundle (including an addendum bundle) of documents comprising pages 1 to 531;

   8.2 A written witness statement from the Claimant;

   8.3 Written witness statements on behalf of the Respondent from Maggie Griffiths (Assistant Principal at Coleg Llandrillo and the Claimant's senior line manager), Lawrence Wood (Principal of Coleg Llandrillo), Jamie Clegg (the Respondent's Human Resources Director since January 2019) and Dafydd Evans (the Respondent's Chief Executive Officer).

9. In addition to the written witness evidence, the Tribunal also heard oral evidence from all witnesses including the Claimant.

10. In light of the issues to be determined, and with the agreement of the parties, the Respondent's witnesses gave evidence first. After completing his initial evidence, Mr Clegg was recalled to give evidence on one particular issue after

all of the Respondent's other witnesses had given evidence but before the Claimant gave evidence. Both parties and the Tribunal had a full opportunity to ask Mr Clegg questions on that issue before the Respondent's case was formally closed.

11. The Tribunal also received written and oral submissions from the representatives of both parties.

Issues

12. A comprehensive list of issues had been prepared by the parties in preparation for the final hearing. The list of issues was agreed as between counsel for the parties. The Tribunal considered the list of issues, agreed with it and therefore adopted it for use at the final hearing.

13. As a consequence of the time estimate, and in light of the number of issues to be determined, the Tribunal indicated that it would focus initially upon issues of liability (but including any issues of contributory fault and Polkey in relation to the unfair dismissal complaint) and would consider any issues of remedy if they arose in light of the findings and conclusions on liability.

14. It is to be noted at this stage that, for the purposes of the complaints of disability discrimination, the Respondent accepts that the Claimant was a disabled person within the meaning of the Equality Act 2010 at all material times by reason of his Type 1 diabetes. It is also to be noted that other medical conditions of the Claimants' are referred to in the documents and witness statements (including cancer and anxiety and depression) but those other conditions are not relied upon by the Claimant for the purposes of his claim and are therefore not relevant to the issues to be determined.

Findings of fact

Preliminary observations

15. Having considered all of the evidence the Tribunal now sets out its findings of fact relevant to the issues to be determined. In doing so, the Tribunal will set out those facts which it considers material to the complaints it has to determine. In doing so, the Tribunal will not rehearse every piece of evidence received and will not seek to resolve every factual dispute that was apparent from the evidence. If any particular piece of evidence is not referred to, that does not indicate it has not been considered.

16. Where any material fact was in dispute between the parties we will make such findings as we consider are appropriate based on the evidence available. We will resolve any dispute of fact on the basis of the balance of probabilities i.e. what the Tribunal finds is more likely than not to be the case.

Findings

17. The Respondent is an education college which was established in 2012. It employs approximately 1,600 staff and provides education to approximately 21,000 students. The students are predominantly Further Education students but approximately 1,500 are in Higher Education. The Respondent services a large area of North Wales and has multiple sites, including sites at Rhyl and Rhos-on-Sea.

18. The Claimant was born on 26 January 1968 and is now aged 53. He commenced employment with the Respondent in 1996. He was employed as a lecturer on a full-time basis teaching Media Studies and GCSE English. He worked in that capacity until his dismissal in April 2019.

19. The Respondent had written policies which applied to the Claimant's employment including a policy on Discipline, Grievance and Capability. The version of that policy which applied at the time of the Claimant's dismissal was approved in July 2018 and appears in the hearing bundle starting at page 75.

20. On 12 April 2018, the Claimant was issued with a written warning by the Respondent. A copy of the warning letter appears in the bundle at page 184. On that occasion, a disciplinary panel had considered allegations against the Claimant of a) "harassment and inappropriate behaviour towards a learner causing safeguarding concerns and detrimentally impact learning" and b) teaching of the wrong specification. The disciplinary panel found the first allegation proved but dismissed the second allegation. The nature of the Claimant's behaviour which led to the former allegation can be gleaned from the warning letter which says, "The panel viewed the way you emphasised "cock" in a student's surname as offensive and humiliating, this is a form of harassment and has had a negative impact on a student's learning." The Tribunal notes that the student concerned was a female student whose surname was Cockbill. The Tribunal also notes that, when cross-examined about this issue, Mr Wood (who had been on the disciplinary panel in 2018) could not specifically recall but was willing to accept that he had told the Claimant in 2018 when dealing with the disciplinary outcome that the Respondent did not consider there to be any sexual element to the behaviour the Claimant was being given the warning for.

21. In May 2018 the Claimant was diagnosed with Type 1 diabetes. Later that year, in August, the Claimant was hospitalised for a period of time as a result of his diabetes.

22. Shortly thereafter, the Respondent carried out a risk assessment in respect of the Claimant's work in light of his diagnosis. In late August 2018 the Respondent received a letter (addressed to Maggie Griffiths and Martin Evans

(Programme Area Manager) from an occupational health nurse in relation to the Claimant. There was some dispute on the evidence as to whether the Respondent also received a copy of the risk assessment at the same time. We do not consider it necessary to resolve that factual dispute for the purposes of this judgment. The letter included the following information:

22.1 The Claimant had recently been diagnosed with Insulin Dependent Diabetes Mellitus;

22.2 At that time, the Claimant's diabetes was unstable but the Claimant had a strict treatment regime to manage and stabilise his condition;

22.3 The Claimant was fit to undertake his role but, due to the chronicity of his condition, it was highly likely that the Claimant was disabled within the meaning of the Equality Act 2010;

22.4 As a result, reasonable adjustments were recommended for the Claimant to manage his condition whilst at work;

22.5 Those reasonable adjustments included providing the Claimant with scheduled breaks for lunch and tea (if required to facilitate an evening class) within his timetable to ensure he has enough time to test his sugar levels, inject and eat an adequate meal.

23. The events which are the focus of these proceedings, and in relation to which the Claimant was subjected to a disciplinary process and ultimately dismissed, took place during the period 20 to 27 September 2018. Some of the events involved students. At the Respondent's suggestion, and without objection from the Claimant, those students are identified within this judgment by the use of an initial only (e.g. student A, B, C).

24. On 20 September 2018, the Claimant was teaching an English class in Rhyl. The class was scheduled to start at 9am. The Claimant didn't start the class until 9:15am. The class was significantly disrupted as a result of the behaviour of one of the students, namely student A. During the course of the class, and on the basis of his own evidence, the Claimant said the following things to student A:

24.1 He told student A that she had "failed" the previous year. The student had obtained a Grade D the previous year;

24.2 When student A got up to leave the class, the Claimant told her to not bother coming back the following week.

25. Later on that morning, the Claimant sent an email to Martin Evans. He described what had happened during the class as follows: "after a very

disruptive session which ended up with [student A] walking out". He also indicated that he was not prepared to have student A in his class. He said student A was spoiling things for the other learners who he described as a quiet, keen group full of learners who want to progress.

26. The Claimant's email was forwarded to Paul Flanagan, the Respondent's Programme Area Manager, who subsequently wrote to the Claimant asking him for a summary of events as soon as possible. In his email Mr Flanagan told the Claimant that the incident would be followed up with student A.

27. The Claimant provided his summary by email to Mr Flanagan on 24 September 2018. His email included the following: "*[Student A] was disruptive throughout the session. She didn't engage with the newspaper article comprehension. … She said that "I just gave work out" and that "Phillipa never taught us like this last year". I reminded her that she didn't pass last year. She then began crying. I reminded the group that in Unit 1 there is an assessed individual presentation. She replied that she hadn't had to do one last year and wouldn't be doing so this year. She was told at least 5 times to put her phone away. She stated that she was contacting [someone] to "tell her what I was like". She constantly talked over me and interrupted. She laughed out loud repeatedly and also sniggered at another student reading out. Due to traffic, the class was starting slightly later so I mentioned that it would have to finish a little later. [Student A] argued about this and said that I "wasn't going to take her lunchtime away". She then told me that she was "a child" and that I'd "made her cry". Shortly after a little more arguing, [student A] then walked out of the session.*"

28. By 25 September 2018, Mr Flanagan had shared the information provided by the Claimant with Maggie Griffiths. On 25 September 2018, Ms Griffiths emailed Martin Evans asking him to address the issue with the Claimant urgently. She observed that [student A] was very upset following the incident and that "another learner" had raised the issue with Mr Flanagan. Ms Griffiths also pointed out that the Claimant could not start and finish classes later because of roadworks as the learners have other classes. Whilst acknowledging it was inconvenient, Ms Griffiths said that the Claimant needed to allow more time to get to the college.

29. The reference in that email to roadworks was a reference to works taking place on the A55 which commenced on or about 17 September 2018 and were due to last for approximately 1 month. The Respondent was aware of the roadworks and, on 14 September 2018, Mr Wood had emailed all staff to inform them of the roadworks, pointing out that they may need to allow extra time for their journeys.

30. On 26 September 2018, at 16:50, Martin Evans responded to Ms Griffiths by email. In his email, he said "*I will talk to [the Claimant] tomorrow. I was unaware that he was starting late as mentioned before. I will sort him*".

31. That afternoon, the Claimant was scheduled to teach an English class in Rhyl from 2:30pm to 5pm. According to the Claimant's grounds of complaint, the Claimant finished the class early at 4:30pm to allow sufficient time to travel back to Rhos where he was scheduled to teach an evening class starting at 6pm. In doing so, the Claimant did not seek any formal approval from a manager to alter the times of the lesson, or to shorten the lesson by 30 minutes.

32. In the evening of 26 September 2018, Mr Flanagan sent a further email to Ms Griffiths about the Claimant. He said that a number of students were raising concerns about the Claimant and how he was "making students fail". He also said that one learner had said the Claimant's appearance and hygiene isn't good. Ms Griffiths forwarded the information the following morning to Martin Evans and asked him to raise the issues with the Claimant. She acknowledged that the issues were sensitive but said that the Claimant needed to address the issues or there would inevitably be student complaints which the Claimant needed to understand.

33. On 27 September 2018, the Claimant was taking another English class during the afternoon. On his own evidence, the Claimant decided to finish the class early at approximately 4:20pm. He had not sought any approval for doing so.

34. There is a significant factual dispute about what took place during the class on 27 September 2018. Findings regarding what occurred on that occasion are relevant to the Claimant's claim of discrimination arising from disability and wrongful dismissal. They are also of relevance to the issue of contributory fault when considering the complaint of unfair dismissal. Accordingly, the Tribunal must make findings about the events of that day and will do so. However, we will set out our findings as to the events of that day later in this judgment.

35. That evening, Ms Griffiths arrived at the Rhyl campus. At approximately 5pm, the administration assistant approached Ms Griffiths and said there was a group of distressed GCSE English resit students who wanted to make a complaint. Ms Griffiths and Mr Evans (who Ms Griffiths had been meeting with when the administration assistant appeared) went to meet the four learners. The learners were students B, D, E and one other (who will be described as student H). The students told Ms Griffiths that during the afternoon class the Claimant had behaved inappropriately towards them by entering their "personal space" and staring at their tops and cleavage. They also said that they had seen the Claimant looking at their bottoms as they left the room for a break part way through the lesson. The students described how the Claimant set them work and then went around the class, appearing to look at their work

but not marking it or commenting on it. They said he was looking down their tops instead of looking at their work. They said the Claimant had made a comment about something written on the T-shirt of student G during the lesson and that the learners had pulled their tops up and put their jackets on to cover themselves throughout the remainder of the lesson. They also said that the Claimant had asked the Learning Support Assistant to stay behind after the class. The students had waited outside the classroom after the lesson when they heard the Claimant speaking to the LSA about the class saying that one of them was working at the level of an 11-year-old and another was incapable of completing a GCSE. The students reported feeling stupid and put down by the Claimant's comments which they had overheard. Students C and G were not present during this meeting but were the subject of some of the issues raised by the other learners.

36. Later that evening, Ms Griffiths took a telephone call from the mother of student C. In the conversation, student C's mother complained about the comments that had been made by the Claimant and overheard by the other learners. No complaint was made about any other alleged inappropriate behaviour by the Claimant during the class.

37. On the afternoon of 28 September 2018, Ms Griffiths sent an email to Mr Wood and copied it to Dafydd Owen (HR Director). The email was entitled "Allegations made against JT 4:45pm 27/08/18 (Rhyl Boardroom, 4 learners asked to complain to MG and ME)". The allegations set out in the email were:

    37.1 The Claimant is behaving inappropriately towards the learners in class. He is in their personal space, staring at them and their tops/cleavage. He stares at all the girls bottoms when they walk out of the room. He stares at them. He sets work and then goes around crouching much too close to them on a level with their bust and while appearing to look at their work he looks down their tops. The girls have been pulling their clothes around them because they feel uncomfortable. They are very upset;

    37.2 The Claimant is upsetting students in the way he speaks to them in class. For example, he has argued with a learner and then told her she "failed" last year in front of the class making her cry before telling her she is not a child;

    37.3 The four learners had overheard the Claimant from outside the classroom talking to the LSA about them by name. The Claimant had said that one student was working at the level of an 11-year-old and that another was not capable of doing the course. The learners had been made to feel put down and stupid as a result;

37.4 The Claimant was changing class times and shortening class hours to suit himself. The email referred to a delayed start to the Thursday class which started at 9:15am and finishing the Thursday afternoon class at 4:30pm instead of 5pm.

38. The email also set out a series of actions which were to be taken. Those actions included a) a personal tutor (Hailey Hockenhull) being asked to "discreetly facilitate" the 4 learners who had complained writing statements the following week during a tutorial which Ms Griffiths would then collect, b) Ms Griffiths speaking to the LSA from the class on 27 September, and c) Ms Griffiths would update Mr Wood on 1 October after actions a) and b) were completed.

39. Mr Wood subsequently appointed Ms Griffiths to investigate the allegations that had been made.

40. On 1 October 2018, statements were taken from four students in relation to the events of 27 September, namely students B, C, D, and E. The Tribunal accepts the evidence presented from the Respondent that those statements were taken from the learners during a tutorial session which was conducted by Ms Hockenhull. The statements appear at pages 197 to 200 in the bundle. The contents of the statements can be summarised as follows:

40.1 Student C (page 197) – the Claimant had looked at student B's breast in class and "kept looking at everyone in there". While they were leaving class, they heard their names while the Claimant was speaking to "another teacher". The Claimant said that student C's English is like an 11-year-old. Student C was not going to attend English class while the Claimant was teaching. The Claimant had made them feel uncomfortable during the lesson;

40.2 Student E (page 198) – the Claimant dismissed the class on 27 September at 4:20pm. A number of students had stayed outside the class so one of them could make a phone call. The Claimant was making "not so nice" comments about some of the students. Whilst she was walking out of class, the Claimant was looking at her bottom. He had also been looking at student B's breasts in class. During a break in the class, the LSA had told student B to zip up her jacket. The Claimant was also looking at student G's breasts because she had writing on the chest area of her T-shirt. The Claimant makes the class and the LSA feel very intimidated;

40.3 Student D (page 199) – she saw the Claimant look at student B's breasts. When student E was walking out of class, the Claimant looked at her bottom. She was told by another student that the Claimant had looked at her bottom (i.e. student D's) as well. She

was outside the classroom at the end of the day and heard the Claimant making comments about the ability of the students in the class and, in particular, the ability of student C. The Claimant makes her feel uncomfortable by staring at her and coming close to her face when he talks to her. The statement concluded with a sentence, all in capital letters, which reads "if he is going to continue to teach GCSE English I will not be attending his classes!"

40.4 Student B (page 200) – the Claimant made people feel uncomfortable by staring in an inappropriate way. He also made people feel intimidated when speaking to them by leaning over them. The Claimant did not help them feel confident in their work. On 27 September, the Claimant made a number of them feel uncomfortable. The Claimant was staring at hers and student G's breasts. He also made the LSA and other members of the class feel uncomfortable. At the end of the lesson, the Claimant wanted to speak to the LSA. The students waited for the LSA because she was also uncomfortable. The Claimant said to the LSA that the students aren't capable of GCSE English, a comment which student B felt was unfair. This statement concluded with a sentence, all in capital letters, which reads "I will not be attending these lessons if he is teaching us due to these circumstances thank you".

41. None of the statements were signed by the learners. The Respondent's disciplinary policy provides (at paragraph 4.1.6) that an investigating officer will interview the employee who is subject to the investigation and any other relevant witnesses. It also provides that the investigating officer will record any meetings in the form of witness statements to be signed by the interviewee and the investigating officer.

42. Also on 1 October, Ms Griffiths spoke to the LSA from the 27 September class, namely Gemma Timoney. Ms Timoney was not asked to prepare a statement but Ms Griffiths prepared a summary of the discussion (page 202). The summary contained the following details. During the first half of the lesson, the Claimant made a comment about student G's top which had the word "Metallica" written on it. The Claimant asked student G if she liked Metallica. Student G said she didn't know who they were but looked uncomfortable and zipped up her jacket. During the mid-lesson break, all of the students told her that the Claimant was looking at their chests and their bottoms. The students were very uncomfortable and embarrassed even talking about it. The LSA suggested they cover up whereupon students B and G zipped their jackets right up before going back into class. After the break, the LSA observed the Claimant whereas she had not been doing so before the break apart from the comment which had been made to student G about her top. The LSA observed the Claimant leaning over students when he was looking at their work and was aware that he was very close to them. Student G then left early because she

had to go to work. The Claimant asked the LSA to stay behind at the end of the class which finished at 4:30pm. The way he did so made the LSA feel like a pupil. The LSA felt uneasy and, as the students were leaving, she stood up, put her coat on and zipped it up. The Claimant then started talking about the learners scores and said that most of the group were not capable. He made comments about individual learners and their low ability. The LSA said she was not comfortable with the Claimant and said he had kept her behind after class twice. She asked Ms Griffiths whether the Claimant is "a little bit pervy". The students had been waiting after class for the LSA because they were scared for her being on her own with the Claimant. The document was not signed by Ms Timoney.

43. On 3 October 2018, Ms Griffiths sent an email to the Claimant telling him that she needed to see him that morning regarding a complaint that had been received. She then met with the Claimant that day and informed him of the allegations that had been made.

44. On 10 October, Ms Griffiths then spoke with some other learners. She spoke to students A and F in relation to the events during the class on 20 September. She spoke to students C and G in relation to the class on 27 September. Ms Griffiths again prepared summaries of the discussions she had and did not ask the learners to provide a witness statement. The notes were again not signed by the learners. The summaries contained the following details:

    44.1 Student A (page 204) – student A was asked to explain the issues that had upset her in class on 20 September. She said that the Claimant just gives them the work and there was no proper teaching. She said that she asked to "be taught" and the Claimant said "you failed last year". She said the Claimant told her she had failed 4 or 5 times and she was very upset and crying. She told the Claimant that he was making a child cry whereupon the Claimant said she was not a child. Later on, the Claimant asked her if she was still sulking which student A felt was him trying to wind her up. At 11:30 she started to pack up when the Claimant told her she had to stay. She then started crying again. She then left the class and the Claimant shouted after her "Don't bother coming back next week";

    44.2 Student F (page 205) – student F was asked about the class on 20 September and the events that had upset student A. He said the Claimant had given out the work and student A had said she didn't understand. The Claimant didn't help her but argued with her. Student A said that she understood it the way the previous teacher had explained it when the Claimant said she had "failed" the previous year. The Claimant continued to argue with student A and was not helping her. He said the atmosphere was very awkward. When student A left the class, the Claimant shouted after her "Don't come

back next week". The Claimant had started the lesson later than scheduled because of the roadworks on the A55 but had not said the lesson would go on later than normal. The group argued when the Claimant tried to keep them late and the Claimant eventually gave up and let them go. He said he was uncomfortable with the way the Claimant had spoken to student A that morning;

44.3 Student C (page 201) – she said that during the class on 27 September the Claimant just kept staring at them. He had asked student G about what it said on her T-shirt which made student G go red and embarrassed. She said the whole class had been uncomfortable. She said the Claimant was also staring at student B during the class;

44.4 Student G (page 257a) – she was asked about the lesson on 27 September and about anything that made her feel uncomfortable. She said that the class was all girls and the Claimant was sitting in the middle of the class and was staring at them. She felt very uncomfortable. He asked her if she liked the band whose name was on her top. The name was across her chest. She then saw him looking at her breasts and she felt very uncomfortable. She then pulled her coat around her. Later on, she said she had to leave early to go to work. She said that while they are working, the Claimant stands over them leaning on the wall and just stares down at their work which makes her feel very uncomfortable.

45. On 15 October 2018, Ms Griffiths wrote to the Claimant inviting him to a meeting in relation to the allegations as part of her investigation. She asked the Claimant to attend on 24 October 2018 or, if that was not convenient, on another date to be agreed. The letter said that the Claimant had the right to be accompanied to the meeting by a trade union representative or a work colleague.

46. On 24 October 2018, Ms Griffiths met with Hailey Hockenhull. Ms Griffiths again prepared a summary of the discussion they had and did not ask Ms Hockenhull to sign a record of it. The summary provides the following details. Some of Ms Hockenhull's tutees made her aware that they felt uncomfortable with the Claimant from week 1. They said he was unclean and unhygienic and would get close to them. They said the Claimant was not very respectful towards them and made them feel stupid through comments he made about their abilities. The students did not give any specific details but said they were uncomfortable and felt the Claimant's behaviour was inappropriate. Ms Hockenhull had spoken to the LSA from the class (Gemma Timoney) who had said the girls were uncomfortable with the way the Claimant was looking at them. Ms Timoney had told the girls to cover up. The LSA had said she was also uncomfortable that the Claimant asked to see her on her own after class

and she was worried about doing so. The students were also worried about the LSA being on her own with the Claimant and that was why they had waited outside the classroom after class. Ms Timoney said she had been uncomfortable with the Claimant since the first week.

47. On 7 November 2018, the Claimant attended an investigation meeting with Ms Griffiths. The Claimant was accompanied by his union representative. A note taker was also present. At the outset of the meeting, Ms Griffiths explained that there were a number of areas of concern to be discussed. She summarised those as including invading the personal space of female learners, standing over them or crouching very close to them and looking down their tops and at their bottoms, using inappropriate language with students, changing and shortening class times, talking to the LSA in a negative way about the learners which was overheard by the learners, poor personal hygiene and his style of teaching and the content of lessons.

48. Ms Griffiths proceeded to ask the Claimant about all of the issues identified. The notes of the meeting show that Ms Griffiths asked questions, the Claimant responded and then there was further discussion on each of the issues. The notes of the meeting appear in the bundle at page 206. The notes reveal the following:

    48.1 The Claimant accepted that class times were changed in Rhyl on two occasions. He said that there were roadworks on the A55 and it was taking over an hour to get from Rhyl to Rhos. He said the class in Rhyl finished at 5pm and his class in Rhos started at 6pm. Within that time, the Claimant said he had to test, inject and eat. Therefore, on the Wednesday, he might have finished early. He said he finished at around 4:30pm due to the traffic. As for the Thursday sessions, he said Martin Evans had agreed the morning session could start at 9:15am. As for the session on 27 September, he had finished at around 4:20pm because a) he had a crushing headache, b) the students had done 2 tasks which they had struggled with and he didn't want to start another that they would also struggle with, and c) the LSA had to leave at 4:30pm and he needed to speak with her before she left. The Claimant could not remember if Martin Evans had authorised the change in lesson times for the Wednesday session;

    48.2 As for the events of 20 September (involving student A), the Claimant said that student A had been rude all morning. The Claimant denied saying that student A had failed repeatedly but had said that she had "failed last year" on one occasion. The Claimant said that student A had said that she was a child and that the Claimant had made her cry. As student A "stormed" out of the class, the Claimant accepted that he had said "don't come back" to her. The Claimant said that

student A had been undermining him throughout the 2 ½ hour class and was not engaging with the work, she was talking over him and was laughing at other students when they were reading out loud. The Claimant said he had never experienced behaviour like this before and had emailed Martin Evans and others about it after the lesson;

48.3 The Claimant admitted expressing concerns to the LSA after the lesson on 27 September. He said they were in an empty classroom and behind a closed door. He did not realise that the learners could hear what was being said. He said in his view one of the students had overheard and had fed back to the others and then they had all put in a complaint. He asserted that the complaint was malicious. Ms Griffiths responded by saying she had no evidence to suggest it was malicious;

48.4 In relation to the class on 27 September, the Claimant accepted that he had asked student G about the writing on her T-shirt but said he was asking if she liked the band. He said he would do the same with male students. When it was put to the Claimant that he had been staring at the students, the Claimant said that he is diabetic and it affects his eyesight. He said he has had eye issues since July 2018 and since September 2018 had been going to the opticians weekly. He said that on that day the lenses the optician had given to him were too weak and he had put in some older contact lenses instead which were too strong which resulted in a headache. He said that he "couldn't read due to this and couldn't stare at anything". He said he was "not in a position to stare at anyone with focus, particularly on that day, and was not looking at those people sexually". When asked about the allegation that he leans across the students when looking at their work, the Claimant said that he comes to the side of the students to look at their work and then moves his head to the side to look. He said there was no need to go behind the students because he could see their work from the front. He said he very rarely crouched down. When it was put to him that students had said he was looking at their bottoms, the Claimant said that was not true. He also questioned how it was possible for them to say that as they were walking out as "they don't have eyes on the back of their head". He said he was not aware the students had kept their coats on in the class;

48.5 The Claimant questioned why, if the issues raised were such a problem, he had not been suspended. He said that if he was a real risk why was he still being allowed to teach. Ms Griffiths told him that the Principal had made the decision to remove the Claimant from teaching that particular group in Rhyl during the investigation.

49. On 20 November 2018, Ms Griffiths then spoke to Paul Flanagan. She again prepared a summary of the discussion which was not signed by Mr Flanagan. The notes of the meeting covered the events of 20 and 27 September. In relation to the former, Mr Flanagan recalled seeing an email from student A about the lesson. Student A had been given a formal disciplinary warning in respect of her behaviour that day. Student A had protested about the warning and alleged that the Claimant had behaved wrongly towards her. Mr Flanagan had then asked another member of staff to speak to student F (who he described as a sensible student) about the events. Student F had confirmed what student A said and that the Claimant had behaved unreasonably towards student A. Student A had also said she was not going back to the Claimant's class. Mr Flanagan had sent an email to the Claimant to inform him that student A had received a warning. As to the events of 27 September, Mr Flanagan had been contacted by Hailey Hockenhull who had said that students were raising concerns about the Claimant. They were being made to feel stupid and were concerned about the Claimant entering their personal space when he came to look at their work. They had also said there were personal hygiene issues concerning the Claimant.

50. On 21 November 2018, Ms Griffiths sent a copy of the notes from the investigation meeting with the Claimant to him by email.

51. On 27 November 2018, Ms Griffiths spoke to Martin Evans in respect of the changes in the Claimant's lesson times. Ms Griffiths again prepared a summary of the discussion. Mr Evans said that he had not given the Claimant permission to change the start and end times of lessons and that, when he became aware of it, he spoke to the Claimant about it. He said that the Claimant told him it was because of the roadworks and the changes were needed to ensure he could get to another class in Rhos. Mr Evans had said that as long as the learners were getting their 2.5 hours of class time it would be ok. Mr Evans also said that he was made aware of the allegations of the Claimant displaying sexually inappropriate behaviour towards learners at the same time as Ms Griffiths.

52. In December 2018, Ms Griffiths produced her investigation report. The report appears in the bundle at pages 186 to 215. The report had appended to it the statements which had been taken during the course of the investigation (apart from the statement of student G which was omitted) and the notes of the investigation meeting with the Claimant. The report set out at the start the issues which had been identified and which had been the subject of the investigation. They were the same issues which had been identified at the investigation meeting with the Claimant. The format of the report was that Ms Griffiths set out her summary of each of the allegations and the evidence in relation to each of them. She then set out her "conclusion" in relation to each of the allegations. At the end of the report Ms Griffiths then set out her overall conclusion and recommendations.

53. The Tribunal makes the following findings in respect of the investigation report:

53.1 The report set out Ms Griffiths' summary of the evidence in support of the allegations;

53.2 There are a number of instances where Ms Griffiths' summary of the evidence was inaccurate or introduced details which were not derived from the evidence collected during the investigation, namely the witness statements/summaries appended to the investigation report. In particular, the Tribunal notes the following examples:

a) Ms Griffiths wrote that "Learners and LSA statements allege that inappropriate sexual behaviour of JT made them feel very anxious and uncomfortable in the class". The LSA's statement had not said anything about feeling anxious or uncomfortable during the class;

b) In relation to the comment about the writing on student G's top, Ms Griffiths wrote "This happened prior to the break and at a point when the LSA and one of the learners were out of the room". In her statement, the LSA described the comment about student G's top and gave a description of how student G looked at the time;

c) Ms Griffiths also wrote "At the break the LSA and additional learner re-met up with the group … The LSA advised that if they were uncomfortable to put their cardies/jackets/coats on and fasten them up (and she also did the same)". In fact, the LSA said she had put her coat on and zipped it up at the end of the lesson and not during the break;

d) "JT (in his interview) said that he had not noticed that the students had put their coats etc. on. The LSA said that he "must have" noticed this". No such comment appears in the statement of the LSA;

e) "The comment made and the way it was made, by JT in relation to the Metallica band, given this was a relatively "skimpy" top on a female student aged 17, are considered inappropriate". There was no mention in the evidence of the student's top being "skimpy";

f) In relation to the incident involving student A, Ms Griffiths wrote "JT agreed that the student was visibly upset and crying while he berated her". The Claimant had not said that he had berated student A while she was crying;

g) Further, Ms Griffiths wrote that "JT shouted after her "Don't bother coming back next week"". The Claimant had admitted saying that but did not admit shouting. Ms Griffiths was therefore presenting the student's account as fact on an issue which was disputed by the Claimant.

53.3 The conclusion in respect of allegation 1 (i.e. inappropriate behaviour of a sexual nature towards learners in GCSE English on 27 September) was that the investigation demonstrated that the learners and the LSA were discomforted and anxious regarding the behaviour of JT which they felt and interpreted as being sexually inappropriate. The comment made and the way it was made, by JT in relation to the Metallica band, given this was a relatively "skimpy" top on a female student aged 17, are considered inappropriate;

53.4 The conclusion in respect of allegation 2 (i.e. inappropriate behaviour/language towards a learner in GCSE English on 20 September 2018) was that it was acknowledged that the student was presenting with challenging behaviour but the situation was not handled appropriately by the Claimant. The "you failed" comment should not have been made and nor should the "you're not a child" comment. Shouting after the student "Don't bother coming back next week" was also not acceptable. The comments, which the Claimant saw nothing wrong with, were considered to fall short of professional conduct expected of a lecturer even in a challenging situation;

53.5 The overall conclusion was that the Claimant had failed to meet the required professional standards on several occasions in September by a) changing lesson times without prior permission from his line manager, b) humiliating student A by telling her she had failed the previous year in front of the class and then telling her not to bother returning the following week, c) standing inappropriately close to learners while they were working and d) making learners feel uncomfortable by staring at their breasts and bottoms;

53.6 The recommendations in the report were for allegations 1 and 2, and also allegations 4 and 5 (changing of lesson times) to be the subject of disciplinary action and that the matters should be referred to the Education Workforce Council. Capability procedures were recommended in respect of allegations 3 (the overheard comments about learners) and 7 (the Claimant's style of teaching and ineffective lesson content). There was no recommendation for any further action in respect of allegation 6 (poor personal hygiene).

54. On 20 December 2018, the Claimant sent Ms Griffiths a document entitled "Meeting (7/11) Clarification Notes". In the document, the Claimant did not seek to challenge the accuracy of the meeting notes particularly, but rather provided some further context or sought to emphasise some of the points he had made during the investigation meeting.

55. By letter dated 7 February 2019, Dafydd Owen (HR Director) invited the Claimant to a disciplinary panel scheduled for 15 March 2019. The letter set out that the panel would consider six allegations. The six allegations were all of the allegations in the investigation report save for the allegation of poor personal hygiene. The letter informed the Claimant that the panel would comprise Mr Wood, Jamie Clegg and Lesley Tipping (Assistant Principal at Coleg Llandrillo). It also said that Ms Griffiths would attend to present her investigation findings. The letter informed the Claimant of his right to be accompanied by a work colleague or trade union representative. The letter enclosed a copy of the Respondent's disciplinary policy and the investigation report and appendices. It is common ground that the documents did not include the statement taken from student G.

56. The disciplinary hearing did not take place on 15 March but was in fact postponed to 9 April 2019 at the Claimant's request. On 7 March 2019, the Claimant had written to Mr Clegg asking for permission to be accompanied to the meeting by his sister. Mr Clegg refused that request pointing out that the Respondent's policy allowed the Claimant to be accompanied by a work colleague or trade union representative.

57. In a letter dated 1 April 2019 which gave the Claimant details of the new disciplinary hearing date, Mr Clegg also informed the Claimant that the written warning he had been given in 2018 (which was due to expire on 10 April 2019) would be extended to reflect his long-term absence and so would remain active for the full extent of the disciplinary process.

58. The disciplinary hearing went ahead on 9 April 2019. The panel comprised of Mr Wood, Mr Clegg and Lesley Tipping. The Claimant was present and was accompanied by Mr Roberto, a trade union representative. Ms Griffiths was present. Leah Williams was also present for the purpose of taking notes. The notes made at the meeting appear in the addendum part of the bundle starting at page 431. Those notes reveal the following:

    58.1 At the outset of the meeting, Mr Wood explained the purpose of the meeting which was to look at the seven allegations identified in the investigation report;

    58.2 The Claimant had prepared a written document for use at the meeting. Although the Respondent would not normally allow new evidence to be relied upon at a disciplinary meeting, the panel were

prepared to allow the Claimant to rely on his document and it was agreed that the panel would take an adjournment to read the document after the investigating officer had presented her findings;

58.3 Ms Griffiths presented her findings as per the conclusions set out in the investigation report;

58.4 The disciplinary panel then asked questions of Ms Griffiths and the Claimant and his trade union representative were given the opportunity to ask questions;

58.5 Ms Griffiths was asked whether she had spoken to other students from other classes taught by the Claimant. She confirmed that she had not spoken to any tutors or learners from the Rhos campus;

58.6 The Claimant pointed out that he had not been happy with the content of the notes of the investigation meeting to which Ms Griffiths said she had not made reference to the Claimant's further document in her report. When asked what difference it would have made to the investigation the Claimant was unable to say. Ms Griffiths said that the outcome of the investigation would have been no different. Mr Clegg confirmed that the meeting notes were in the pack available to the panel and would not be ignored;

58.7 After hearing from the investigating officer, the panel then adjourned to consider the written submission and further evidence provided by the Claimant. In total, the panel adjourned for approximately 1 hour and 15 minutes;

58.8 The Claimant's trade union representative made a number of comments initially. Concerns were expressed about the allegations and the way they had been made. Concerns were also raised about the procedure that had been followed by the Respondent;

58.9 The Claimant felt victimised and suggested that Ms Griffiths had a dislike towards him which was reflected in the investigation outcome;

58.10 When speaking about the class on 27 September, the Claimant said:

a) He felt stressed on the day and also couldn't see properly. He had recently been diagnosed with Type 1 diabetes which was affecting his eyesight. He had been given the wrong contact lenses by the optician and this had given him a big headache;

b) When asked by Mr Clegg why, if he had poor vision, he was standing over anyone to look at their work, the Claimant said he

may have picked the papers up and had not crouched down to read them;

c) He went home straight after meeting with the LSA (said in response to Mr Clegg asking why he had not gone straight home if he felt ill);

d) He should not have been driving on that day due to the way he was feeling but he didn't want to be away from work anymore following his previous absence;

e) He had been having problems with his sight for some time, even before the summer break;

f) The Claimant said that he unfortunately did not obtain authorisation from his line manager to finish class early and accepted that he should have told his line manager and sought permission;

g) On Wednesday 26 September, he had to travel from Rhyl to Rhos for his evening class and one hour was not sufficient time given the roadworks;

h) In relation to the incident on 20 September, the Claimant admitted telling the student she had failed and that she should not bother coming back the following week. The Claimant again said that he had been provoked by the behaviour of the learner for approximately 2 ½ hours during the lesson. The Claimant said he was at the end of his patience. The Claimant also said he would like training on dealing with difficult learners and de-escalation;

58.11 Amongst the documents submitted by the Claimant was an image of one of the learners from the 27 September class. The image appears in the bundle at page 399. Mr Wood asked the Claimant why it had been included. The Claimant said that it shouldn't be in the pack and that he had left it in the pack by mistake. When asked what the original purpose of including it was, the Claimant said it was there to show he had no interest in the learner at all. The Claimant asked for the picture to be disregarded and said it was not a point he wanted to make;

58.12 Mr Clegg commented that capability was not the main focus of the disciplinary as the Claimant was an experienced, capable and qualified member of staff but the focus was on other issues namely what he said to the learners and his behaviour in class.

59. As part of the evidence adduced by the Claimant, he also presented a letter dated 1 March 2019 from Mr Mohammad Nissar, an optician at Asda Opticians in Llandudno. That letter included the following:

"*Mr Taylor has been attending the Opticians at Asda Llandudno regularly from August till November 2018 due to an unstable and fluctuating prescription most likely due to fluctuating sugar levels related to his diabetes.*

On each visit vision was normally poor and prescription adjusted each time to correct these changes. Most significant changes in prescription were between 15/09/18 to 29/09/18. He had to return for a new prescription each time as the prescription was changing significantly over a short period of time which would cause poor vision and discomfort. The correction on the 29th of September was significantly different from the correction on the 15th of September; which would mean very poor vision leading up to the 29th September. He had no lenses inbetween these dates to correct his vision to see comfortably.

From November onwards his vision and prescription has been stable and has been advised to return if he notices any changes."

60. After considering all of the evidence, the panel concluded the hearing and informed the Claimant that the outcome of the hearing would be sent to the Claimant by post within 5 days.

61. The panel deliberated and came to the following conclusions which were recorded as part of the notes of the disciplinary panel meeting:

    61.1 Allegation 1 (inappropriate behaviour of a sexual nature towards learners on 27 September 2018) was made out. In addition, the panel was very concerned by the presence of the image of the learner in the evidence submitted by the Claimant. The panel felt there was a clear pattern of inappropriate behaviour displayed by the Claimant;

    61.2 Allegation 2 (inappropriate behaviour towards/language towards a learner on 20 September 2018) was made out and the behaviour fell short of the expected standards;

    61.3 Allegations 4 and 5 (changing of class times) were made out and would have had a detrimental impact on learners;

    61.4 No further action would be taken in respect of allegations 3 and 6;

    61.5 Any issues in relation to teaching style or content would be dealt with through a performance review process.

62. The panel also noted that the behaviour had occurred at a time when the Claimant was the subject of a written warning (from 2018) which had been issued in respect of inappropriate behaviour towards a female learner.

63. The Respondent wrote to the Claimant setting out the outcome of the disciplinary meeting in a letter dated 10 April 2019. The letter set out the following conclusions:

    63.1 The panel found allegation 1 (inappropriate behaviour of a sexual nature towards learners on 27 September 2018) was founded and that the Claimant's behaviour was wholly inappropriate. The panel was further concerned about the Claimant including a picture of a learner in his submission to the disciplinary panel and felt that was distasteful and a significant example of unprofessional conduct demonstrating a total lack of respect for the learner and the Claimant's own role;

    63.2 In relation to allegation 2 (inappropriate behaviour towards/language towards a learner on 20 September 2018) the panel found that the behaviour admitted by the Claimant was inappropriate and did nothing to professionally resolve the issues the Claimant had with the learner. The allegation was founded and the Claimant's behaviour fell short of the expected professional standards;

    63.3 Allegations 4 and 5 (changing and shortening class times) were found to be founded. The panel also concluded that the Claimant's actions had a detrimental impact on learners;

    63.4 Allegations 3 (inappropriately discussing the learners' abilities) and 6 (poor personal hygiene) were unfounded;

    63.5 Any required improvements in teaching style or lesson content (allegation 7) would be addressed through performance management at line management level.

64. The letter concluded that the panel were concerned that the Claimant had changed class times without management approval and found that to be inappropriate. However, the letter said that the main concern was the Claimant's unprofessional conduct towards female learners which had not changed since the written warning issued to the Claimant in 2018. The panel found that the Claimant's behaviour was unjustifiable. The letter said that, as a result of the Claimant demonstrating unprofessional conduct on three occasions in his behaviour towards female learners, the Claimant was summarily dismissed for gross misconduct in accordance with the Respondent's disciplinary policy. The letter said that the Claimant's

employment was terminated on 9 April (i.e. the day before the date of the letter) and he was dismissed without notice. The letter also informed the Claimant of his right of appeal.

65. It should be noted at this stage that, in line with the dismissal letter, the Respondent ceased paying the Claimant with effect from 9 April 2019.

66. By email dated 16 April 2019, the Claimant informed the Respondent of his intention to appeal. The Claimant repeated his intention to appeal in an email the following day. In doing so, the Claimant asked to be provided with all documents relevant to his case. He also asked for an extension of time to appeal until 29 April. That request was subsequently granted by Mr Clegg.

67. On 2 May 2019 the Claimant sent an email to the Respondent attaching his grounds of appeal. The attachment appears in the bundle starting at page 314. Mr Clegg accepted the Claimant's appeal (despite it being submitted beyond the extended deadline).

68. The document set out the Claimant's grounds of appeal in summary and included the following:

    68.1 Insufficient consideration had been given to the Claimant's explanation of the circumstances leading up to his dismissal;

    68.2 Dismissal was too harsh and disproportionate to the alleged misconduct;

    68.3 The Claimant's length of service had not been adequately considered when deciding to dismiss him;

    68.4 The Claimant had had no other disciplinary issues in over 20 years of service save for the incident which led to the written warning in 2018;

    68.5 The investigation and process had been driven by Ms Griffiths who had a personal dislike for the Claimant;

    68.6 A lesser sanction should have been imposed.

69. The Claimant then went on to make specific comments about the three allegations he had been dismissed for. He said that any alleged staring had been misinterpreted as a result of him trying to focus but suffering with poor eyesight as a result of his diabetes. He maintained that he was feeling unwell on that day. As for the lesson on 20 September, the Claimant said he was severely provoked by the learner. He was not at his best and was coming to terms with his diabetes. He said he had not been offered any training in how

to de-escalate such situations. He denied shouting or berating the learner but said that he had "simply pointed out that the learner had not been successful the last time she took GCSE". He said he regretted saying what he said at the end of the lesson but reiterated that it was after more than 2 hours of provocation from the learner. As for changing lesson times, the Claimant said that he was under duress at the time due to the roadworks on the A55. He said Martin Evans was informed on the morning of 20 September and accepted the situation but the Claimant accepted that he should have obtained written agreement in advance. On 26 September, the Claimant said that he needed more time between classes in order to test, inject and eat. He also maintained that the class on 27 September had ended due to his very poor eyesight, a bad headache and his concerns about the abilities of the students.

70. On 8 May 2019, the Respondent wrote to the Claimant inviting him to an appeal hearing on 23 May 2019. The letter gave details of the appeal panel and said that Mr Wood would be present to set out details of the case. The letter told the Claimant that he could bring a work colleague or trade union representative with him.

71. On 22 May 2019, the Claimant submitted a further document. It was entitled "Statement of Appeal". The document set out in considerable detail the basis on which the Claimant was challenging his dismissal. A summary of the grounds relied upon were set out on page 2 of the document (page 334 of the bundle). The document then set out more detailed comments in support of each of the grounds of appeal.

72. The appeal hearing was subsequently postponed at the Claimant's request and was rescheduled to take place on 4 June 2019.

73. On 7 June 2019, the Respondent sent an email to the Claimant asking for his consent for access to his occupational health records and asking him to complete a form enabling the Respondent to obtain copies of the Claimant's medical records from his GP.

74. The Claimant responded to that request on 11 June 2019. He gave his consent for the Respondent to access all relevant information held by occupational health. As for access to his GP records, he raised concern about providing unfettered access to those records. He pointed out that he had provided a letter from his GP and his optician and sought clarification of what further information was being requested. He also provided an updated letter from his GP.

75. It is common ground between the parties that the Respondent did not respond to the Claimant's request for clarification as to the information it needed from the Claimant's GP records.

76. The letter from the Claimant's GP was dated 20 May 2019. It appears in the bundle at page 330. The letter confirmed that the Claimant was diagnosed with Type 1 diabetes. It also stated that it is "quite common to get visual problems after commencing insulin".

77. The appeal hearing was subsequently postponed further until 28 June 2019 but then went ahead on that date. Dafydd Evans chaired the hearing and was joined by Debbie Tebbutt (Assistant Principal) as the other member of the panel. Mr Wood was present as was a note taker. The Claimant attended and was again accompanied by a trade union representative.

78. Mr Evans explained the purpose of the panel which was to focus on the Claimant's appeal statement in respect of the allegations which had been considered by the disciplinary panel. The notes of the appeal appear in the bundle starting at page 361. The notes reveal the following:

    78.1 Mr Evans started the meeting by explaining the purpose of the meeting which was to focus on the statement of appeal provided by the Claimant in respect of the allegations which had been considered by the disciplinary panel;

    78.2 The Claimant was asked to initially present an overview of his appeal. He relied upon his statement of appeal and said that he felt the decision that had been made was wrong;

    78.3 He said that he regretted losing his composure in September (a reference to the incident on 20 September) and wished he had made different decisions on the day;

    78.4 He regretted commenting on the word displayed on student G's t-shirt but rejected the sexualized staring complaint and maintained that he had not looked at the learner in an inappropriate way. He said he regretted the incident and would be more aware in the future;

    78.5 He regretted including the photograph of student E in the documents submitted to the disciplinary panel but explained that he had asked the panel to disregard it. He said it had been included to show an example of the t-shirt which the learner was wearing;

    78.6 He explained that he rejected all allegations that he had stared at the learners;

    78.7 After that initial overview, Mr Wood was asked to present the reasons for the decision to dismiss as chair of the disciplinary panel;

78.8 Mr Wood also set out his response to the grounds of appeal set out in the Claimant's statement of appeal;

78.9 The appeal panel asked questions of Mr Wood, and the Claimant and his union representative were also afforded an opportunity to ask any questions of Mr Wood which they wanted to ask;

78.10 When talking about the Claimant's asserted medical issues and their relevance to the issues which arose on 27 September, Mr Wood commented that the Claimant could have provided blood level readings for the day in question and queried whether the Claimant should have been driving on that day;

78.11 The Claimant said that the disciplinary panel had not requested copies of his occupational health records. Mr Wood replied saying the Claimant could have asked for them to be shared voluntarily;

78.12 The hearing concluded with the Claimant being told that he would be informed of the outcome of the appeal by the end of the week;

78.13 The decisions of the appeal panel were then set out in the notes of the meeting. The decisions were subsequently set out in the letter informing the Claimant of the appeal outcome.

79. After the appeal meeting, the appeal panel decided that there were further questions which they wished to ask of Ms Griffiths. During the appeal meeting, the Claimant confirmed he was happy for Ms Griffiths to be spoken to in his absence.

80. Ms Griffiths was spoken to on 1 July 2019 by the appeal panel. She confirmed that she was not biased against the Claimant in any way and that it would be normal practice for her to investigate the allegations against the Claimant. Ms Griffiths was asked about the preparation of the statements by the learners. She said that it was agreed with Ms Hockenhull that the statements would be prepared discreetly and that the students were asked to write them in silence at the start of a tutorial. A statement was chased up from a further learner on a later occasion who had not been in the tutorial session. The panel asked whether student G had been interviewed. This question was asked because neither the disciplinary panel nor the appeal panel had been provided with any statement from student G. The Claimant had not been provided with that statement either. Ms Griffiths provided a copy of the statement to the appeal panel and the panel considered it. Ms Griffiths was asked about the reference to a "skimpy" top in her report and where that term came from. Ms Griffiths said that it had been mentioned verbally by one of the learners but was not included in any statement. The notes of the meeting with Ms Griffiths record that the appeal panel felt that nothing really turned on the description of the

student's top and that the concern was whether the Claimant had behaved inappropriately.

81. On 5 July 2019, the Respondent wrote to the Claimant with the outcome of the appeal. The letter set out the Respondent's conclusions in respect of each of the Claimant's grounds of appeal. None of the Claimant's grounds of appeal were upheld. The overall conclusion of the appeal panel was in very similar terms to the conclusion of the disciplinary panel. The decision of the appeal panel was to uphold the Claimant's dismissal for gross misconduct.

82. In August 2019, following the Claimant's dismissal, Mr Clegg asked the Claimant to return to the college to oversee the return of his personal belongings. During that process, various CD-ROMs were located amongst the Claimant's personal belongings. The Claimant agreed for Mr Clegg to access the discs to ensure that they did not contain material belonging to the Respondent. Upon doing so, Mr Clegg discovered that they contained over 5,000 "glamour images" of two female celebrities, some of which showed them posing in underwear or swimwear with a number focusing on the breasts of the person in the picture. Mr Clegg took a photograph of an example of some of the images which appears in the addendum part of the bundle at page 531.

Findings of fact in relation to the events of 27 September

83. The Tribunal now sets out its findings of fact in respect of the events which took place on 27 September 2018. This was a matter of significant dispute during the disciplinary process and remained so before the Tribunal.

84. Having considered all of the available evidence, the Tribunal finds as a fact that, during the class on 27 September 2018, the Claimant did behave inappropriately towards the female students in the class, in particular by a) entering their personal space and/or b) looking at the breasts and bottoms of some of them. The Tribunal has come to that conclusion for the following reasons:

    84.1 The statements taken from the learners who were present in that class as part of the disciplinary investigation are broadly consistent as to the core allegations that the Claimant behaved inappropriately in looking at the breasts and bottoms of the learners, even though they are not entirely consistent with each other on all of the details;

    84.2 In particular, students B, C, D and E all said that the Claimant had been staring at the breasts of student B during the class and students B, E and G said that the Claimant had also been looking at the breasts of student G;

    84.3 In addition, students D and E both said that the Claimant had looked at student E's bottom as she left the room at the end of the class;

84.4 The students reported to Ms Timoney that they felt uncomfortable in the class and that the Claimant had been looking at their breasts and bottoms. She advised them to zip up their tops/coats. Those events took place during the break in the lesson and, notably, before the students overheard the comments which the students overheard the Claimant making about them to the LSA after the lesson thus undermining the Claimant's suggestion that the complaints about inappropriate behaviour in the class were malicious and arose as a result of the comments made after the class had ended;

84.5 Some of the students also reported to Ms Hockenhull that they had felt uncomfortable around the Claimant since the first week of term;

84.6 The body of evidence collected from the students and as summarised above is, in the Tribunal's judgment, significant and compelling, notwithstanding that the documents are not signed by those who gave the statements and that the individuals were not present to give oral evidence to the Tribunal. The Tribunal was satisfied, having heard the evidence of Ms Griffiths that the statements prepared, even though not signed, represent the evidence of the witnesses she spoke to and the evidence of the four students who prepared their own statements during a tutorial supervised by Ms Hockenhull;

84.7 By contrast, the Tribunal considered that the evidence of the Claimant was not compelling or impressive. In particular:

a) The Tribunal finds that the Claimant's evidence as to the events of that day given during the disciplinary process materially changed. During the investigation, he told Ms Griffiths that, due to his eyesight and the way he was feeling that day he could not stare at anything with focus and was not staring in a sexual manner at any of the students. By the time of his appeal, the Claimant was saying that any staring had been misinterpreted as a result of the difficulties he was experiencing with his eyesight;

b) In addition, the Tribunal considered the Claimant's evidence before the Tribunal (and, in particular, his oral evidence) to be unimpressive. The Tribunal found the Claimant to be evasive during cross examination on a number of occasions, particularly when faced with difficult questions regarding his own behaviour. Further, on various occasions, he preferred to pick up on an isolated part of a question being asked (which was not difficult for him to deal with) rather than focusing on and answering the main point of the question being asked (which was rather more difficult for him);

c) On other occasions, most notably during the disciplinary process, the Claimant displayed a tendency to underplay or trivialise issues or to place a spin upon them which was positive in his favour. For example, when asked about the comment he made to student A on 20 September 2018 that she had "failed" the previous year, the Claimant preferred (at least at one stage in the process) to suggest he had said she "hadn't been successful". More notably, he also has sought to minimise his culpability for the issue which led to his written warning earlier in 2018. He describes it as minor misconduct. The Tribunal does not agree with that assessment, and neither did the Respondent who found that the Claimant had behaved in an offensive and humiliating way;

84.8 The Tribunal also considers that other evidence supports and is consistent with the findings made. In particular:

a) The Claimant was made the subject of a warning earlier in 2018 for repeatedly emphasising the word "cock" when saying the surname of a female student. Even though Mr Wood accepted that he had told the Claimant that it was not considered to be sexual at that time, the Tribunal concludes that the word has sexual connotations and, at the very least, displays inappropriate behaviour towards a female student using a word which may be considered to be sexual in nature;

b) It is likely, in the Tribunal's judgment, that any student (including any female student) would be able to tell the difference between someone staring in an effort to look at their work in class and someone staring at their breasts and/or bottoms;

c) The Claimant's decision to include an image of one of the learners in his pack for the disciplinary meeting is also of significance. Even though the Claimant asked for it to be removed and did not seek to rely on it, by his own admission he originally decided to include it to show what that learner looked like. In cross-examination, he accepted that meant that he was trying to demonstrate that he would not be attracted to that particular learner. That evidence is significant because i) it implies that the Claimant was (or at least may have been) attracted to the other learners whose images he did not include, ii) it shows a lack of judgment regarding the learner in question and iii) it displays an attitude towards the particular female student which is inappropriate and disrespectful;

d) The CD-ROMs located amongst the Claimant's personal belongings which included images of young female celebrities in

little clothing is consistent with and indicative of the Claimant's ability and willingness to objectify young females.

85. Taking all of those matters into account, the Tribunal prefers the evidence adduced by the Respondent and finds that the Claimant did behave in a sexually inappropriate manner towards the female students in the class on 27 September 2018, in particular by staring at the breasts and bottoms of some of them.

86. The Tribunal must also make findings as to whether that behaviour was in some way connected to the Claimant's diabetes. Having considered all of the evidence, the Tribunal is satisfied that the Claimant's behaviour was not connected to his disability.

87. The Tribunal has taken into account the contents of the letter from the Claimant's optician and the Claimant's GP. Both of those documents are consistent with a conclusion that diabetes can cause issues with vision and that the Claimant was experiencing some issues with his vision in late September 2018. However, that evidence can only take the matter so far. The Tribunal must still consider whether the Claimant's behaviour on 27 September was caused by (or arose from) his disability.

88. In determining that issue, much again rests upon the evidence of the Claimant. For the reasons already set out, the Tribunal did not find the Claimant's evidence impressive.

89. Further, the Tribunal finds it very difficult to understand any suggestion that the Claimant's staring at the bottom of a learner as she was leaving the classroom (as the Tribunal has found occurred) can be in any way related to the Claimant's disability. Further, the same is true of the Claimant staring at the breasts of the students. Once the Tribunal has concluded that the Claimant was not behaving in a way that has been misinterpreted by the students, the Tribunal comes to the conclusion that it is more likely than not that the Claimant was consciously staring at the students' bodies and that it was not connected, in any way, to his disability or any issues arising from it.

90. As a final finding, the Tribunal also rejects the Claimant's evidence that he finished the class on 27 September 2018 early because he had a headache arising from his disability. Although that is the Claimant's evidence, the Tribunal does not find the evidence credible for the following reasons:

    90.1 Despite the severity of the problem described by the Claimant, he remained in the classroom after the class had finished in order to discuss the abilities of the learners with the LSA, a discussion which was not urgent and could have waited until another occasion;

90.2 The Claimant had driven to work that day and, more significantly, drove home despite apparently being unable to see clearly and suffering with a severe headache;

90.3 The Claimant did not mention his illness to anyone as a reason for finishing a class early until after the disciplinary investigation commenced.

Applicable law

Unfair dismissal

91. Unfair dismissal claims are governed by the provisions of Sections 94 and 98 of the Employment Rights Act 1996.

92. Consideration of claims under that Section involve a two-stage process. Firstly, Section 98(1) provides that the Respondent bears the burden of proving a) the reason for dismissal and b) that the said reason falls within one of the potentially fair reasons for dismissal set out in Sections 98(1) or 98(2).

93. Section 98(2)(b) provides that a reason which relates to the conduct of the employee is a potentially fair reason for dismissal.

94. If the Respondent is able to discharge the burden under section 98(1), the Tribunal must then consider whether the decision to dismiss the Claimant for that reason, is fair or unfair pursuant to the provisions of Section 98(4) of the 1996 Act. Section 98(4) ERA 1996 provides that, in deciding whether a dismissal is fair or unfair (having regard to the reason for which the Claimant was dismissed), a tribunal must consider whether the Respondent acted reasonably in treating that reason as a sufficient reason to dismiss the Claimant bearing in mind all the circumstances, including the size and administrative resources of the Respondent, equity and the substantial merits of the case.

95. The burden of proof when considering the issues arising under section 98(4) is neutral (**Boys and Girls Welfare Society v MacDonald [1995] ICR 693**).

96. Where the reason relied upon by the employer is conduct, the following issues fall to be considered as set out in **BHS v Burchell [1980] ICR 303**: a) did the employer have a genuine belief that the employee was guilty of the conduct in question, b) was the belief held on reasonable grounds and c) was the belief held on those grounds after as much investigation as was reasonable in the circumstances.

97. In addition to the above well-known authorities, the parties also referred the Tribunal to a number of further authorities from which the following propositions can be taken:

    97.1 In order for an investigation to be fair, there is an obligation on employers to ensure that they focus as much on evidence which exculpates the employee as on that which inculpates him (**Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402**);

    97.2 Where, as a consequence of the particular allegations, an employee may lose their reputation, their job and even the prospect of securing future employment in their chosen field, anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances (**A v B [2003] IRLR 405**);

    97.3 An ostensibly thorough process will not be a sufficient guard against a claim of unfair dismissal when the persons conducting it do not do so with open minds (**Sovereign Business Integration Plc v Trybus UKEAT/0107/07/DM**);

    97.4 "*To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole*" (**Shrestha v Genesis Housing Association Ltd [2015] IRLR 399**).

98. In deciding whether a particular decision to dismiss was reasonable or unreasonable, the question which a Tribunal must ask is whether the employer's decision fell within the range of reasonable responses which a reasonable employer might have adopted (**Iceland Frozen Foods Ltd v Jones [1983] ICR 17, EAT**).

99. It is important to note that in deciding whether an employer has acted reasonably or unreasonably, the tribunal must not substitute its own view for that of the employer i.e. the Tribunal cannot say a dismissal is unfair simply because the Tribunal would have done something different in the circumstances. The question is not what the tribunal would have done in the circumstances but whether what the employer did was reasonable (**Foley v Post Office; HSBC Bank plc v Madden [2000] ICR 1283, CA**).

Disability discrimination

100. Sections 39(2)(c) and (d) of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by dismissing her or by subjecting her to any other detriment.

101. The burden of proof on complaints of discrimination is provided for in section 136 EqA 2010. Section 136(2) provides that "If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred". That section is subject to the express qualification set out in section 136(3) that "… subsection (2) does not apply if A shows that A did not contravene the provision".

Discrimination arising from disability

102. Section 15 EqA 2010 defines discrimination arising from disability as follows: "A person (A) discriminates against a disabled person (B) if (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim".

103. When considering a complaint of discrimination contrary to section 15 EqA 2010, guidance as to the correct approach can be taken from **Pnaiser v NHS England [2016] IRLR 170**:

103.1 A Tribunal must first identify whether there was unfavourable treatment and by whom;

103.2 The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the mind of A. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a more than trivial influence on the unfavourable treatment, and amount to an effective reason for or cause of it;

103.3 The Tribunal must determine whether a reason or cause is "something arising in consequence of B's disability". That expression can describe a range of causal links which may include more than one link;

103.4 The more links there are in the chain the harder it is to establish the requisite connection as a matter of fact;

103.5 This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

104. If the two-stage test is satisfied by the Claimant, then it is for the Respondent to show that the treatment is a proportionate means of achieving a legitimate aim. That is a question which requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition (**Hampson v Department of Education and Science [1989] ICR 179**).

Failure to make reasonable adjustments

105. Sections 20 and 21 EqA 2010 apply to a complaint of failing to make reasonable adjustments: "A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments" (section 21 EqA 2010). "The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage" (section 20(3) EqA 2010.

106. Substantial means more than minor or trivial (section 212 EqA 2010).

107. An employer a) is not subject to a duty to make reasonable adjustments and b) does not discriminate against an employee contrary to section 15 of the Equality Act 2010 if the employer lacks the requisite knowledge (Section 15(2) and paragraph 20 of Schedule 8 to the Equality Act 2010). Knowledge for these purposes may be actual or constructive knowledge.

108. When considering such a complaint, the Tribunal must a) identify the provision, criterion or practice applied by or on behalf of the employer, b) the identity of non-disabled comparators (where appropriate) and c) the nature and extent of the substantial disadvantage suffered by the claimant (**Environment Agency v Rowan [2008] IRLR 20**).

Breach of contract (including wrongful dismissal)

109. For an employer to be entitled to dismiss an employee without notice the employee's conduct must amount to a repudiatory breach of his contract of employment or, in other words, gross misconduct.

110. The questions for the Tribunal to consider on a complaint of wrongful dismissal are a) whether the claimant is guilty (as a matter of fact) of the conduct alleged and b) whether that conduct justifies the employer's decision to dismiss the employee without notice.

111. A dismissal communicated by letter takes effect when that letter is received by the employee (**Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood [2018] 1 WLR 2073**).

Discussion

Discrimination arising from disability

112. There is no dispute between the parties that at all material times the Claimant was a disabled person within the meaning of the Equality Act 2010 by reason of his diabetes.

113. The initial burden of proof in respect of a claim of unlawful discrimination under the Equality Act 2010 is upon the Claimant. The Claimant must prove the facts from which the Tribunal could conclude that he has been subjected to unlawful discrimination

114. In the context of a complaint of discrimination arising from disability contrary to section 15 of the 2010 Act, the Claimant must prove that he was treated unfavourably because of something arising in consequence of his disability. That requires proof of a) unfavourable treatment, b) something arising in consequence of his disability and c) a causal connection between the two.

115. As set out in the agreed list of issues, the Claimant relies on three things as the "something arising" in consequence of his disability, namely i) poor eyesight meaning he needed to stand close to students to see their work, ii) poor eyesight meaning that he gave the impression of staring but in fact could not focus and iii) a severe headache on 27 September 2018 resulting in him deciding to finish class teaching early.

116. For the reasons set out earlier in this judgment, the Tribunal has concluded that the Claimant's actions of i) standing close to students (otherwise described as entering their personal space) and ii) staring at the bodies of the female students were not actions connected to the Claimant's disability by reason of poor eyesight or otherwise. Further, again for reasons set out earlier, the Tribunal was not satisfied that the Claimant's decision to finish teaching early on 27 September 2018 was the result of a headache (severe or otherwise) or that it was connected to the claimant's disability. The Claimant failed to discharge his burden of proving that it was.

117. Accordingly, the Tribunal concludes that the Claimant has failed to prove, on the balance of probabilities, that any decisions taken by the Respondent in relation to the events in question (and therefore any unfavourable treatment which the Claimant was subjected to) were based in any way on something arising in consequence of the Claimant's disability.

118. As that is an essential component of the complaint of discrimination arising from disability under section 15 of the 2010 Act, and as the Claimant has failed to discharge his burden of proving that component, the Claimant's complaint under section 15 cannot succeed. That complaint is dismissed.

Failure to make reasonable adjustments

119. When considering a complaint of a failure to make reasonable adjustments, the Tribunal must a) identify the provision, criterion or practice applied by or on behalf of the employer, b) the identity of non-disabled comparators (where appropriate) and c) the nature and extent of the substantial disadvantage suffered by the Claimant.

120. The first step in considering this complaint is to identify the provision, criterion or practice (if any) applied by the Respondent. The list of issues shows at paragraph 4 that the Claimant's contention as to the PCP applied by the Respondent is that the Respondent "planned classes in different locations and at times which assumed that individuals could drive straight from one to the other".

121. The Tribunal has considered that formulation of the PCP. It occurs to the Tribunal that the PCP as described in the list of issues is simply another way of saying that the Respondent required its teachers/lecturers to teach classes in accordance with the timetable set by the Respondent.

122. There was no dispute on the evidence that the Respondent created a timetable for the teaching of classes during the academic year and that the timetable for the academic year in question had been prepared in something of a hurry at the start of the academic year. It was clear from the evidence of the Respondent's witnesses that teachers (including the Claimant) were expected to teach their classes in accordance with that timetable and were not permitted to alter the timetable without first obtaining the authority of someone more senior than them. In those circumstances, it seems clear and the Tribunal finds that the Respondent had and applied a PCP of requiring teachers/lecturers to teach classes in accordance with their timetable.

123. The next issue to determine is whether that PCP put the Claimant at a substantial disadvantage in comparison to people who are not disabled. The Tribunal notes that substantial for these purposes means more than minor or trivial.

124. The Claimant's evidence was that, requiring him to teach his class in Rhyl concluding at 5pm did not leave him with sufficient time to travel to Rhos to commence teaching his evening class at 6pm and also allow him sufficient time to eat, test his blood sugar levels and inject himself with insulin as his

disability required. The Claimant's evidence was that was even more so the case as a result of the traffic delays caused in September 2018 by roadworks that were being conducted on the A55. Therefore, says the Claimant, he was left in the invidious position of either failing to teach his classes in accordance with the timetable by either finishing one class early or starting another class late thereby leaving himself open to criticism and possibly to disciplinary action (as in fact transpired in this case) on the one hand or, on the other hand, having insufficient time to properly take care of his health needs arising from his disability.

125. The tribunal is satisfied that, although the events in question arose only on one or two days in late September 2018, the requirement for the Claimant to teach these classes in accordance with the timetable was a requirement that was to be applied for the duration of at least the academic year in question. The Tribunal therefore rejects any argument (as advanced by the Respondent) that there was no PCP applied by the Respondent on the facts of this case.

126. The Tribunal is also satisfied that the PCP applied did put the Claimant at a substantial disadvantage in comparison to people who are not disabled by reason of the matters referred to above. A non-disabled person would not have been faced with the same difficulties as the Claimant as they would not have had to make a choice between complying with the requirements of the Respondent in teaching classes in accordance with the timetable or looking after their own health needs. They would not have had the added element of needing to eat, test blood sugar levels and inject as was faced by the Claimant. Accordingly, they would not have been faced with the invidious position the Claimant found himself in.

127. It was argued on behalf of the Respondent that any substantial disadvantage faced by the Claimant was not a result of the teaching timetable but was rather a product of the roadworks on the A55, a matter unconnected with the Claimant's employment or disability. The tribunal considers there to be little force in that argument. A PCP applied by an employer, and any substantial disadvantage it creates for any disabled employee, must be considered at the time of the alleged discrimination and must be seen in the context of the circumstances existing at the time. Part of those circumstances in this case were the road works on the A55. The Respondent knew of those roadworks and the Respondent knew of the delays they caused for anybody travelling along that route between the Respondent's sites. The Respondent also was aware of the Claimant's disability and of the needs of the Claimant to take care of his health needs by testing, eating and injecting. Therefore, the view of the Tribunal is that the substantial disadvantage to which the Claimant was subjected (on the findings of the Tribunal) was caused by the Respondent's PCP in the circumstances prevailing at the material time.

128. The next stage of consideration on this complaint is whether the Respondent failed to take such steps as it would have been reasonable for the Respondent to take to overcome the substantial disadvantage.

129. In her oral evidence, Maggie Griffiths was asked about the Claimant's teaching timetable. During cross-examination she accepted that a gap of one hour to travel from Rhyl to Rhos was a tight turnaround even for somebody without diabetes who needed to eat, test and inject. Although she indicated that it would not be "easy" to make alterations to the timetable to accommodate the Claimant's health requirements, on 2 occasions she accepted that it would have been reasonable to have widened the gap between the Claimant's classes and that the Claimant's teaching timetable should have been amended.

130. The difficulty faced by the Claimant and the substantial disadvantage to which he was subjected arose as a result of the lack of time between his classes. If the gap between his classes had been extended, he would not have been faced with the same problem and would not have suffered the substantial disadvantage. It is readily apparent that an adjustment that could have been made to alleviate or remove that substantial disadvantage was to alter the Claimant's teaching timetable to allow him sufficient time to travel between classes and to look after his health needs. On the basis of Ms Griffiths' own evidence, such an adjustment could have been made and, although such an adjustment may not have been "easy to arrange", the Tribunal is satisfied and finds that the adjustment should have been made by the Respondent.

131. That reasonable adjustment was not made by the Respondent and, accordingly, the Tribunal is satisfied that the Respondent failed to make a reasonable adjustment contrary to its duty to do so under sections 20 and 21 of the Equality Act 2010.

132. The Claimant also asserts that the Respondent failed to make a reasonable adjustment in failing to treat the Claimant's decision to finish early in order to allow him time to take his insulin injections as not amounting to misconduct for the purposes of the disciplinary process. In light of the Tribunal's other findings on the complaint of failure to make reasonable adjustments, the Tribunal does not need to resolve this issue. However, the Tribunal is not satisfied that this issue amounts to a failure to make reasonable adjustments on the part of the Respondent. In particular, the Tribunal is satisfied and finds that the decision to treat the Claimant's actions as misconduct was related to the Claimant's decision to finish classes early or to unilaterally alter the times of his classes without first seeking managerial approval. Where the issue involved was a failure on the Claimant's part to seek approval from his manager, the Tribunal is not persuaded that the Respondent's actions amounted to a failure to make a reasonable adjustment.

133. For the reasons set out above, the Tribunal is satisfied that the Claimant's complaint of a failure to make reasonable adjustments is well-founded and succeeds.

Unfair dismissal

134. The Claimant did not dispute the reasons advanced by the Respondent as being the reasons for the decision to terminate the Claimant's employment. Those reasons are set out in the notes of the disciplinary hearing and are also referred to in the dismissal outcome letter. It is clear that the Respondent dismissed the Claimant by reason of the events of 20, 26 and 27 September 2018 with the Respondent's primary concern being the events of 27 September.

135. The Claimant also does not dispute that the Respondent had an honest and genuine belief that the Claimant was guilty of the misconduct in question. That concession is made clearly in paragraph 36 of the Claimant's closing written submissions.

136. The focus of the Claimant's complaint of unfair dismissal is upon the reasonableness of the investigation carried out by the Respondent, the reasonableness of the grounds upon which the Respondent held its belief in the Claimant's guilt and the reasonableness of the sanction applied by the Respondent in dismissing the Claimant.

137. It is important to consider each of those issues and to also consider, in light of the conclusions reached on those issues, whether the decision of the Respondent to dismiss the Claimant was reasonable or unreasonable by reference to section 98(4) of the Employment Rights Act 1996.

138. Having considered all of the evidence including the documentary evidence and witness evidence (both oral and written) the Tribunal has a number of concerns regarding the investigation that was carried out in this case. Those concerns are sufficient for the Tribunal to conclude that the investigation conducted by the Respondent was not within the range of reasonable investigations which could have been carried out by a reasonable employer. In coming to that conclusion, the Tribunal has been careful not to substitute its own view for that of the employer but has nonetheless come to the conclusion set out above. The reasons for the Tribunal coming to that conclusion are as follows:

138.1 During the disciplinary process the Respondent was presented by the Claimant with evidence suggesting that there was a link between his behaviour on the days in question (and particularly on 27 September 2018)

and his diabetes. Whilst the Tribunal concludes that it cannot be said in this case that the Respondent failed to engage with that argument, the Tribunal does consider that it was open to the Respondent to have obtained further evidence in respect of that suggestion prior to making any decision to dismiss the Claimant and that, in the circumstances of this case, the Respondent should have done so, it being unreasonable not to do so;

138.2 The Respondent's investigation did not comply fully with the Respondent's own policy on disciplinary investigations and therefore gives rise to concerns as to its fairness and transparency. In particular, the process of gathering witness evidence conducted by Maggie Griffiths was not conducted in accordance with the Respondent's policy. The policy required witnesses to be interviewed by the investigating officer and then for statements to be prepared reflecting the evidence given by the witness which could then be signed by both the witness and the investigating officer. A number of the witnesses in the investigation conducted by Maggie Griffiths were not interviewed by her. Specifically, the four students who were asked to prepare statements under the supervision of Miss Hockenhull were not interviewed by Ms Griffiths as part of her investigation. Whilst it is true to say that she had spoken to at least some of them on the day of the events in question at the end of the day, no disciplinary investigation had been commenced at that time and, therefore, there was no interview conducted of them in relation to the events in question as part of the disciplinary investigation once it had started. Further, a number of the witnesses' evidence was not recorded in statements signed by them but was instead summarised by Ms Griffiths following her discussions with those witnesses. As those steps are clearly set out within the Respondent's own policy, it is difficult to see how the Respondent could suggest that they are not important steps. In any event, the Tribunal considers that such steps amount to good practice in carrying out a disciplinary investigation and are intended to be safeguards to ensure the fairness and transparency of the investigation carried out;

138.3 The investigation report prepared by Maggie Griffiths contained a significant number of inaccuracies, including matters not supported by the underlying evidence. Those matters are set out earlier in this judgment in the findings section and the Tribunal does not propose to repeat them here. Suffice it to say that the Tribunal is satisfied that the inaccuracies contained within the report were all matters which were unfavourable to the Claimant. There were no inaccuracies included in the Claimant's favour. One specific example of note, as summarised in paragraph 38 g) of the Claimant's closing written submissions is that the report contained a suggestion that the Claimant had looked down the tops of the female students. That suggestion was not included in any part of the evidence attached to the investigation report and which underpinned it.

139. Notwithstanding those matters of concern, the Tribunal was not satisfied that the Respondent, and particularly Maggie Griffiths, had conducted a deliberately one-sided investigation against the Claimant or that she (or others) had engaged in some form of collusion with a view to creating or bolstering the disciplinary case against the Claimant. It is the view of the Tribunal that the approach taken by Maggie Griffiths was a result of an incompetent approach to the investigation rather than anything more sinister. Nonetheless, the Tribunal is satisfied that the said incompetence leads to a conclusion that the investigation conducted by Maggie Griffiths and the evidence produced by it was not within the reasonable range as set out above.

140. The Tribunal notes that the issues identified above are also relied upon by the Claimant in asserting that the procedure followed by the Respondent in dismissing him was also not reasonable. The Tribunal accepts that submission insofar as it relates to the matters identified above when talking of the reasonableness of the disciplinary investigation. However, the other issues raised by the Claimant as set out in paragraph 41 of the Claimant's closing written submissions are not issues which the Tribunal considers are well-founded.

141. The Tribunal must also consider whether the Respondent had reasonable grounds for its belief in the Claimant's guilt of the misconduct for which he was dismissed. On the evidence that was before the Respondent, the Tribunal is satisfied that the Respondent had reasonable grounds for its belief. The Tribunal comes to that conclusion notwithstanding its reservations and findings above about the reasonableness of the investigation and the procedure adopted. The Tribunal still finds that the evidence available to the Respondent was compelling and significant. For the reasons set out above, the evidence was sufficient for the Respondent to reasonably conclude that the Claimant had committed the misconduct in question. The events of 20 and 26 September 2018 were admitted by the Claimant during the disciplinary process, at least in respect of the main salient features of those events. As for the events of 27 September 2018, the Tribunal concludes that there were reasonable grounds upon which the Respondent could hold an honest belief in the Claimant's guilt. In making its findings of fact in relation to the events of that day, the Tribunal has set out its reasons for concluding that the Claimant acted in the manner described earlier in this judgment. To a significant degree, the Tribunal's reasons reflect the decisions and thought processes of the Respondent when dealing with the disciplinary process. It was a matter for the disciplinary panel to consider the evidence before it and to conduct the balancing exercise of applying weight to the evidence available and coming to conclusions. The Tribunal is satisfied that the Respondent conducted that exercise, that it considered the evidence available, weighed the evidence available, and came to conclusions open to it on that evidence. It is clear that the Claimant disagrees with the Respondent's conclusions and continues to maintain his innocence in relation to the events in question. That does not, of

course, mean that the Respondent did not have reasonable grounds for the conclusions reached.

142. The Tribunal also concludes that the decision to dismiss the Claimant for the reasons the Respondent dismissed him for was a decision within the range of reasonable responses open to the Respondent. In essence, the Respondent concluded that the Claimant had acted in a sexually inappropriate manner towards one or more female students in his class. His behaviour had occurred during class time and therefore during his performance of his duties. Behaving in a sexually inappropriate way towards those in your charge when teaching is, in the Tribunal's view, something which can reasonably be considered to amount to an act of gross misconduct. A reasonable employer would be entitled to conclude that such actions amount to a breach of trust and that it would not be possible or appropriate for a teacher who had committed such acts to continue in his or her role. The Respondent was also entitled to take into account the fact that the Claimant was still the subject of a written warning in relation to an earlier instance of inappropriate behaviour towards a female student at the time of the events which led to his dismissal.

143. In the circumstances, the conclusion of the Tribunal is that the Respondent dismissed the claimant for a potentially fair reason, namely the Claimant's misconduct and that the Respondent had a genuine belief in the Claimant's guilt of that misconduct and that the belief was based upon reasonable grounds. Further, the Tribunal concludes that the decision to dismiss was a decision within the range of reasonable responses open to the Respondent. However, the Tribunal has concluded that the investigation carried out by the Respondent in this case was not a reasonable investigation by reason of the matters set out above and that, accordingly, the Respondent's dismissal of the Claimant was unfair taking into account the provisions of section 98(4) of the Employment Rights Act 1996 and the guidance from BHS v Burchell.

144. Having come to that conclusion, there are two further matters which the Tribunal must deal with as part of this judgment. As discussed with the parties at the final hearing, the Tribunal has focused upon issues of liability at this stage of the proceedings but intends to also address issues of Polkey and contributory fault as part of the liability decision.

145. Although the Tribunal has concluded that the investigation carried out by the Respondent was not reasonable, in part because of a failure to obtain additional medical evidence or to approach occupational health for further advice, the Tribunal concludes that any failures in the investigation would have made no difference to the outcome, including whether the Respondent had sought additional medical evidence or advice prior to dismissing the Claimant. The Tribunal concludes that there is no evidence to show that, if the Respondent had sought additional medical evidence or had approached occupational health for further advice, that any additional evidence would have

become available, or at least that any evidence would have provided a different picture to the Respondent in terms of the events in question and the conclusions that were reached.

146. When considering the issue of contributory fault, the question for the Tribunal to consider is whether the Claimant's conduct was culpable or blameworthy such as to justify a reduction in any award made to him. It is to be noted that the Claimant's conduct can be a reason for a reduction in both the basic and the compensatory awards in an unfair dismissal complaint.

147. Findings of contributory fault require the Tribunal to make its own findings of fact about the events in question. The Tribunal has done so earlier in this judgment and has concluded that the Claimant committed the acts which he was ultimately dismissed for. Whilst the events of 20 and 26 September 2018 are more minor acts of misconduct which were admitted by the Claimant, the events of 27 September 2018 are particularly serious. The Tribunal has already set out its conclusions that the acts of the Claimant in behaving in a sexually inappropriate manner towards female students he was teaching amounted to a breach of trust and gross misconduct. They are actions which, in the Tribunal's view, carry with them a high degree of culpability and blameworthiness. The Tribunal has also concluded that the Claimant's actions on that date were not connected with his disability. Therefore, the Tribunal is left with a conclusion that the Claimant made a conscious decision to act in those inappropriate ways. Whilst there is some fault on the part of the Respondent for the Claimant's dismissal by reason of the Tribunal's conclusions as to the unreasonableness of the disciplinary investigation, the vast majority of the blame for the Claimant's dismissal rests upon the Claimant himself in the Tribunal's view. The Tribunal has considered carefully the extent to which the Claimant should be held liable for the termination of his own employment in light of those matters and has concluded that the extent of the Claimant's culpability justifies a reduction in the awards made to him (both basic and compensatory) of 90%.

Breach of contract/Wrongful dismissal

148. The Claimant's complaint of wrongful dismissal was presented on a number of alternative bases at the final hearing as set out at paragraphs 53 to 55 of the Claimant's closing written submissions.

149. The Claimant's primary submission was that the Respondent had no justification for dismissing him without notice in circumstances where the allegations relating to his behaviour on 27 September 2018 were disputed and the incident on 20 September 2018 and 26 September 2018 were not sufficiently serious as to amount to a repudiatory breach of his contract of employment.

150. The Tribunal has made findings against the Claimant in relation to the events of 27 September 2018 and has concluded that he behaved in a sexually inappropriate way towards one or more female students within his class. The Tribunal concludes that such behaviour amounts to a breach of trust on the part of the Claimant in the sense that he held a position of trust in respect of those students he was teaching. The Tribunal also concludes that such behaviour amounts to gross misconduct for the reasons set out above and that the Respondent was justified in dismissing the Claimant summarily by reason of those events taken alone and, even more so when considered in conjunction with the other events of 20 and 26 September 2018.

151. The Claimant's secondary submission is that if he had committed any repudiatory breach of his contract of employment by his behaviour on 27 September 2018 or on the days prior, the Respondent either waived that breach or affirmed the contract by electing not to suspend him and taking a lengthy period of time to conduct a disciplinary process. It is argued on the Claimant's behalf that it was no longer open to the Respondent to accept his repudiatory breach and to dismiss him summarily when it did so.

152. The Tribunal rejects that argument. The Respondent did not act in a way which can be said to have either waived the breach committed by the Claimant or to have affirmed the contract of employment. A decision to suspend an employee is a neutral act. Employers are encouraged not to suspend employees even in the light of allegations of misconduct without careful consideration. Although the Claimant was not suspended, a decision was taken to remove him from teaching the class containing the students at the centre of the allegations made against the Claimant. Further, despite allegations of delay in the process, the Respondent proceeded to subject the Claimant to a disciplinary process in respect of the events in question. The Respondent did not simply ignore the issues. The Respondent did not give any indication to the Claimant that it was not intending to proceed with the disciplinary process. In the circumstances, the Tribunal finds there to be no force in the submission that the Respondent had waived the Claimant's breach of contract or had affirmed his contract of employment despite the breach he had committed.

153. The final basis upon which the Claimant pursues his claim of breach of contract is somewhat different. The Claimant relies upon the fact that the Respondent wrote to him on 10 April 2019 informing him of the Respondent's decision to terminate his employment. In doing so, the letter was sent to the Claimant by post and, notwithstanding that it was likely to have been received by the Claimant no earlier than 12 April 2019, purported to dismiss him from his employment with effect from 9 April 2019 (i.e. the date of the disciplinary hearing). The Respondent concedes that the Claimant's pay had been stopped with effect from 9 April 2019.

154. In submissions, it was conceded by Mr Duffy that those actions on the part of the Respondent amounted to a breach of the Claimant's contract of employment. A dismissal communicated by letter takes effect when that letter is received by the employee, not when it is sent by the employer. Accordingly, it was not open to the Respondent to cease paying the Claimant as of 9 April 2019 or to treat him as dismissed with effect from that date when he was not told of the termination of his employment until he received the letter of termination.

155. The Tribunal has concluded that the letter was most likely to have been received on 12 April 2019 and, accordingly, the Claimant is entitled to recover the pay he would otherwise have received for the period 10 to 12 April 2019 arising from his dismissal which amounted to a breach of his contract of employment on that basis.

Conclusions

156. In the circumstances, the Judgment of the Tribunal is as follows:

156.1 The Claimant's claim of breach of contract/wrongful dismissal succeeds to the limited extent set out above.

156.2 The Claimant's claim of a failure to make reasonable adjustments under s.20 and s.21 of the Equality Act 2010 is well founded and succeeds.

156.3 The Claimant's claim of discrimination arising from disability under s.15 of the Equality Act 2010 fails and is dismissed.

156.4 The Claimant's claim of unfair dismissal contrary to s.98 of the Employment Rights Act 1996 is well founded and succeeds.

156.5 The Claimant's entitlement to any basic award and compensatory award is reduced by 90% pursuant to sections 122(2) and 123(6) of the Employment Rights Act 1996 respectively.

_____

Employment Judge R Vernon

Dated 2 June 2021
REASONS SENT TO THE PARTIES ON 8 June 2021

.....

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche