EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr T Barwick	AND	Falmouth University

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 23 and 24 November 2021

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **In person, Assisted by Mrs S Zerar, Friend**
For the Respondent: **Mr R Moore of Counsel**

JUDGMENT

The judgment of the tribunal is that:
1. The claimant's claim that he was automatically unfairly dismissed for health and safety reasons is dismissed on withdrawal by the claimant; and
2. The claimant's claim for unfair dismissal generally is also dismissed.

RESERVED REASONS

1. In this case the claimant Mr Thomas Barwick claims that he has been unfairly dismissed. His additional claim that he was automatically unfairly dismissed for health and safety reasons was withdrawn at the commencement of this hearing. The respondent contends that the reason for the dismissal was for "some other substantial reason" of a kind such as to justify dismissal, and that the dismissal was fair.
2. This has been a hybrid hearing by consent which was conducted in person save for the attendance of Mrs Zerar, who assisted the claimant, and who attended remotely by Cloud Video Platform.
3. The parties have consented to this matter being heard by an Employment Judge sitting alone pursuant to section 4(3)(e) of the Employment Tribunals Act 1996.
4. I have heard from the claimant. I have heard from Mr Nigel Owen, Miss Catherine Pope, and Mr Peter Cox on behalf of the respondent. Mr Charles Marson and Mr Robin Kirby also prepared statements of evidence on behalf of the respondent which were not challenged by the claimant and their evidence was therefore accepted without their attendance.

5. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
6. The Facts:
7. The respondent is Falmouth University which is a specialist University for the creative industries based in Falmouth and Penryn in Cornwall. The claimant Mr Thomas Barwick was appointed as an Associate on the respondent's BA Illustration Course and commenced his employment with the respondent in that role on 12 February 2016. The claimant was promoted to Senior Lecturer with Course Coordinator responsibilities on the same course with effect from 22 August 2016. The Course Leader is Mr Nigel Owen, from whom I have heard, and he was the claimant's line manager, as well as being line manager for the other staff on the course, which numbered about 20. There then followed a succession of incidents between the claimant and his colleagues which over time led to an irretrievable breakdown in the working relationships within the team. The claimant eventually accepted that he was unable to return to that team, and he sought redeployment. Efforts to secure redeployment were unsuccessful, with the result that the respondent terminated the claimant's employment with effect from 18 March 2020.
8. A summary of the main events which led to the grievance and disciplinary processes prior to the termination of the claimant's employment is as follows. In circumstances where the claimant accepts that there was an irretrievable breakdown in working relationships it is not in my judgment appropriate or proportionate to make detailed findings of fact on each of the events in question, and more particularly, who might have been more to blame. It is however important to note that the claimant asserts that he was suffering from anxiety and depression during this time, and that on two occasions he suffered from what he describes as a "breakdown". He complains of a lack of support from the respondent during this time.
9. On 26 August 2016 the claimant had a disagreement with two colleagues, namely Rachel Dunn and Nick Mott, and during this agreement he told them "Grow the fuck up". During 2016 and 2017 the claimant also complained that he was being micromanaged by Ms Dunn which was not appropriate given his role as Course Co-ordinator.
10. Mr Owen asserts that despite the support which he gave to the claimant following his appointment, in the hope that his appointment would be a success, the claimant was difficult to manage. In particular he was instructed in his first year as Course Co-ordinator to follow the existing and established course structure and to shadow the exiting Course Co-ordinator Ms Clarke, who would mentor him during this process. However, the claimant became single-minded and intent on delivering his own version of the course, which conflicted with the existing overall vision for the course. The claimant's actions generated stress with experienced staff, particularly when he made unilateral changes, criticised the way things were done, and did not comply with Mr Owen's instructions. This contrasted with the rest of the team who worked collaboratively together within a successful working relationship.
11. Despite the fact that Ms Dunn and Ms Clarke offered support and guidance the claimant reacted aggressively to this and alleged that he was being undermined and micromanaged. There was another altercation between the claimant and Ms Dunn in early July 2017 when she complained that the claimant had told her: "None of your fucking business and you're not second-in-command now. I'm your boss". Although the claimant disputes this version, something clearly happened which gave Ms Dunn cause to complain, which she did subsequently.
12. Towards the end of 2016 the respondent laid some new flooring as part of the refitting of the Illustration Course studios. The new flooring gave rise to a very strong smell. The claimant emailed Mr Owen on 29 September 2016 complaining about the fumes and how others were feeling unwell. Mr Owen was aware of the issue which was being investigated at that time by way of air quality assessments and a COSHH assessment. The conclusion was that the hazard was low risk, but that one office had an unsatisfactory ventilation rate. The claimant subsequently complained about the accuracy of the air quality survey and Mr

Owen arranged for a second test to be carried out. Although Mr Owen was dealing with matters through the appropriate channels, the claimant then decided to act independently, and deliberately broke a reinforced window with a hammer in order, as he saw it, to improve the ventilation.

13. In February 2017 there was an exchange of emails between Ms Clarke and the claimant with the result that both parties had a "falling out". Ms Clarke perceived this to be sufficiently aggressive on the part of the claimant that she no longer wished to act as his mentor. The claimant and another colleague Ms Gibson also fell out about a student's loan iPad in November 2017.
14. Meanwhile the claimant and his line manager Mr Owen had met to discuss work issues in the staff canteen in November 2017. Mr Owen informed the claimant that he been introducing new material haphazardly without telling other staff, and that he was required to discuss any new ideas with him as his line manager in order to ensure that they met the overall philosophy of the course. The claimant took umbrage and lost his temper. The claimant then aggressively slid a plate across the table at high speed at Mr Owen, and he stormed out of the canteen. The claimant complains that Mr Owen has given four different versions of this event and that his account is not accurate. However, the claimant subsequently apologised for his inappropriate behaviour, and I am satisfied that (regardless of the minor details) the claimant acted aggressively and inappropriately in public to his line manager Mr Owen on that occasion.
15. On 6 December 2017 there was then a further altercation between the claimant and Mr Owen at a team meeting. The claimant raised his voice at Mr Owen in a disrespectful manner in front of the other members of the team and he then stormed out of the meeting. Mr Owen pursued him out of the meeting to try to resolve the position, but this was unsuccessful, and the altercation continued outside the lecture theatre. Mr Owen subsequently emailed the claimant on 6 December 2017 to confirm his concerns at claimant's conduct, but also to continue to offer further support. This was consistent with Mr Owen's management of the claimant at the time which was considerate and supportive despite the problems which the claimant was clearly causing.
16. The claimant was then absent from work on certified sick leave from 5 June 2018 until 4 October 2018. The claimant confirmed that this was for reasons of "stress, anxiety and depression". In June 2018 the claimant exchanged emails with Ms Catherine Pope, an HR Business Partner to the respondent, from whom I have heard. The claimant requested that she explored the possibility of redeployment. Ms Pope explained that the respondent's procedures did not envisage that they were required to create a post in such circumstances, and under the normal redeployment procedures the claimant would have to apply formally, by way of a redeployment form. This would then commence a time limit on seeking an alternative position during which "the clock was ticking" and at the end of which the termination of employment might be a possibility if no redeployment was found. The claimant did not wish to adopt that course of action at that time. The claimant had applied for an alternative position in the respondent's Games Academy in late June 2018, but that application was unsuccessful, and on 25 June 2018 the claimant suggested to Ms Pope that his potential redeployment remained urgent.
17. Meanwhile the respondent had obtained an Occupational Health ("OH") report dated 20 June 2018 which advised on how the claimant might return to work and what other options, including redeployment, were available. The claimant had confirmed that there were "complex and challenging workplace relationships". A phased return to work was suggested (and agreed by the claimant) which involved shorter hours, reduced duties, less contact with students, and regular reviews of the schedule. Following a meeting between Mr Owen and the claimant on 12 September 2018 the claimant commenced his phased return to work on 5 October 2018.
18. The claimant complains that this phased return to work was not implemented properly and that Mr Owen failed to manage the work schedule which had been agreed. He argues that this lack of support led to his subsequent involvement in the disciplinary process, which in turn led to his dismissal, and that if the respondent had not failed to implement the phased return to work plan, then he would never have ended up being dismissed. Mr Owen's

version of events is that the necessary procedures were put in place to assist the claimant as agreed by all parties, and that the claimant had previously made it clear that he no longer wished to meet with Mr Owen.

19. There was also a dispute about the administrative responsibilities required for a student trip to London. The claimant complains that he was overburdened with this responsibility, whereas Mr Owen asserts that to support the claimant he removed the administrative responsibilities of the trip from the claimant and undertook them himself. In any event there was an incident on 13 November 2018 when a colleague Mr Mott reported to Mr Owen that the claimant had started a heated argument during which he accused Mr Mott and Mr Owen of overburdening the claimant with the London trip. Mr Owen decided to defer a lecture he was about to present to try and mediate between the claimant and Mr Mott.
20. There was then a meeting later that day on 13 November 2018 between the claimant and Mr Owen, with Mr Mott present. The claimant covertly recorded this meeting without informing or seeking the consent of Mr Owen and Mr Mott, and I have seen a transcript of that recording. I agree with Mr Owen's assertion that the claimant then became critical of Mr Owen and attacked both his character and his management. Although Mr Owen was trying to calm the claimant down and to provide support, the claimant's conduct was aggressive and threatening. The claimant asserts that he was suffering from his mental illness at this time, and that he was complaining about lack of support from the respondent. The claimant accuses Mr Owen of goading him into making a formal complaint against him, but Mr Owen repeatedly failed to accept the criticism raised against him, and informed the claimant that the correct avenue for his concerns would be to raise a formal complaint in the unlikely event that he felt that it could be supported.
21. At the end of that meeting when the claimant left Mr Owen and Mr Mott were both shaken and upset. Mr Mott made the comment "He needs to go", just before the claimant re-entered the room to collect his phone on which he was making the covert recording. The claimant subsequently sent details of the recording to other colleagues, again without informing or seeking consent from Mr Owen and Mr Mott.
22. Following this meeting Mr Mott informed Mr Owen that he felt it impossible for him to work with the claimant again in the office. Mr Owen concluded that the claimant's behaviour was a further escalation of the breakdown of his relationship with his colleagues on the course and concluded there was nothing he could do to help to resolve the situation. Mr Owen felt that he had made considerable efforts to assist the claimant back to work that this had been unsuccessful. He was of the view that the breakdown within the team had gone beyond any meaningful possibility of successful mediation. When Mr Owen discovered shortly thereafter that the conversation had been covertly recorded, he concluded that this must have been premeditated by the claimant and that any trust between them had been irretrievably eroded.
23. The respondent has a grievance procedure under its Dignity at Work Policy. The claimant raised a Dignity at Work complaint on 14 November 2018, and both Mr Mott and Mr Owen raised Dignity at Work complaints against the claimant on 18 and 19 November 2018. This prompted an investigation under the respondent's Dignity at Work procedures. The claimant then commenced a further period of sickness absence for stress anxiety and depression from 19 November 2018, until his return to work on 3 January 2019.
24. Meanwhile the respondent obtained a further Occupational Health report which is dated 18 December 2018. This reported that the claimant felt that he had had a panic attack arising from a combination of the side-effects of his medication and the altercation at work. The claimant was considered to be fit to attend any meetings in order to assist the swift conclusion of any investigation which would be beneficial. The OH report confirmed that the claimant believed that returning to the same environment would have an adverse impact on his mental health because the issues he had with the two colleagues who were being investigated (Mr Owen and Mr Mott), and that his request for redeployment and to change Campus could help.
25. During early 2019 the respondent appointed Mr Masterton, its Head of Sustainable Product Design, to investigate the various Dignity at Work grievances. Both the claimant and his colleagues confirmed that there had been an irretrievable breakdown in the working

relationships between them. During January 2019 the claimant also confirmed that he wished to apply for medical redeployment, or alternatively informal redeployment. The claimant then returned to work on 4 January 2019 on a phased return working remotely from home. On 4 February 2019 the claimant requested a delay in the redeployment process until the conclusion of the Dignity at Work investigation, and it was agreed that the claimant could apply for roles at either of the respondent's two campuses through the normal job application process. Further OH advice in February 2019 confirmed that the claimant should consider redeployment in a different work environment given his difficulty in working with his colleagues.

26. Mr Masterton prepared a detailed report after an extensive investigation into the various Dignity at Work complaints. Following this report the claimant's complaint was investigated by Professor Murray, the respondent's Deputy Vice-Chancellor (Academic). He did not uphold the claimant's complaint. The claimant appealed against the rejection of his complaint and his appeal was heard by Mr Robin Kirby the Strategic Adviser to the Vice-Chancellor. Mr Kirby dismissed the claimant's appeal.
27. Meanwhile Mr Masterton's report had highlighted sufficient concerns about the actions of the claimant that the respondent decided to commence disciplinary proceedings against the claimant. The reasons included swearing at colleagues, forcefully and inappropriately mishandling a plate at Mr Owen, unkind and derogatory comments, and generally upsetting and falling out with colleagues.
28. The claimant had been suspended on 5 March 2019, and by letter dated 30 July 2019 he was invited to a disciplinary hearing to answer nine allegations of potential gross misconduct. These were in short (i) telling Mr Mott and Ms Dunn to "Grow the fuck up"; (ii) inappropriately and forcefully mishandling a plate at Mr Owen; (iii) falling out with Ms Clarke over emails; (iv) upsetting Ms Gibson in connection with the student iPad; (v) making unkind and demeaning comments to Mr Owen; (vi) covertly recording the meeting with Mr Owen and Mr Mott, and then subsequently distributing the recording without their consent; (vii) during that meeting with Mr Owen and Mr Mott repeatedly using profane language and making derogatory remarks about both Mr Owen and the respondent; (viii) knowingly making a false declaration in his pre-employment health questionnaire (to the effect that the claimant did not suffer from mental illness); and (ix) deliberately damaging the respondent's property with regard to using the hammer to smash the office window. It was noted that each of these allegations were "by your own admission", in other words the claimant had not disputed that these events had occurred. The claimant was informed that dismissal for gross misconduct was a possible sanction as a result of the disciplinary hearing. He was invited to be accompanied by a fellow worker or trade union representative. The claimant was also sent the relevant documents and policies.
29. The disciplinary hearing took place on 15 August 2019. Mr Cox chaired the hearing, and the claimant chose to be accompanied by a work colleague. Mr Cox considered the allegations and the claimant's replies. Mr Cox decided not to apply any disciplinary sanction for seven of the nine allegations. Although he felt that the claimant's behaviour had been inappropriate and his actions had had a profound and adverse impact on some colleagues, and the facts were generally not disputed by the claimant, nonetheless Mr Cox concluded that these colleagues had not raised issues or complaints formally at the time, and this had not given the claimant the opportunity to correct his behaviour. Mr Cox also decided to discount the events which had happened when the claimant said he was having a panic attack and had taken his health position into account.
30. Mr Cox did decide to uphold two of the allegations, namely that he had deliberately failed to disclose his depression in the pre-employment health questionnaire, and which he had knowingly falsified, and that he had deliberately broken the window on campus with a hammer. Mr Cox decided to issue the claimant with a final written warning for these two instances of misconduct.
31. In addition, Mr Cox was concerned about the internal relationships within the BA Illustration Course and discussed with the claimant whether and how we might return to work in his role. The claimant made it clear that he wished to be redeployed into a new role outside of his current team because of a fundamental breakdown in the working relationship with

some of his colleagues. He made it clear to Mr Cox that this was the case and that the position would not change.

32. Mr Cox decided that this was consistent with other comments made during the investigation process. Mr Mott had commented that "He could not see how it would be feasible for him or other staff to work with the claimant" and that "It made him feel physically sick or as if his heart would burst". Ms Gibson had been tearful and said that the claimant had "frightened the living beJesus out of her through his aggression"; that "The situation had floored her, increasing her anxiety"; that she had stopped visiting the claimant, and that she also tried to avoid team meetings if he was present. Ms Dunn had been tearful at her interview and had confirmed that she had retreated and did not engage with the claimant and was afraid of him. She made it clear that she could not work with the claimant again. Ms Hazel confirmed that the claimant's behaviour was frightening and that "The workplace no longer felt safe and there was a huge sense of anxiety."
33. Having considered all of the relevant evidence Mr Cox decided that there was a fundamental breakdown in the working relationships in the course, and that the position had become untenable. Mr Cox determined that the claimant could not be reincorporated back into the team without unacceptable disruption, and that this was not appropriate given that there were only about 20 colleagues. In addition, the claimant made it clear that he did not wish to go back to the team. Mr Cox did not seek to determine who was to blame for the situation but concluded simply that that was the reality at the time. There was a deep ingrained mistrust between the parties and Mr Cox concluded that the resurrection of good working relationships was extremely unlikely.
34. Mr Cox considered what alternative options there were on the basis that the claimant was unable to return to the Course. The first was potential mediation, which had initially been suggested by Mr Masterton. The claimant was of the view that effective mediation might have prevented escalation of previous events, but he did not seek to argue that mediation might assist to resolve the position in which they found themselves at that stage. Mr Cox considered potential mediation but was not satisfied that the relevant persons would consent to mediate, nor that mediation would work because none of the parties seemed to have any interest in seeking to retrieve the relationship. Mr Cox was aware that parties could not be forced to undergo mediation against their will. In addition, the claimant had not indicated any remorse as to how his behaviour had impacted on others and had only suggested that he was a victim. Mr Cox was aware that previous informal attempts to resolve working relationships within the team, including mediation, had been unsuccessful. For these reasons Mr Cox discounted mediation as potential course of action.
35. Mr Cox also considered the possibility of changing work patterns within the course to avoid contact amongst those who had fallen out. Mr Cox discounted this because the relevant team was small and worked closely together, and it usually involved very regular contract amongst the team members. In addition, a significant number of staff within the team had already been affected by the breakdown in working relationships.
36. Finally, Mr Cox considered potential redeployment of the claimant. The claimant had been asking for redeployment for approximately 12 months and this had also been raised as a possibility in the first two Occupational Health reports. The claimant also asked again for redeployment during the disciplinary hearing with Mr Cox. Mr Cox agreed to explore this possibility. Mr Cox concluded his letter dated 16 August 2019, in which he confirmed his decision following the disciplinary hearing, with these comments: "Finally, I need to address your return to work. You have made it clear you cannot return to work in in your current role due to a fundamental breakdown in your relationship with some of your colleagues. Your preference is to be redeployed to another post based at the Penryn Campus. We will therefore commence the process to determine whether there is an appropriate alternative vacant role for you at the Penryn Campus and you will be contacted shortly in order to progress this. You should note that we will also now make arrangements to recruit to your current post, as you have signalled you cannot return to it. In the meantime, and as you cannot return to your current post, you will be placed on special leave pending any appropriate redeployment being identified. During this time, you will continue to be paid and remain under your contractual terms and conditions of employment. I should point out

that this search for an appropriate alternative vacant role will be for a finite period of time and if it cannot be found within that time it may be necessary to consider terminating your employment."

37. The respondent and the claimant then made joint efforts to seek a suitable alternative role into which the claimant could be redeployed. The claimant signed the redeployment application form for this purpose. Despite their efforts their initial attempts were unsuccessful, and after two weeks Mr Cox wrote to the claimant on 20 September 2019 giving him three months' notice of the termination of his employment. The reason relied upon was "some other substantial reason, such as to justify dismissal, which was because of the irreconcilable breakdown in the relationship between the claimant and others in his former team. Mr Cox confirmed that the respondent would continue to seek redeployment for the claimant during his notice period of three months, and the claimant was offered a further right of appeal.
38. The claimant had already appealed against the final written warning for misconduct in connection with the allegation relating to the broken window. This was superseded by a further letter of appeal in which the claimant appealed against the termination of his employment, and also for the imposition of the final written warning for the two allegations of misconduct. The second appeal was by letter dated 26 September 2019. His appeal was heard by Mr Eddy the respondent's Director of Research and Innovation Funding. At the appeal hearing the claimant confirmed that he was still seeking to be redeployed outside of the BA Illustration Course team. The claimant made no suggestion that he wished to repair relationships with his colleagues in order to return to his original substantive role. He suggested that if he was able to find a new role on the Falmouth Campus which brought him into contact with some of his colleagues then some form of reconciliation at that stage might be helpful. The respondent was in potential agreement provided that a new role could be found. Mr Eddy decided to downgrade the disciplinary sanction from final written warning to written warning, and he extended the redeployment for a further three months at the claimant's request. However, Mr Eddy upheld Mr Cox's decision to terminate the claimant's employment because of the breakdown in relationships.
39. Mr Marson of the respondent's HR department was involved in assisting the claimant with the redeployment process. He was aware that the claimant had been put on special leave pending the search for appropriate redeployment in August 2019 following the disciplinary hearing. He ensured that two of his colleagues in the HR team, Miss Pope and Ms Hendry, were aware of the circumstances so that the HR team could consider any potentially suitable roles before they were advertised. On 22 August 2019 Mr Morrison ensured that the claimant updated his redeployment form, which the claimant returned on 2 September 2019. The claimant was put on the respondent's Redeployment Register under its Redeployment Policy, on the basis that his employment might be terminated for some other substantial reason, and not because of medical redeployment. Some potential vacancies did arise, but there was nothing that amounted to suitable alternative employment for the claimant. The claimant did apply for some jobs but was not shortlisted because he was not suitable for them. Mr Marson kept a regular record of the respondent's vacancy bulletins between August 2019 and the termination of the claimant's employment in March 2020, and he supported the claimant in applying for jobs during this process. He had regular email and telephone contact with the claimant, along with various meetings to discuss progress on his job applications. Mr Marson bought a number of job roles to the claimant's attention, and he encouraged him to apply for these. Mr Marson ensured that the claimant was given appropriate feedback on applications and ensured that his email account with the respondent was reinstated in order to facilitate the redeployment process. Unfortunately, the parties were unable to secure redeployment into a suitable alternative position, even though the original period of three months was extended on appeal for the six-month period.
40. The claimant's employment therefore terminated with effect from 18 March 2020. The claimant presented these proceedings on 16 June 2020 claiming unfair dismissal. His potential claims were discussed and clarified at a case management preliminary hearing on 15 February 2021 and set out in a case management order made by Employment Judge

Bax on that date. The grounds of the claimant's unfair dismissal claim were set out, together with a claim for automatically unfair dismissal for health and safety reasons (which latter claim was withdrawn at the start of this hearing). In addition, the claimant had indicated that he might wish to amend his proceedings to bring new claims for both detriment for health and safety reasons, and for disability discrimination. The respondent objected and the claimant was informed that he would then need to make a formal application which would need to set out those potential claims in detail. At a further case management preliminary hearing on 18 June 2021 the claimant confirmed that he did not wish to pursue his claims for detriment for health and safety reasons, nor for disability discrimination, and accordingly those claims did not proceed. The claimant's sole remaining claim is therefore one of unfair dismissal under sections 91 and 98(4) of the Employment Rights Act 1996.

41. Having established the above facts, I now apply the law.
42. The Law:
43. The reason relied upon by the respondent for the dismissal was some other substantial reason of a kind such as to justify dismissal which is a potentially fair reason for dismissal under section 98 (1) (b) of the Employment Rights Act 1996 ("the Act").
44. I have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
45. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
46. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Taylor v OCS Group Ltd [2006] ICR 1602 CA; Leach v Office of Communications [2012] ICR 1269 CA; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The tribunal directs itself in the light of these cases as follows.
47. Applying Iceland Frozen Foods Limited v Jones, (approved by Post Office v Foley, HSBC Bank Plc) the starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair.
48. Applying Sainsbury's Supermarkets Ltd v Hitt, the band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd.
49. At the case management preliminary hearing on 18 June 2021 (and confirmed in an Order of the same date) the claimant confirmed that he asserts that his dismissal was unfair for the following reasons: (i) Others were to blame, or equally to blame, for what happened; (ii) He was not given a phased return to work; (iii) Many allegations were untrue; (iv) the respondent took into account, when it should not have done, that the claimant raised a health and safety concern in September 2016 and/or took steps to remove an imminent

and serious danger by making a hole in a window in November 2016; and (v) Dismissal was too harsh a sanction. The claimant developed these arguments at this hearing, and now complains of a lack of support, both generally and by way of failure to implement the agreed phased return to work, and complains that if the respondent had dealt with matters differently at an earlier time, circumstances would have been different, and would not have resulted in him being before Mr Cox under the disciplinary process. For the reasons which are explained below, and with the exception of the allegation that dismissal was too harsh a sanction, I do not consider these matters are relevant to the matters which this Tribunal is required to deal with. Nonetheless I deal with them each briefly in turn.

50. The respondent's decision to dismiss the claimant followed his agreement that there had been an irretrievable breakdown in working relationships and his request for redeployment. It does not really matter who was to blame for that set of circumstances which were before Mr Cox when he took his decision to dismiss the claimant, and indeed Mr Cox formed the same view, namely that he was not required to determine blame for the breakdown in relationships. For the record, in my judgment the claimant demonstrated a consistent course of unacceptable conduct towards his colleagues and any suggestion that the breakdown in relationships was caused more by his colleagues than by the claimant is in my view unsupportable. Be that as it may, apart from rejecting any allegation (if indeed there be one) that the claimant was a victim of a set of circumstances for which he was in no way responsible, the first allegation that others may have been partly to blame is simply not relevant.
51. Secondly, the claimant alleges that he was not given a phased return to work. There is a dispute between the claimant and Mr Owen as to the extent to which Mr Owen should have done more to supervise the agreed phased return to work. Nonetheless the respondent did put in place an alternative system of working whereby the claimant had fewer hours, fewer duties, reduced contact with students, and a different work schedule. Mr Owen says he did not follow this up as closely as he might otherwise have done simply because the claimant had already told him that he wished to have no further interaction with Mr Owen. Again, this is not directly relevant given the decision which Mr Cox had to make on the facts before him, but nonetheless it is clear that the respondent had acted on the recommendations of Occupational Health, and an agreed alternative work schedule was in place to assist the claimant.
52. Thirdly the claimant asserts that many of the allegations against him were untrue. For the same reasons, it is not necessary to make findings of fact as to the accuracy of each of the allegations given that the claimant accepted that there was an irretrievable breakdown in working relationships and had asked for redeployment. Nonetheless it is worth recording that the all of the allegations which the claimant faced in the disciplinary proceedings were actions which the claimant had conceded had happened, by his own admission.
53. Fourthly, the claimant asserts that the respondent wrongly took into account his actions with regard to breaking the window allegedly for health and safety reasons when it should not have done. Again, in my judgment this is not relevant to the decision to dismiss. It is clear from Mr Cox's evidence and the contemporaneous documents that this did not feature in Mr Cox's decision to dismiss the claimant. There was effectively a separate process resulting in a final written warning for misconduct, which included this allegation, in respect of which the claimant successfully appealed to have his final written warning downgraded to a written warning. It did not feature in the decision to dismiss him, which was for a separate reason, and in respect of which the claimant appealed separately.
54. The fifth reason relating to the harshness of the decision to dismiss is dealt with below in my findings relating to the band of reasonable responses.
55. Finally, I deal with the claimant's allegations that if the respondent had dealt with matters differently historically, and effectively supported the claimant more than it had done so, then the claimant would not have found himself in a disciplinary process which ultimately led to his dismissal. The respondent rejects this assertion, and it makes the point that the claimant is trying to rewrite history, particularly as it was clearly the claimant's fault as a result of his misconduct that he was facing the disability process in the first place. Either

way in my judgment it is not directly relevant to the task before this Tribunal, for the following reasons.

56. There is one claim for this Tribunal to consider, namely a claim of general unfair dismissal in respect of which the statutory test is in section 98 of the Act. In the first place this requires there to have been a potentially fair reason for dismissal under the Act. An irretrievable and irreconcilable breakdown in working relationships falls within "some other substantial reason such as to justify dismissal" in section 98(1)(b) of the Act. The first question to be addressed therefore is whether the respondent has made out the potentially fair reason for dismissal upon which it relies.
57. I find that it is clear from the witness evidence of the parties and the contemporaneous documents that as at the time of Mr Cox's decision to dismiss and Mr Eddy's decision on appeal that there was an irretrievable and irreconcilable breakdown in the working relationships between the claimant and his colleagues on the BA Illustration Course. The claimant concedes as much in the first paragraph of his witness statement which he prepared for the purposes of this hearing. This was the reason the respondent dismissed the claimant, and it was for no other reason. In my judgment this was a potentially fair reason for the claimant's dismissal. It was not for one of the four reasons in section 98(2) of the Act, but it was for some other substantial reason of a kind such as to justify dismissal in accordance with section 98(1)(b) of the Act.
58. The next question is the extent to which the dismissal was fair or unfair bearing in mind section 98(4) of the Act. What seems to me relevant in this process is the extent to which potential alternatives to dismissal were considered, and if necessary implemented. All parties agreed that there was an irretrievable breakdown in working relationships and that the claimant could not go back to the BA Illustration Course. It would arguably have been unreasonable of the respondent, and therefore an unfair dismissal, if the respondent had merely dismissed the claimant in the face of this conclusion as a "knee-jerk reaction", without considering alternatives. However, it is clear from Mr Cox's evidence that this was not the case.
59. In the first place, Mr Cox considered potential mediation. For the reasons explained in the findings of fact above, he rejected mediation as a potentially successful course of action. Informal mediation had already occurred, and additional support provided to the claimant, which had been unsuccessful. He was entitled to form the view that he could not force the claimant's estranged colleagues to engage in mediation when they did not wish to do so, and that therefore any such process was highly unlikely to be successful. That was a considered conclusion which in my judgment Mr Cox was entitled to make.
60. Mr Cox also considered the possibility of changing work patterns within the BA Illustration Course in the hope of avoiding contact between the claimant and those whom he had upset and estranged. Mr Cox rejected that possibility because it was a small department of approximately 20 people who were used to working closely together in the team, and it was simply not practical to try to reinstate the claimant into that department and to avoid close proximity with the various colleagues who had complained against him. Again, in my judgment that was a considered conclusion which Mr Cox was entitled to make.
61. The claimant had not suggested that there were any other options open to the respondent, other than to seek redeployment, which the claimant had requested. The claimant had been requesting redeployment consistently for several months; he had suggested in his Occupational Health referrals that this would have been beneficial; and the respondent took repeated and supportive steps to find the claimant redeployment as requested. The respondent makes the telling point that under the relevant Redeployment Policy the claimant needs to complete the redeployment application form, but that this then triggers a period of time within which to find redeployment, and during which "the clock is ticking", before termination of employment might result if no redeployment is found. For understandable reasons the claimant initially chose not to embrace this policy formally and fully, in order that the clock would not start ticking. However, he subsequently did so immediately after the disciplinary hearing which as a result of his own application initiated a time period of three months consistent with his notice period. Upon appeal this was extended at his request by a further three months. During this time the claimant was

supported fully in his attempts to find suitable alternative employment by way of redeployment for the reasons set out in the findings of fact above. It was only after this exhaustive period of six months, and without finding suitable alternative employment, that the claimant's employment was terminated. Against this background the claimant has not suggested that there were any vacancies or alternative positions which were suitable for him but to which the respondent refused to redeploy him.

62. The position therefore seems to me to be very straightforward. The conclusion was reached, with which the claimant agreed, that he could not go back to the BA Illustration Course because of the irreconcilable breakdown in the working relationships. This gave rise to a potentially fair reason for dismissal. By way of alternatives to dismissal the respondent concluded that successful mediation was not a potential resolution; neither was a return to the Course with altered duties in the hope of avoiding colleagues; and genuine and repeated attempts at finding redeployment were unsuccessful. Against this background the respondent concluded that it had no option other than to terminate the claimant's employment. This followed a full and fair disciplinary process during which the claimant was fully aware of the circumstances giving rise to his potential dismissal and during which he had every opportunity to state his case in the presence of his chosen representative.
63. In applying section 98(4) of the Act, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair.
64. In my judgment, given the surrounding circumstances the respondent was left with no effective or pragmatic alternative to dismissing the claimant, and I find that his dismissal fell within the band of reasonable responses which a reasonable employer might have adopted. Accordingly, I find that even bearing in mind the size and administrative resources of this employer the claimant's dismissal was fair and reasonable in all the circumstances of the case, and I therefore dismiss the claimant's unfair dismissal case.
65. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 6 to 41; a concise identification of the relevant law is at paragraphs 42 to 48; how that law has been applied to those findings in order to decide the issues is at paragraphs 49 to 64.

Employment Judge N J Roper
Dated: 25 November 2021

Judgment & reasons sent to parties: 14 December 2021

FOR THE TRIBUNAL OFFICE