



# EMPLOYMENT TRIBUNALS

**Claimant:** Dr A Merrison

**Respondent:** York St John University

**Heard at:** Manchester

**On:** 9, 10 and 11 November 2020  
15 December 2020

**Before:** Employment Judge Leach  
Mrs A Jarvis  
Ms B Hillon

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Miss S Tharoo, Counsel

# JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal is dismissed.
2. The claimant's claim of discrimination arising from disability (section 15 Equality Act 2010) is dismissed.
3. The claimant's claim that the respondent failed to make reasonable adjustments (sections 20 and 21 Equality Act 2010) is dismissed.

# CORRECTED REASONS

## Introduction

1. This case concerns the termination of the claimant's employment with the respondent on or about 30 April 2019.

2. The claimant was dismissed from his employment with the respondent following a disciplinary hearing on 23 April 2019. The claimant claims the dismissal was unfair.

3. The claimant also claims that the dismissal amounts to discrimination arising from disability contrary to s15 Equality Act 2010 and that the respondent failed to make reasonable adjustments which, had they been made, would have enabled the claimant to continue in his employment.

### **The Issues**

4. The issues were identified in a preliminary hearing (case management) on 4 November 2019 and recorded in the Case Management Summary which followed that hearing. The parties confirmed that these remained the issues to be determined except that:

- (1) the respondent admits that the claimant is (and was at all relevant times) disabled within the meaning of section 6 of the Equality Act 2010;
- (2) a claim of indirect discrimination (protected characteristic, disability) was no longer being pursued.

5. The issues are as follows:

### **UNFAIR DISMISSAL**

1. *Was the reason for dismissal the conduct of the claimant?*
2. *Has the respondent followed all required procedures under its statutes?*
3. *Did the Respondent conduct a reasonable investigation?*
4. *Did the Respondent have reasonable grounds to believe that the Claimant was guilty of the misconduct?*
5. *Did the Respondent believe that he was guilty?*
6. *Was dismissal within the range of reasonable responses open to the Respondent?*
7. *Did the Respondent and the Claimant comply with the ACAS Code of Practice?*

### **REMEDY**

8. *If the Claimant's claims are upheld:*
9. *What remedy does the Claimant seek?*

10. *If the Claimant seeks reinstatement or reengagement, is it practicable for the Respondent to comply with such an Order?*

11. *What financial compensation is appropriate in all of the circumstances?*

12. *Should any compensation awarded be reduced in terms of Polkey v AE Dayton Services Ltd [1987] ICR 142 and, if so, what reduction is appropriate?*

13. *Should any compensation awarded be reduced on the grounds that the Claimant's actions caused or contributed to his dismissal and, if so, what reduction is appropriate?*

14. *Has the Claimant mitigated his loss?*

### **DISCRIMINATION - DISABILITY**

15. *Was the Claimant disabled within the meaning of section 6 and Schedule 1 of the Equality Act 2010?*

The respondent admits that the claimant has the impairment of Autistic Spectrum Disorder and that this is a disability for the purposes of the Equality Act 2010

### **Discrimination arising from disability**

20. *Did the Respondent know/could the Respondent reasonably have been expected to know that the Claimant had a disability? If not, when ought the Respondent to have been aware of the Claimant's disability?*

21. *What is the "something arising" as a consequence of the Claimant's alleged disability upon which he relies?*

22. *The something arising is alleged to be the claimant's difficulty in understanding and interpreting rules and boundaries in the same way as others who do not have the condition. In particular, the respondent's policy on relationships/boundaries between staff and students.*

23. *Was the Claimant treated unfavourably because of the "something arising" as a consequence of their alleged disability?*

*The unfavourable treatment alleged is the dismissal.*

24. *If so, what was the reason for that treatment?*

25. *In treating the Claimant in that way what aim was the Respondent seeking to achieve?*

*The respondent relies on the aim of ensuring that its students are free from unwanted and inappropriate conduct from members of staff.*

26. *Was that aim legitimate?*

27. *Was the treatment a proportionate means of achieving that aim or was there a less discriminatory way of achieving it?*

### **Indirect Discrimination**

[Claim withdrawn]

### **Reasonable Adjustments**

*31. What was the provision criterion or practice which put the claimant at a substantial disadvantage – the claimant's case is that the provision, criterion or practice was the application of respondent's policy on staff and student relationships and the decision to dismiss the claimant?*

*32. Did the respondent fail to take such steps as it would have been reasonable to avoid the substantial disadvantage of dismissal?*

*33. The claimant says that the respondent should have taken into account the report and recommendations? From Dr Larkin and not dismissed the claimant.*

### **Wrongful Dismissal**

*34. Was the claimant guilty of gross misconduct that was a repudiatory breach of contract entitling the respondent to dismiss the claimant without notice?*

### **The Hearing**

6. The claimant represented himself at the hearing. The respondent was represented by Miss Tharoo of counsel. The hearing took place by Cloud Video Platform which worked well throughout the hearing and enabled the hearing to go ahead in the midst of the COVID 19 Pandemic. We thank all those participating for their cooperation and conduct throughout the hearing. We are satisfied that a fair hearing took place.

7. We heard evidence from Dr Bourne a member of the respondent's disciplinary panel which made the decision to dismiss the claimant. We also heard from Professor Stanton, who was until recently, the respondent's Vice Chancellor and chaired the respondent's appeal panel.

8. We also heard evidence from the claimant and from Robert Avery, an employee at the respondent university and a local representative of the Universities and College Union ("UCU").

9. The parties had agreed a bundle of documents which was provided to us. References to page numbers below, refer to this bundle.

10. About two thirds of the bundle (some 1400 pages out of a total of 2000 or so pages) comprise a series of text messages. We asked both parties if they wished the Tribunal to read through these in their entirety or whether they wished to direct us to any particular pages. Both parties informed us that they did not expect us to read through the messages. There are some references to text messages

elsewhere in the evidence and we have reviewed the texts where directed and where we considered we should do so.

### **Anonymisation Order.**

11. At the beginning of the hearing Ms Tharoo, on behalf of the respondent, applied for an Order (under Rule 50 of the Employment Tribunal Rules of Procedure 2013) requiring that the identity of a former student of the respondent university should not be entered on the register of judgments kept in accordance with Regulation 14 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. This former student is significantly involved in the allegations of misconduct that led to the claimant's dismissal. The claimant did not object to the application.

12. We agreed to the respondent's application. In this judgment we refer to the student who is the subject matter of the respondent's application and our Order as Student X. In writing this judgment, we decided that the principle of open justice did not require us to use the actual name of any student or recent former student of the respondent and we have chosen to use terms which preserve anonymity.

### **Findings of Fact**

#### The claimant's employment with the respondent

13. The claimant was employed as an academic member of staff with the respondent university. His employment began on 1 January 1999 and his most recent post was as Senior Lecturer in Linguistics.

14. We have not seen a written contract of employment or role description for the claimant. It is clear that the claimant's role of senior lecturer required him to spend a significant amount of time with students, teaching those students in lectures and tutorials. The claimant also supervised and marked coursework and examination work.

15. The claimant was required to comply with employment policies. These included the following:

- (1) The respondent's policy on consensual relations between staff and students which is dated February 2013 ("Policy"). The claimant claims to have been made aware of this Policy in October 2016. We note the following extracts from the Policy:

3.1 *The University believes the professional relationship between a student and a member of staff is a central part of the student's educational development. it is vital that trust and confidence exist between staff and students to ensure students maximise their learning experience.*

3.2 *Staff have a professional duty to develop their students' abilities and a responsibility to safeguard students' welfare. Given the imbalance of power between staff and students, any abuse, or*

*perceived abuse, by staff of this relationship will be viewed with concern.*

- “3.3 Staff are strongly advised not to enter into a sexual/romantic relationship with any students they are responsible for teaching, supervising or assessing. Such relationships could compromise the professional relationship between staff and students and damage the teaching and learning environment for other students and staff.

*Should a relationship develop between a member of staff and a student the member of staff must declare that relationship to their manager. In the case of lecturers, the manager should transfer teaching and assessment of that student and relevant cohort to another member of staff. Where this is impossible given the subject or alternative available staffing, arrangements must be made to ensure that the member of staff does not directly assess the student’s work. In cases of other staff the manager should ensure that the nature of any relationship does not influence the service provided to any student. Failure to declare a relationship may lead to disciplinary action.*

*The university further requires that if such relationships arise they must be conducted with the utmost discretion and entirely outside the professional environment.”*

- (2) The claimant was also required to comply with the respondent’s Code of Conduct which sets out standards of behaviour the respondent expects of its employees. This Code of Conduct includes the following general principle:

“2.1 Employees are expected to act professionally and honestly, with integrity and respect for others and due regard to the impact of their conduct and behaviour on the university, colleagues, students, external partners/customers and the environment.

2.2 All employees must conduct themselves in a manner that at all times promotes a positive image of the university.”

16. The respondent has a disciplinary policy, agreed with its recognised unions. Below are extracts from the policy which we consider relevant. The whole policy is at pages 45-54.

### Suspension

*Suspension is not a disciplinary penalty and should not be viewed as such. Suspension should only be used if it is deemed that the employee’s presence at the workplace will be of detriment or a risk to either:*

- *the investigation and/or*

- *the student experience or effective service delivery and/or*
- *any party, including themselves and only after considering if the employee could be placed in an alternative post.*

*Where suspension is being considered the line manager must consult with the HR Department prior to meeting with the employee. It is imperative all efforts are made to ensure suspension is kept to a minimum. Where appropriate, the employee may be temporarily redeployed elsewhere within the University as an alternative to suspension or have their duties restricted.*

*Prior to taking the decision to suspend, an employee must be given an opportunity to explain themselves and their response should be listened to and considered by the line manager. In exceptional circumstances where this has not been possible, the reasons for the suspension need to be fully explained to the Executive Board member who will then endorse or otherwise the decision to suspend.*

#### *Investigations*

*It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In most cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing.*

*The line manager will normally assume the role of investigating Officer unless there are specific reasons for someone else carrying out this role. There may be situations where it is advantageous for the Investigating Officer to have no connection to the employee and/or team involved, leaving the line manager to manage and support the affected colleague and/or team through the process. Where there is a situation when the investigation involves a number of colleagues in different parts of the University then a discussion will take place with the HR team to determine the most appropriate investigating Officer.*

#### *Disciplinary Hearing*

*Where the Investigating Officer has concluded that a disciplinary hearing is required they will write to the employee to invite them to the hearing, providing at least 5 working days' notice. A copy of the University's Disciplinary Policy, investigation report, all witness statements and any other documentation referred to in the investigation report will be sent to the employee with the invitation. If previously agreed, a copy of all documents will also be sent to the employee's representative.*

*The employee will be asked to detail any disability-related access requirements that they might have.*

*If requested by the employee, attempts will be made to convene a hearing in a shorter timescale in order to allow time for exchange and consideration of documents prior to the hearing, the employee should submit any written information upon which they will rely at the hearing to the HR advisor to the panel at least 2 working days prior to the hearing, who will then disseminate copies to the panel and Investigating Officer.*

*The panel at the hearing will be made up of two managers, with support from a member of the HR team. The Chair of the panel would normally be the line manager of the Investigating Officer. In exceptional circumstances where the employee has admitted to an act of misconduct, following advice from HR, it may be appropriate for only one manager to hear the case with support from a HR representative. A note taker will be present at all hearings.*

*In cases where the allegations could result in dismissal, the disciplinary panel will be chaired by a member of the Executive Board. supported by a member of the Senior Team. The Head of HR will advise the panel.*

*The Investigating Officer will attend the hearing to present their report and findings and to respond to any questions from the panel or employee relating to their investigation and findings.*

*The employee has the right to be accompanied at the disciplinary hearing by a recognised trade union representative or workplace colleague.*

### Dismissal

*Dismissal can occur in one of two ways:*

*a. Incrementally, following a series of warnings for misconduct  
Dismissal may follow a series of breaches in conduct which have been considered at disciplinary hearings and for which the employee has received formal warning/s. The misconduct for which the warnings were given do not have to be linked. Such a dismissal would be given with the standard notice reflecting the employee's contract, either given or paid in lieu.*

*b. Gross misconduct*

*Where a disciplinary panel concludes that the employee's conduct amounts to gross misconduct Le. a fundamental breach of trust of confidence which results in a breach of contract. then they may be summarily dismissed. This would be with immediate effect (i.e. notice not given or paid in lieu).*

*Appeal hearing*



*A more senior level of management than the original panel will hear appeals against a written or final written warning.*

*The Vice Chancellor will hear appeals against dismissal with support from a member of the Executive Board not involved in the earlier panel and a member of the Governing Body.*

*A HR representative will be present at all appeal hearings as advisor to the panel. In the case of appeal against dismissal, this will be the Head of HR. A note taker will also be in attendance.*

*At appeal, the decision of the disciplinary hearing will be reviewed against the specific grounds on which the appeal is based. The appeal panel can either:*

*Dismiss the appeal and confirm the sanction issued.*

*Uphold the appeal and review/reduce the level of sanctions.*

*In exceptional circumstances, instruct a re—investigation I re-hearing of the case.*

### The Claimant's Suspension

17. The claimant was suspended from his employment on 10 January 2019 after a complaint had been made by a former student. We refer to this student as "Student X."

18. Student X had contacted the respondent to raise concerns about the claimant's behaviour towards her during the academic years 2015/6 and 2016/7. An appointment was made for Student X to see a member of the respondent's welfare team on 4 January 2019, which she attended, accompanied by another former student. The discussion and concerns raised are noted in an internal email dated 4 January 2019 (page 87). A further meeting was arranged with Student X and the other former student accompanying her. This meeting took place on 9 January 2019 and was led by Rachel Wicaksono ("RW") Head of School of Languages and Linguistics at the respondent. A member of the HR team was also present. Notes of this meeting are at pages 89-99 and include the following:-

- (1) Student X explained that she had been "talent spotted" by the claimant when she joined the course he ran; that the claimant spoke to her and sent her an email on that basis. Student X accepted that she was perhaps flattered at the time and it had not initially occurred to her that it was (her word) "weird."
- (2) That the claimant became her "*best friend*" for a while and they talked and sent texts.
- (3) That the factor that changed the relationship was when Student X started a relationship with a boyfriend and it was then that the claimant gave her the Letter (see below). This was in September 2016 which

was the beginning of the claimant's third year at the respondent university.

- (4) That friends of Student X thought the relationship with the claimant was weird.
- (5) That the claimant turned up to Student X's house at 11pm one evening (at a time when student X was working hard) and asked student X if she wanted a Chinese meal.
- (6) That on another occasion the claimant walked in to the student house (when another student and resident was there) and in to the kitchen, saying he was getting some plates for student X.
- (7) Student X said that the claimant had set up a whatsapp group with herself and 2 other students, and so excluding the rest of the class, asking why a 50 year old married man would want to *"whatsapp three 20 year old girls, under his power."*
- (8) The student who accompanied Student X to this meeting stated that she felt that the claimant was selecting students in an attempt to groom them and keep them separate. Student X was then asked by the HR team member if she would use the word *"groomed."* Student X replied that, looking back, it was grooming behaviour.
- (9) That there was an audio recording of the claimant reading the Letter (see below) out loud to Student X. (This was forwarded by Student X to RW following the meeting).
- (10) That the claimant was following Student X on Facebook,
- (11) That the claimant would tell Student X about grades for her work before she was supposed to know them
- (12) That the claimant put pressure on Student X, recalling an occasion when the claimant had said to her that if she did not get "90 something for a piece of work, something would have gone horribly wrong."
- (13) That when Student X became upset at the pressure, the claimant would give her a hug and occasionally kiss her on the forehead.
- (14) That the claimant would talk with Student X about other students and their grades.
- (15) That when the claimant found out that Student X had a boyfriend and because she had mentioned previously to the claimant she was asexual, the claimant wanted to know if Student X had sex with her boyfriend.
- (16) Student X described the claimant's behaviour as calculated and coercive, that she felt she was targeted and pursued on the basis that

she was quite vulnerable. Student X had recently been assessed as being on the autistic spectrum.

- (17) That when she went to that assessment, the claimant offered to accompany her and she felt that she could not decline the offer. The claimant had introduced himself at the assessment as “a significant other” but not her significant other.” The assessor took from that they were in a relationship.

19. RW then met with the claimant on 10 January 2019. RW told the claimant that she had met Student X and that there were a number of concerns about the claimant’s behaviour towards her. An initial discussion took place, notes of which are at pages 100/1. The claimant was told that a decision had been made to suspend him and he was provided with a letter, also dated 10 January 2019 (98/9) (Suspension Letter). The Suspension Letter provided details of the allegations relating to Student X that had been raised and were to be investigated. These allegations were the same as those taken to the disciplinary hearing, and we set them out below and in full:

*During the academic years 2015-2016 and 2016—2017, your conduct and behaviour towards a student, (Student X) (now Alumni}, was inappropriate, unwanted and breached professional boundaries. Specifically, these allegations relate to the following incidents:*

- *“A letter dated 11 September 2016 which you presented to Student X alongside playing an audio recording of yourself reading the letter. This letter contains a number of concerning disclosures, including a declaration of love, physical attraction, jealousy towards her boyfriend and friends, and a request to be added to her Facebook account in order to ‘be as integrated as possible into her life’. The letter also suggests that Student X was ‘not the first to receive Merrisonian treatment’.” (Incident One)*
- *“That at a dinner at Bill’s Restaurant where a number of students were present, you held Student X’s hands under the table, resulting in her feeling very uncomfortable.” (Incident 2)*
- *“That at Student X’s autism assessment meeting in which you accompanied her, you described herself as her ‘significant other’.” (Incident 3)*
- *“An incident where you allegedly visited the house Student X shared with other students on Brownlow Street late in the evening and entered the house without the permission of [Student X’s housemate –] to collect plates for a Chinese takeaway you had ordered. Student X reported feeling very vulnerable, and felt you had abused your position of power to enter the property.” (Incident 4)*
- *“That Student X reports feeling ‘groomed’ by your behaviour towards her, which singled her out from the rest of the cohort, sending a large number of text messages and bombarding her with compliments.”*

20. The claimant was informed that an investigation would take place and that the allegations, if proven, could amount to gross misconduct and could result in the claimant's dismissal.

### The Letter

21. The first of the alleged incidents above, relates to a letter dated 11 September 2016 ("Letter"). There is no dispute either that the Letter exists or about the content of the Letter. The bundle contained a copy of the handwritten original and a typed transcript which runs to 8 pages (86A to 86H). The terms of the Letter are important when considering the issues in this case, and so we set out a number of extracts. We note that these extracts when considered in isolation cannot be said to be considered out of context. The extracts very much reflect the content of the Letter as a whole:

*"When your wife believes that the first person her husband thinks about when waking up is a woman more than half her age instead of her, something is not right. And when her husband knows that she's right, that is scary. What does it mean for me to wake up and immediately think of you? Does it mean that I don't love my wife? NO. Does it mean that I'm unfaithful to her? NO. But does it mean that I must be in love with you? I think it probably does. And that can't not be scary. For me. For you. For her. For any of us. That's what I need to try to explain now. I'm in love with you, student X. Of that I have no doubt."* **(Extract One)**

*"First off, it's scary because I'm nearly 51; you are 21 and people (society) will assume that my attraction to you is a physical one. Well it is. I have no doubt that when I know I'm going to see you my mood lifts, my pulse probably quickens and I get nervously excited. You affect me physically. You are endorphin to me. But it's the next step that is really frightening. People (society) will assume that my attraction to you is a sexual one. But it isn't, it really is not. I do not want to have sex with you. And what is scary is the idea that others will not believe that. And what is scarier still is that the level of connection that sex represents between sexual partners doesn't even begin to come close to the level of intimacy that I want to share with you, student X. I want you to be part of my soul. And I want you to want me to be part of yours. 'You are me and I am you'. No boundary. FUSED. **(Extract 2)***

*So there is my fear and that's why I have always been extra cautious around you. To commit to you so deeply, so fully, so utterly honestly is to risk losing everything. And who wouldn't be frightened at the risk of losing everything?! Not me, that's for sure." **(Extract 3)***

*"I am your lecturer. Herein lies a blessing and a curse. The blessing is that I get direct access to, insight into....., let's be honest, influence on your mind. And that is so very beautiful (your mind not my access!). You are the brightest, shiniest student I've EVER had. And for me, qua teacher, that is A JOY. An utter utter JOY. So why is it a curse? Societal expectations. Societal constraints. People seem to be unable to divorce humans from their institutional ROLES – and that brings inherent expectations for and*

*constraints on behaviour. I know that for as long as I am your lecturer or supervisor I cannot not be your teacher. And that carried great responsibilities and much power – and I do not want to have ANY power or authority over you. I don't want you to have to ever worry about what to say or how to be when you're around me. I don't want you to feel that you need to defend yourself. And that brings me to the topic of Facebook and our friendly connections. As much as I love you you are not the first person who has received special Merrisonian attention..."(Extract 4)*

*"I am afraid for you Student X. Though I can't tell (because I am not your Facebook friend I cannot see your friends list) I assume you have several Facebook friends who are current students. And if you accepted me as your friend, I can imagine the sorts of twisted and bemoaning things that might get said; to me, to my managers, to HR and, most importantly, to you. People who have received special Merrisonian attention have, in the past, had to deal with all sorts of abusive behaviours from those who believed that those friendships were not only inappropriate, but also that they were evidence for grade inflation." (Extract 5)*

*And yet-and here's the thing that makes me so sad-friends hang out; they go on "dates" just to be with each other. They spend [time] at each others' houses. And this is denied me: partly for institutional reasons again, and partly for the reason that I'm married and that hanging out with you would be difficult to socially warrant. WRONG SOCIETY again. POLYAMOURY isn't a cultural norm – and even if it were, I'd still have to contend with the ageist stigma. So here I am-with all this love for you and virtually no legitimate outlet for it. About the only place I can express myself is in texts and because of their semi public nature, I have to be especially cautious and wary about what I say out loud. And that I hate. Texts and the occasional and all too brief stolen tryst somewhere." (Extract 6)*

*"I love you, Student X. And if the world had been different, I would have asked you to marry me and I would have tried to make you happy." (Extract 7)*

### Previous Concerns

22. The complaint from Student X was not the first time that concerns had been raised about the claimant's conduct with students.

23. In 2009 the then Deputy Dean of the respondent wrote to the claimant about inappropriate use of language with students and his relationships with students, particularly in connection with the use of Facebook. The following is an extract from the letter:

*"In relation to your use of Facebook, whilst I have no objection to your presence on the site and would not want to impinge upon your private life, when communicating with students it is important that you remain professional at all times and present a positive image of the university. Whilst I accept Facebook is a social networking site, students will still regard you as their tutor and consequently you need to act accordingly. I know you*

*have removed some of the photos from your personal pages that caused me concern and I would ask that you continue to consider carefully how you interact with students on the sites you use.”*

24. Arrangements were then made to monitor and undertake performance review meetings throughout the following year to ensure compliance with the respondent’s policies.

25. In October 2016 information was received by the respondent, that the claimant may be engaged in a sexual relationship with one of his students (not Student X, we will refer to this student as Student Y). Dr Rachel Wicaksono (“RW”) (the claimant’s line manager) spoke with Student Y who informed her that she was not having an inappropriate relationship with the claimant. No disciplinary action was taken although a discussion did take place between RW and the claimant. There are no contemporaneous notes of this meeting. It is relevant to note that this meeting took place a month after the claimant had sent the Letter. The claimant was informed that there was no evidence of a romantic relationship between him and a student, but a discussion took place about how he and the respondent might make sure that “the best interests of all students are being served”. During that meeting the claimant informed RW that whilst he strongly denied a sexual relationship, he loved student Y but also mentioned that he loved a number of other students. Whilst Student X was amongst the students listed by the claimant, he did not make any reference to his relationship with and intense feelings about Student X. We find that the claimant did not do this because he chose not to disclose it to RW. He chose not to disclose it because he knew that it was inappropriate, that it would be met with strong disapproval by RW. The claimant had been clear in the terms of the Letter that he knew that there would be strong disapproval of the relationship from his employer as well as other parts of society. We also find that the claimant’s reference to loving a number of his students, ensured that RW was not concerned about any one relationship.

26. In February 2017 a further discussion took place between the claimant and RW about relationships that were then in play between the claimant and 3 students. RW was convinced that there was nothing inappropriate, her discussion was on preventing new “disciples forming” from the next student cohort rather than trying to change current relationships. A brief note of this discussion is at page 130. It is in an email dated 17 January 2019 in which RW transcribes a brief note that she took of that discussion. That note also indicates that RW wondered about referring the claimant to the respondent’s occupational health department about the claimant’s behaviour but that she did not as she had been told by OH that they did not provide a diagnostic service and that this should be accessed via an individual’s GP. The claimant’s evidence is that he does not recall the discussion in February 2017. We find the discussion did take place. We find that the note is consistent with the discussion in October 2017, that it is an incomplete note (more in the form of a jotting) and was reported by RW in January 2019, just as the most recent concerns about the claimant’s conduct were being investigated.

#### Investigation meeting with the claimant

27. RW held an investigation meeting with the claimant on the afternoon of 14 January and morning of 15 January 2019. Notes of the meeting are at pages 105

to 129. The claimant attended with Robert Avery, a local representative of the respondent's recognised union, UCU. The claimant had a prepared, written statement. We note the following in relation to the meeting:

- (1) The claimant was able to provide the respondent with all of the information that he wanted to provide.
- (2) The claimant informed the respondent that there was a significant amount of text communications between the claimant and Student X. There were about 9,000 text contributions in all making up over 1,300 pages of text.
- (3) The claimant accepted that he had the personal mobile numbers of some of the students.
- (4) The claimant accepted that he told Student X that he loved her but that he had also said that to "a number of others" and the claimant gave two examples, being the same two students that he had accepted he had mobile telephone numbers for.
- (5) The claimant stated that where he has had a close association with a student and they have been on his module, *"I've always made sure their work has been internally and externally verified. Making sure teaching and learning is institutionally appropriate"*.
- (6) When the claimant was asked whether he thought that other staff have these kinds of relationships with students he answered that he did not think they did.
- (7) The claimant stated that he regarded Student X as his friend and that the Letter was overall personal, not a letter written to her in the lecturer/student relationship. Specifically, when the claimant was stating to student X *"I want you, I need you, I love you"* he was not having that conversation with a student but was having it as a friend.
- (8) The claimant was asked how Student X distinguished the advice that he gave her as a lecturer and that he gave her as a friend, and the claimant said he did not know.
- (9) RW commented that personal relationships were discouraged; the claimant responded, *"but they are allowed, policy says that you can have relationships with students"*.
- (10) The claimant was asked if he had disclosed the relationship, having regard to the terms of the policy on consensual relationships. The claimant responded that it was not a sexual relationship so he did not have to disclose it.
- (11) The claimant was asked about a text exchange where Student X referred to her self-harming. There was a period when Student X, according to the claimant, was self-harming with a penknife. He was asked in his professional capacity what he did to seek help for the

student in difficulty: had he spoken with the wellbeing team? The claimant's response was *"No, sounds terrible, I didn't do any of that. Didn't think about that. Sounds stupid me saying that now. Where she was cutting, it wasn't a dangerous place – thighs above skirt mark, what I was trying to do was help her stop doing that"*, and also *"she had told me about self-harm but not told anyone else. Trusted me to tell me that"*.

28. A large part of the meeting involved a discussion about the Letter. We note the following comments by the claimant at the meeting explaining why he wrote it (120):

*"At point of writing or delivery of letter I know Student X had a friend called [Z]. It wasn't until after that I realised she was in a relationship. I saw on Facebook her status changed. Conversation around about the knife. I said she should talk to [Z]. This was me accepting that [Z] is the person who is Student X's partner. I'm jealous of one your special friends – at the time he wasn't a boyfriend – just a close friend. But I was jealous of everyone in Student X's life who was unconstrained on how they could interact with her. Closest friend outside the group of me (and names of two other students). Up until then I thought the main person in her life was me. It was nothing to do with Student X but the letter enabled me to deal with those relationships."*

29. The claimant was asked whether it occurred to him he should have had a conversation with RW, his line manager, knowing that there was a policy about relationships with students in place. The claimant's response was that it did not occur to him because he did not feel it was relevant to the policy. He explained that being in love means that he was thinking about Student X all the time but that he did not think it made it a romantic love which is what would have brought it in line with the policy, and therefore he did not feel that he needed to discuss the matter with RW. The claimant specifically referred to the meeting in October 2016 that he had had with RW and said that even then it did not occur to the claimant that he needed to disclose the letter/relationship. We confirm our finding at paragraph 25 above, that the claimant chose not to disclose the relationship. We do not accept that disclosure did not occur to him.

30. The event at Bill's Restaurant referred to in the Suspension Letter (which we have called Incident 2) was discussed. The claimant's explanation was that he was not holding Student X's hand but he gave her a hand squeeze. His explanation was as follows:

*"We sat next to each other. I think **STUDENT X** was uncomfortable in that environment for some reason and I offered and she accepted a hand squeeze."*

31. The claimant was asked whether he had accompanied Student X to a doctor's appointment. (Incident 3). The claimant informed RW that he had but that he had not introduced himself as the significant other of student X. Instead what he had said to the doctor was *"I'm an other who is significant but not her significant other."* The claimant explained that this had been misrepresented in Student X's medical notes



32. A discussion also took place about Incident 4, a visit to student X's house, also mentioned in the Suspension Letter. The claimant's response to this was that he had already been invited into the house by two other students (student X and another individual) and therefore his attendance at the house was not uninvited.

33. The attendees at the meeting also discussed the use of the word "groomed". The claimant objected to the use of this word. He quoted a definition noting that it was a reference to a paedophile preparing a child for a meeting with the intention of committing a sexual offence. He noted that student X was not a child and, further, she had made known to the claimant that she was asexual, and therefore grooming was an inappropriate term. When asked why she would use such a word the claimant responded that it must be because she wanted the claimant to be dismissed.

34. At the end of the meeting the claimant's representative commented that he believed that there were signs of potential autism in the claimant, that the claimant had carried out an initial screening which indicated that he is autistic and that the claimant was asking his doctor for an assessment.

35. The respondent then supported and funded an appointment with (and assessment by) an appropriate expert. A report was received from Dr Larkin, clinical psychologist on 27 March 2019.

#### The claimant's General Statement.

36. As noted above the claimant attended the meeting on 14 January 2019 with a prepared statement:

*My position is that the accusations made are either false, or presented in a way which selectively highlights only part of the context required for appropriate Interpretation.*

*While I recognise that some of the things I said/did may have been foolish, I genuinely believed that there was nothing harmful or wrong with them.*

*I considered the relationship I had with Student X to be complex, multifaceted, and it was one of friendship, similarity, appreciation, deep connection and love in its purest form.*

*From all the interactions I had with Student X, I had no indication that she felt otherwise. indeed, there is text evidence to support my belief that she also felt the same way.*

*My 'personal' feelings for Student X were always kept out of the classroom to maintain a clear distinction between professional and familiar settings.*

*For the record, from very early on, I knew that Student X was asexual. Since September 2017, I have ceased socialising with undergraduate students.*

*I no longer teach or play bridge.*

*I do not belong to any friendship groups of any size with students.*

37. The claimant also attached sections of the Letter with comments and explanations added.

#### Dr Larkin's Report

38. The report noted the following assessment outcome:

*"Following the screening assessment, Andrew was advised that he showed a high number of symptoms of ASD and that he should have further assessment for ASD to confirm an official diagnosis. This will be scheduled once Andrew and his HR department confirm that they wish to pursue and fund this assessment."*

39. The purpose of the assessment was to ascertain whether the claimant showed sufficient symptoms of an autism spectrum disorder (ASD) to proceed for a full assessment.

40. Whilst the respondent had not provided details of the current disciplinary investigation it is clear from the report contents that some discussion took place and the report included the following:-

*Andrew explained that he is seeking an ASD assessment following a formal complaint being made to his employer about inappropriate behaviour towards a student. Andrew is a Senior Lecturer at York St John University, and an on-going investigation is taking place following one of his previous students reporting that she felt "groomed" by Andrew who had a non— sexual relationship with this student over the course of her studies. Andrew reported that he did not see anything inappropriate about his behaviour with this student but he has noticed a historical pattern of people telling him that he has no sense of boundaries and "often acts inappropriately. He reported that his Union representative advised him to have an ASD assessment himself.*

*This complaint has sparked a crisis for Andrew, as he explained that it has shaken his understanding of how well he can read people and take them at face value, and he now risks dismissal from his job, which is a central part of his identity. Andrew reported that ASD is one of several avenues he is exploring, and he is also on the waiting list for an ADHD assessment and is accessing mental health assessment and support from IAPT. Andrew reported being aware of how the outcome of this assessment could have significant implications for the on-going workplace investigation.*

*Andrew did not mention any other expectations of the assessment. ...*

And

*In the situation with the current complaint, Andrew explained that he "clicked" with the student, [Student X] and encouraged her through an ASD assessment herself. He said their relationship was intimate but not sexual and explained that he thought about her often and had regular contact with her outside of the academic context, as well as nurturing her academic development Since*

*graduating, she had brought the complaint against him for breaching professional boundaries. Andrew explained that he wants to understand how to behave differently so that he can return to work.*

### Investigation

41. One of the investigative steps taken by the respondent was a discussion between Dr Larkin and Mrs Stanton from the respondent's HR department. This took place on 1 April 2019, just a few days after Dr Larkin's report had been received. A note of the discussion is at page 170 and 171. We note the following

- (1) LS noted a concern that the claimant acknowledged a lack of understanding of appropriate boundaries of relationships. Dr Larkin opined that the claimant has a lack of awareness of boundaries "*a blindness to them which is typical of ASD.*" (page 170) but that with support Dr Larkin felt that the claimant would be "*able to do fine*" and that the claimant would be able to keep to the rules if explained in a way which he understands them. She also noted that "*the rules have never been explained to him in a way that he understands so he doesn't know.*"
- (2) Dr Larkin recommended a full assessment, that it would be about 6 weeks and the cost would be about £1000. We note here that the respondent decided not to undertake this further step and continued with the disciplinary process.

42. The investigation in to the misconduct allegations was carried out by RW. The claimant suggested a number of witnesses for the investigation. Most of these were current or former students of the respondent who RW decided not to interview. There were also 3 longstanding professional colleagues and friends of the claimant who RW also decided not to interview, with one exception – a former colleague of the claimant's called Professor Graham Turner ("GT") who had witnessed discussion between the claimant and Student X. GT is a former employee of the respondent. By the time of the interview he had moved to an academic post at another University.

43. RW interviewed GT on 24 January 2019. GT informed RW that he had seen the claimant and Student X together but just on the one occasion which was at the end of a class when the claimant told Student X (in GT's presence) that he loved her. GT recalls asking Student X how well she knew the claimant and her reply was that she did not know him. GT said that he was not surprised by the claimant's comment. He and the claimant had known each other since childhood and described the claimant as "*a lovey, a theatrical person with a stage presence who lets all his emotions hang out.*" GT also noted that Student X was not upset by the comment and that the claimant has genuine affection and dedication to his students. GT's evidence was consistent with the liberal use of the word "love" by the claimant in his meeting with RW in October 2016. However, it was clear from GT's evidence that the claimant had not disclosed to GT his true feelings for Student X, even though they were long-time friends and colleagues.

44. We note that the claimant referred to this incident with GT, in comments which he attached to his General Statement when he said about the Letter: "*this*

letter is not the first expression of AM's love for Student X. It was first expressed in from of Professor Graham Turner at the end of a sociolinguistics class in February 2016." (141) We note (and we find) that the incident described by GT and expression of love in February 2016 (an expression likened to the behaviour of a "theatrical lovey") was of a completely different intensity to the love expressed in the Letter in September 2016 (see Extracts 1 and 2). They are incomparable.

45. There was some delay to the investigation process as it had been decided to await the report from Dr Larkin (see above). Once the report had been considered, a decision was made that there should not be any more delay to the process.

46. RW wrote an investigation report dated 10 April 2019. There are a number of appendices to the report including documents and information that the claimant had provided for the investigation. This additional information included samples of text messaging between the claimant and Student X

47. The investigation report notes and concludes that the claimant accepted that the specific incidents occurred.

- (1) Clearly there is no doubt the letter was sent and the contents of the letter; (Allegation One)
- (2) there was an acceptance that there was physical contact between the claimant and Student X at Bills restaurant but which the claimant described as a hand squeeze in encouragement or reassurance rather than hand holding (Allegation 2);
- (3) that the claimant had accompanied the claimant to a medical appointment but had described himself as "a significant other" rather than "her significant other" (Allegation 3)
- (4) That the claimant had visited the students' house but denied anything unprofessional or otherwise inappropriate (allegation 5)

48. The investigation report also notes that the claimant "*displays signs of ASD*" and Dr Larkin's report was one of the appendices to the investigation report. RW recommended a disciplinary hearing to consider the facts and determine an appropriate outcome.

#### Anonymous Email

49. The claimant provided RW with an email dated 17 February 2018, received by him from an anonymous sender. In summary, the email tells the claimant that the sender is aware that he has been "*preying on*" girls in his class, using their vulnerabilities to his advantage and warning the claimant that if he does not "*cease and desist*" there will be adverse consequences for him. The claimant mentioned the in the disciplinary processes and also in the Tribunal hearing. We note here our finding that this email had no bearing on the decision to dismiss the claimant.

#### Disciplinary hearing

50. The respondent wrote to the claimant by letter dated 11 April 2019, inviting him to a disciplinary hearing on 23 April 2019. This letter listed the same 5 allegations as in the Suspension Letter. The claimant was provided with a copy of RW's investigation report and the appendices to this which include notes of interviews, additional documents and information provided by the claimant, Dr Larkin's reports, various correspondence and copies of the respondent's code of conduct and policy on consensual relations. The letter inviting the claimant also told him that RW would be present to present her report and that there would no witnesses in attendance to provide evidence.

51. The claimant responded to raise some concerns. The claimant wanted the panel to have copies of texts that showed emoji' and other images; wanted the panel to have an audio recording of the claimant reading the Letter out loud to Student X; wanted to note that an email (the "Anonymous email" - see above) had been included but not commented on; wanted to note that whilst no witnesses were to be called, he had provided a list of 16 witnesses and particularly wanted the respondent to contact a former student who had recently left the respondent university in order to study for a PhD at another University (Student Y).

52. The respondent (Mrs Stanton of the HR Department) replied in the following terms to the claimant's request for Student Y to attend:

*To confirm I have now spoken to Jane, who has considered your request for (Student Y) to attend as a witness at the hearing next week. I'm afraid your request is being turned down, as it is not believed she is able to comment specifically on your relationship with [Student X] and the complaints which have been raised by her. The panel will only consider the facts of the specific case and your relationships with other students do not form part of the allegations being considered next week. Additionally there is no need for character witnesses to be provided as part of this process.*

53. The disciplinary hearing was before a panel of 2, being Dr Jane Rand, Deputy Vice-Chancellor and Dr Richard Bourne, Head of the School of Humanities ("Disciplinary Panel"). The claimant was accompanied by Mr Avery of the UCU. The claimant was allowed to audio record the hearing. Notes of the hearing (including a number of corrections by the claimant) are at pages 362-407.

54. RW introduced the report. We note the following from RW's introduction:

- (1) That Student X came forward with concerns about her relationship with the claimant, having been taught by him on a number of modules and having had her dissertation supervised by him.
- (2) That RW was extremely concerned about a number of passages in the Letter, particularly having regard to the respondent's policy on consensual romantic or sexual relations between staff and students.
- (3) That RW was concerned about Student X feeling "groomed" by the large number of texts initiated by the claimant.
- (4) Her overall concern for the health and wellbeing of students

- (5) That she saw evidence that the claimant knew his relationship with Student X was not appropriate.
- (6) That the relationship with Student X and the sending of the Letter came at around the same time that she and the claimant had met to discuss concerns raised about his relationship with a different student – and had discussed the policy on consensual relations.
- (7) RW's extreme disappointment that the claimant had not disclosed the relationship with Student X at the same time as these discussions and that she had little confidence in the claimant's willingness to accept guidance from her.

55. At the meeting, RW explained that, having met with Student X and the other former student accompanying her, that she accepted Student X's version of events including her account of the relationship as unwanted. RW also noted a discussion that had taken place between herself and Mr Avery outside of the hearing, which appear to have focussed (for some part of it at least) on whether it was important to show that the relationship was unwanted on the part of student X. RW's view was that it was far more relevant to note the power imbalance in the relationship, which made it difficult for Student X to know how to get out of the relationship.

56. The claimant provided an opening statement which he was allowed to read through after RW had presented the report. In this statement he noted that:-

- (1) Many of the retrospective accusations and comments by Student X are untrue.
- (2) Whilst he accepts that some things he said and did may have been foolish, he believed there was nothing wrong in them.
- (3) That he knew Student X to be "asexual" because she had told him so. His relationship was not sexual or romantic.
- (4) His relationship with Student X was multi-faceted, it was professional, collegial, a friendship, appreciation and "*deep connection and love in its purest form.*"
- (5) That there is evidence that Student X welcomed her interaction with the claimant; that she had expressed that he was her "best friend" and that she loved him.
- (6) That at the first indication that there was something problematic with his friendship with Student X (16 September 2017) he ceased all interaction with her. He has not interacted with her since.
- (7) He does not accept the Letter is a love letter as RW has categorised it.
- (8) His personal feelings for Student X were kept out of the classroom to maintain a distinction between professional and friendship and the work of Student X that he graded was internally and externally moderated.

- (9) Since September 2017, he has stopped socialising with undergraduate students.
- (10) Whilst he recognises that he has done things that were not professional, he distinguishes being non-professional from being unprofessional.

57. The Disciplinary Panel members discussed with the claimant the content of the Letter. The claimant's stated position at the hearing was that his frequent reference to love in the letter did not indicate romantic feelings and that, when referring to love in this letter, it was the type of love parents have for their children.

58. The claimant was asked about his comment in the letter about societal expectations (see Extract Five) and that Student X was his student and he was her lecturer. The claimant responded that others are not able to be involved in different relationships concurrently and that social constraints assume that a relationship between a 50 year old man and a 20 year old woman is "*of an untoward nature*" and that it is societally problematic. (page 384)

59. The claimant was then asked, given these explanations, why he did not think it necessary to disclose the letter or the relationship he had with Student X when talking with RW in October 2016. The claimant's response was "*because it wasn't a sexual/romantic relationship. It's the only answer I can give.*" (page 385)

60. The claimant's representative stated that the claimant had 2 parallel relationships with Student X; one as her lecturer and one as her friend. But these 2 relationships were "*separate entities*" (385)

61. The claimant was asked how he navigated that distinction when carrying out marking of Student X's work and influencing her degree classification. The claimant's response was that, when doing his work he's doing his work and when he is being a friend, he is being a friend "*the 2 things don't impinge.*"

62. The attendees at the hearing spent some time discussing the claimant's recent diagnosis, particularly following observations and a recommendation by Mr Avery that the claimant obtain a diagnosis.

63. The claimant was asked what he understood by the term "unprofessional" in the context of his role. The claimant replied that it meant you could not be friends with students. You could be friendly but not friends. The claimant also asked that the policy on relationships be amended to refer to friendships and that he could not understand that you could have sex with a student but could not be friends with a student. (We note here that the position is not as the claimant described at all. The issue was that sexual/romantic relationships were discouraged for the reasons noted in the Policy but that any such consensual relationship should be declared and steps taken in relation to teaching arrangements).

64. The claimant explained that he became aware in September 2017 that something was wrong in his relationship with Student X and that he decided there was a "*dangerous state of affairs so I ceased all-I removed myself from opportunities to be in dangerous situations.*" The claimant explained that he stopped playing bridge with students and ceased friendships with students from that

point. The claimant was questioned on this point by the Disciplinary Panel towards the end of the meeting (page 400) and the claimant explained that he had gone to the house of Student X to return some items which belonged to Student X (books and lego) and was told by her house mate that he should never interact with her again. The claimant was asked why the result of that was to stop running Bridge classes (something he had done for years) and how the comments by the house mate of Student X, related to his decision to stop the Bridge classes. The claimant replied that he could not remember his logical thinking process but suspected that if a relationship that he thought had been so good turned out not to have been then he should not have friendship relationships with other students.

65. The claimant accepted that he did not inform RW of this (the “dangerous state of affairs” as the claimant described it and the cessation of his activities with students) in September 2017.

66. The claimant was asked why he considered it relevant that he was aware or believed that Student X was asexual (as he had referred to in his opening statement). the claimant responded by noting that student X identified herself as such and that if somebody is asexual then it is “*clearly impossible for there to be a sexual relationship with an asexual person.*” (395)

67. The claimant also noted that he found out about Student X being asexual when she became a second year work placement and, in the disciplinary hearing he reported as having stated to her “*Oh that clearly makes my having a close relationship with you so much safer*” referring to other students in the past who had been accused of not having proper relationships with him and, those suspected relationships leading to grade inflation.

68. The claimant was asked what support he felt he needed from the respondent university to help maintain boundaries. The claimant informed the Disciplinary Panel:-

- (1) Things that the respondent might consider to be problematical to be spelled out.
- (2) The policy document for example to “ditch the word sexual and romantic and just say ‘any type of friendship’” ( page 396).
- (3) That he did not need micromanaging moment by moment but that he does need to be told certain things.
- (4) That the respondent should not assume that the claimant would be able to work a particular issue out and that it wouldn’t be a problem; because the claimant does not see the world in the same way as others and so he might need to receive instruction about issues that might be obvious to others.
- (5) That he did not think he was the best person to answer that question. Someone like Dr Larkin should be asked. Further, as Dr Larkin was about to take up a post at the respondent university, she could be a useful mentor.



69. Mr Avery made closing comments on the claimant's behalf when he made the following points:-

- (1) The group of students including Student X attended RW's 50<sup>th</sup> birthday party.
- (2) No one had mentioned the Anonymous email and that the claimant found the term "grooming" to be difficult to hear.
- (3) That term was, according to the transcript of the interview with Student X, introduced by the interviewer and the term had not up to that stage been used by Student X.

70. Following the meeting, the claimant emailed the Disciplinary Panel to provide further evidence about his meeting with RW in October 2016 to discuss the accusation that he was engaged in a sexual relationship with another student (Student Y) and informed the Disciplinary Panel that he had told RW that he loved other students (including Student X) and that he loved (and still loves) many of his students.

71. The Disciplinary Panel sent the claimant's email to RW who replied in the following terms:-

*"Thank you for forwarding me this email. As I said at the hearing yesterday, the aim of my conversations with Andrew were to try and help him to understand the nature of professional boundaries, as generally understood in our academic community of students and teachers. In the conversations Andrew refers to, I accepted that he was not in a romantic relationship with [Student Y], as rumoured. But I stressed that, more broadly speaking, the intensity of the relationships Andrew regularly has with our students is not, more broadly speaking, considered appropriate or in the students' interests."*

#### Reasons for Dismissal

72. The Disciplinary Panel wrote to the claimant by letter dated 29 April 2019 ("Dismissal Letter") to inform him of their decision that he should be summarily dismissed from his employment with the respondent. They provided the following reasons:-

*After due consideration. the panel found that during the academic years 2015—2016 and 2016-2017 your conduct and behaviour towards a student, Student X (now Alumni), was inappropriate, unwanted, and breached professional boundaries. The panel concluded you had committed an act of gross misconduct.*

73. The Incidents are repeated in the Dismissal Letter. The Disciplinary Panel decided that there was inconclusive evidence in relation to the specific incidents referred to above as Incidents 2 and 3. The following was also noted in the Dismissal Letter:-

- (1) That the arguments made by the claimant in mitigation had been considered.
- (2) The report of Dr Larkin and that the claimant had shown a high number of symptoms of ASD.
- (3) That some time was spent considering whether a lesser sanction (a warning) could be imposed but that, in light of previous discussions in which RW had tried to help the claimant understand professional boundaries, that was not considered appropriate. The Disciplinary Panel decided that RW had made the claimant aware that the intensity of relationships the claimant had with some students was not appropriate or in the students' interests.
- (4) Due to the pattern of inappropriate behaviour over the years, the Disciplinary Panel decided there was a likelihood the claimant would breach professional boundaries again, without close supervision.
- (5) Whilst consideration was given to possible redeployment to a role where there would be no potential risk to students, no suitable roles could be identified.
- (6) That the mutual trust had irretrievably broken down.

74. We find that the reasons for dismissal were, as noted in the Dismissal Letter, that the Disciplinary Panel decided that the claimant's conduct towards Student X was inappropriate, unwanted and breached professional boundaries.

75. At the Tribunal hearing, Dr Bourne provided evidence about the Disciplinary Panel's decision to dismiss. We make the following findings:-

- (1) That the Disciplinary Panel accepted that Student X raised her concerns in her meeting with RW because they were genuine concerns. The Disciplinary Panel (like RW) accepted Student X's account including that she felt uncomfortable with physical contact with the claimant, that she felt unable to decline the claimant's offer to accompany her to a medical assessment; that she considered that the claimant's behaviour towards her was "calculated and coercive." (Student X's description – see page 96)
- (2) The Disciplinary Panel decided that the claimant did apply pressure to Student X to reply to the letter, noting text message exchanges between the claimant and Student X in December 2016 (314-5). We have reviewed these texts. Whilst some include suggestions by the claimant to Student X, not to continue to draft her response to the letter, they also continue the discussion about the letter and the claimant's feelings. The topic of the letter continues. The text exchange shows that Student X is struggling to decide how she should deal with the Letter and how she should reply to it. Dr Bourne noted the Disciplinary Panel found that there was evidence of pressure to reply, some months after the letter had been sent and that the claimant had provided Student X with an envelope and that he knew she was carrying drafts around with her.

- (3) The Disciplinary Panel considered the significant quantity of the text messages between the claimant and Student X some of which contained intimate content.
- (4) The Disciplinary Panel accepted the claimant's description of the relationship as not being romantic or sexual. They found that the relationship was one of significant intensity and feelings; that in many ways (from the claimant's perspective) it was even more intimate than a romantic or sexual relationship might be and that it was clearly appropriate to disclose it. The Disciplinary Panel noted particularly that the claimant's conversation with RW in October 2016 was just a short time after the claimant had written and sent the Letter.
- (5) The Disciplinary Panel concluded that the claimant was aware of the professional boundaries applicable to him and knowingly breached them.

### Appeal

76. The claimant wrote a letter dated 13 May 2019, to appeal the decision to dismiss him (415). The basis of the claimant's appeal was that not enough weight was given to Dr Larkin's report; that Dr Larkin considered that reasonable adjustments could be put in place to enable the claimant's academic employment to continue; that emphasis had been placed instead on the efforts of the claimant's line manager to enable him to understand professional boundaries but that these efforts had been made without knowing of (or taking in to account) the claimant's disability.

77. The appeal was heard by a panel of 3, chaired by the respondent's Vice-Chancellor, Professor Stanton on 29 May 2019 ("Appeal Panel"). The other 2 members of the Appeal Panel were Andrew Smith, Pro Vice-Chancellor and Steven Milner, one of the respondent's Governors. Jane Rand ("JR"), who chaired the disciplinary Panel attended the appeal hearing. The claimant was accompanied by Mr Avery. The claimant was allowed to audio record the hearing.

78. The claimant attended the appeal hearing with a pre-prepared opening statement (422) which he read out at the beginning of the hearing and which Mr Avery added to. In summary:-

- (1) The claimant accepted that his relationship with Student X was inappropriate but because of the claimant's neuro diversity (referring to his disability) that he did not see that the policy on sexual and romantic relationships would be relevant.
- (2) That his response to the signals from Student X were as expected on someone with the claimant's level of autism.
- (3) That he did not sexually harass Student X but that his neuro diversity meant that he did not know that he should not write to students about loving them as a friend as a "*neurotypical university lecturer would know.*"
- (4) That Dr Larkin had noted that he had shown a willingness to learn and that with support, the claimant would understand boundaries. The claimant referred to this as a reasonable adjustment under the EqA.

(5) That the respondent should reconsider the decision to dismiss and consider a period of leave for the claimant during which specialised training can be put in place.

(6) That Dr Larkin's report and proposals were not sufficiently considered.

79. JR was asked to respond and explained how the panel reached the decision to dismiss by providing the following detail:-

*We gave serious consideration to the report and what pro—active support measures, monitoring and supervision could be put in place. However, our primary consideration was the welfare of our students. This was a pattern of behaviour, concerns over professional boundaries with students had been discussed before, with the support offered by the Head of School. We asked AM what support measures he felt he needed to manage these boundaries. He says he needs things very clearly spelled out; the panel also considered Dr Larkin's comments about Facebook and the need for prescriptive boundaries with things set out in "black and white". It was suggested Dr Larkin assume the role of mentor. We considered this option but also the potential conflict of interest as she is now an employee.*

*In reaching our decision, we genuinely considered confidentiality, potential mentoring and adjustments to the role but also considered student safety and security. We considered alternative employment options and did not think we could take the sufficient measures required; there were no alternative, suitable roles available at the time that did not have student facing aspects.*

80. The Appeal Panel asked what information Dr Larkin had when making recommendations; specifically, whether she was aware of the details of the behaviours giving cause for concern and whether she was aware of the relevant role description. The Appeal Panel was later told that the full details of the disciplinary allegations had not been provided to Dr Larkin (see below).

81. The Appeal Panel asked about the Disciplinary Panel's consideration of required support. JR's response was that they decided that there would be a need for close supervision and that they did not consider it viable.

82. The Appeal Panel also asked about comments in Dr Larkin's report indicating that the claimant had been disciplined for making inappropriate comments on Facebook. JR noted that this disciplinary action was in 2009 and that the disciplinary panel considered the discussions that the claimant had with the head of School (RW) in 2016 around boundaries and the intensity of relations with students.

83. The Appeal Panel asked JR about what risk the claimant posed. JR replied that professional boundaries had been breached, that it was not for the first time that the claimant's behaviour had been inappropriate and that there was a concern that it could occur again.

84. The claimant responded to this with an analogy of a person advised that they might have diabetes. *“but until they have a firm diagnosis in response to clear medical advice, may not act on it.”*

85. JR also noted that the Disciplinary Panel decided there was a pattern of behaviour about the claimant’s involvement in intense relationships and there had been discussions about this and suitable boundaries. The claimant denied that there had been several intense relationships, noting that there were other close friendships but none like Student X. In closing, the claimant reiterated his willingness to change.

### Appeal outcome

86. The Appeal Panel decided not to overturn the decision to dismiss. The outcome letter is dated 3 June 2019 (pages 430-1). In their outcome letter, the panel noted their decision that the dismissal was fair and reasonable and that the disciplinary panel had given suitable consideration to all relevant matters prior to reaching its decision.

87. At the Tribunal hearing, Professor Stanton provided some more detail about the Appeal Panel’s decision not to uphold the claimant’s appeal, in her witness statement and in responses to questions put by the claimant. We make the following findings:-

- (1) That, the Appeal Panel considered for itself whether the relationship was unprofessional. In doing so, they had copies of many 100s of text messages and the appeal panel took in to account a number of comments within these. Professor Stanton’s evidence was that they included questions about the claimant’s sex life and the disclosure of grades before they were released. We have also had sight of text messages between the claimant and Student X where grades and the release of grades have discussed. The following extract (page 841) is an example:-

**Andrew John Merrison:**

$(75+90/2) = 82.5 = 83\%$

**Student X:**

*Whoo!*

**Andrew John Merrison:**

*what you won’t know ... and what you mustn’t probably let be known that you know is that there were only 2 first class essay grades and the other one was only 80 so you are WAY OUT ON TOP!*

We have also seen texts from the claimant to Student X about the issue of asexuality.

- (2) That the Appeal Panel found that there was an imbalance in the relationship, that the boundaries were not clear and that it was hard for Student X to understand what was and was not appropriate behaviour during the course of the relationship. The Appeal Panel was concerned that, following the end

of the relationship, Student X said that she felt the claimant's behaviour in the relationship had been calculated and coercive.

- (3) That, whilst Professor Stanton had referred to the claimant having been told on "*a number of occasions and over a number of years*" about his behaviour, the particular examples provided were the discussion in October 2016 about Student Y and a conversation that RW referred to as taking place in February 2017 about "*new disciples forming.*" These are the occasions relevant to the findings of the Appeal Panel.
- (4) That the Appeal Panel took into account that Student X had reported concerns about the relationship and what those concerns were.
- (5) That the Appeal Panel was concerned to read of an incident when it appeared that the claimant had entered a student house, uninvited.
- (6) That the Appeal Panel had considered the feasibility of reasonable adjustments and, as part of their considerations, were informed that Dr Larkin had not had the full details of the disciplinary case. The Appeal Panel concluded that the suggested adjustments (ongoing monitoring of the claimant) could not be reasonably implemented.
- (7) That the Appeal Panel decided that the trust between the claimant and respondent had irretrievably broken down and therefore that dismissal was the appropriate sanction.

Did the Claimant know that his relationship with Student X was inappropriate?

88. The claimant distinguishes his relationship with Student X from one which should be disclosed under the terms of the Policy. Dr Bourne accepted that the policy did not refer to every possible type of relationship and that the Disciplinary Panel had considered the inappropriateness of the relationship more widely.

89. Having heard and read the evidence about the relationship between Student X and the claimant, we find that the claimant knew that the relationship impacted considerably on the way that he behaved towards Student X in his capacity as a lecturer and, further, that the claimant was well aware of this at the time that the relationship was ongoing. This finding is supported by the following:

- (1) The quotes in the Letter and in text messages (see above).
- (2) The claimant's own evidence at the tribunal.

90. The claimant gave evidence, when being cross examined by Ms Tharoo, he was aware at the time of sending the Letter, that his relationship with Student X was one that he needed to inform his manager (RW) about but that he had not done so as he was not teaching Student X at the time that he sent the letter (it being the start of the respondent's academic year and classes having not then begun).

91. The claimant explained that classes were going to begin some 2 weeks' later and that he worked on changing his feelings in that 2 week period so that, by the time classes began, he had successfully reduced the intensity of the relationship so

that he did not have to disclose the relationship to RW and could continue teaching Student X.

92. We do not accept that the intensity of the claimant's feelings had diminished to that extent. He knew that his feelings for Student X breached professional boundaries, that it was inappropriate for him to be Student X's tutor in September 2016 (when the letter was sent) and in the academic year that followed. Significantly he knew that he was engaged in this relationship in October 2016 when he met with RW and he chose not to disclose to her the relationship that he had for Student X. He knew that such an undisclosed relationship between him and a Student that he was teaching and whose work he was marking, was inappropriate.

Was there a different role available for the claimant as an potential alternative to dismissal?

93. We heard evidence about whether there was a different and non-student facing role for the respondent to move the claimant in to.

94. Our finding is that, whilst consideration was given to the possibility of alternative roles at both the Disciplinary Panel and the Appeal Panel stage, there was considerable reluctance on the members of the panel to continue the claimant's employment. The issue of alternative employment was being considered at the same time that the respondent had decided that there had been an irretrievable breakdown in trust between the claimant and respondent caused by the claimant's gross misconduct.

95. At the tribunal hearing, the claimant accepted that there were no suitable non teaching academic roles available at this particular university (there were no research only roles). Dr Bourne's evidence (which we accept) was that the claimant has a skillset as an academic and deployment in to a non academic role (such as within the administration departments of the University) would not have been appropriate. We also note that the claimant did not claim that there were roles available. Rather, the claimant's position was that he should have been allowed to continue in his academic lecturer post, but with increased supervision/mentoring.

Was mentoring a potential alternative to dismissal?

96. The possibility of introducing mentoring for the claimant was considered by the Disciplinary Panel. We note here too, that the respondent considered this alternative to dismissal having decided that the claimant had committed gross misconduct and particularly, in doing so, had knowingly breached professional boundaries. Whilst consideration was given to this option, we find that the respondent was reluctant to engage in the option given its conclusions about the claimant's conduct and duty of care to its students. The respondent decided that it was not a viable option. The respondent was not prepared to allow the claimant to engage with students without constant supervision. A mentor would not attend the claimant's lectures and tutorials (shadowing the claimant through his working day) and the respondent would still have to rely on students reporting any concerns about the claimant's behaviour.

97. Neither Panel accepted Dr Larkin's views that the mentoring would not be onerous, noting that Dr Larkin had not been provided with details of the claimant's behaviour towards student X.

### Submissions

98. Both the claimant and Ms Tharoo provided us with written submissions. They also made oral submissions when we continued the hearing on 15 December 2020. We read the documents provided and listened to the oral submissions. WE make reference to certain of these in the section headed "Analysis and Conclusions" below.

### The Law

#### Unfair dismissal, misconduct.

99. The respondent bears the burden of proving, on the balance of probabilities, the reason why it dismissed the claimant and that the reason for dismissal was one of the potentially fair reasons stated in s98(1) and (2) ERA. If the respondent fails to persuade the Tribunal that it had a genuine belief in the reason and that it dismissed the claimant for that reason, the dismissal will be unfair.

100. The reason for dismissal is a set of facts known to the respondent or a set of beliefs held by it, which caused it to dismiss the claimant.

101. If the respondent does persuade the Tribunal that it held that genuine belief and that it did dismiss the claimant for one of the potentially fair reasons, the dismissal is only potentially fair. Consideration must then be given to the general reasonableness of that dismissal, applying section 98 (4) ERA.

102. Section 98 (4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing him. This should be determined in accordance with equity and the substantial merits of the case.

103. In considering the question of reasonableness of a dismissal, an Employment Tribunal should have regard to the decisions in **British Home Stores v. Burchell [1980] ICR 303 EAT**; **Iceland Frozen Foods Limited v. Jones [1993] ICR 17 EAT**; **Foley v. Post Office, Midland Bank plc v. Madden [2000] IRLR 827 CA** and **Sainsbury's Supermarkets v. Hitt [2003] IRLR 23** ("Sainsbury")

104. In summary, these decisions require that an Employment Tribunal focuses on whether the respondent held an honest belief that the claimant had carried out the acts of misconduct alleged and whether it had a reasonable basis for that belief, having carried out as much investigation in to the matter as was reasonable. A Tribunal should not however put itself in the position of the respondent and decide the fairness of the dismissal on what the Tribunal itself would have done. It is not for the Tribunal hearing and deciding on the case, to weigh up the evidence and



substitute its own conclusion as if the Tribunal was conducting the process afresh. Instead, it is required to take a view of the matter from the standpoint of the reasonable employer.

105. The function of the Tribunal is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses. This band applies not only to the decision to dismiss but also to the procedure (including the investigation) by which that decision was reached.

106. When determining compensation for an unfair dismissal, employment tribunals must apply s123 ERA

*“s123(1) ....the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

....

*S123(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”*

107. Compensation is reduced on just and equitable principles under s123(1) in 2 broad categories of cases:-

- (1) Where the employer can show that the employee was guilty of misconduct which would have justified dismissal, even if the employer was not aware of this at the time of the dismissal.
- (2) Where it is just and equitable to apply a “Polkey” reduction (applying the case of **Polkey v. AE Dayton Services Limited 1988 AC 344**).

The second category potentially applies here.

108. Provisions for an adjustment to the basic award are at section 122(2) ERA which requires a tribunal to reduce the amount of a basic award where it is just and equitable to do so, having regard to the claimant's conduct before the dismissal.

### Disability Discrimination

#### **s.15 EqA Discrimination arising from disability**

- (1) 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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

109. Subsection 2 above does not apply to this case. The respondent accepts it knew that the claimant had the disability.

110. In Secretary of State for Justice and anor v Dunn EAT 0234/16 the Employment Appeal Tribunal (“EAT”) noted 4 findings to be made, for the claimant to succeed in a section 15 claim:-

- (1) there must be *unfavourable treatment*
- (2) there must be *something* that arises in consequence of the claimant’s disability
- (3) the unfavourable treatment must be *because of* (i.e. caused by) the something that arises in consequence of the disability, and
- (4) the alleged discriminator cannot show that the unfavourable treatment is *a proportionate means of achieving a legitimate aim*.

111. In Paisner v.NHS England (UKEAT/0137/15/LA) the EAT provided guidance to Employment Tribunals when considering these claims which we summarise below.

- (1) The tribunal should decide what caused the treatment complained of – or what the reason for that treatment was.
- (2) There may be more than one cause. The “something” might not be the sole or main cause but it must have a significant impact.
- (3) Motives are irrelevant.
- (4) The tribunal should decide whether the/a cause is “something arising in consequence of” the claimants disability. There could be a range of causal links under the expression “*something arising in consequence of...*”

112. When deciding whether a measure is proportionate in the context of the legitimate aim being pursued (s15(1)(b) EqA above) a tribunal must weigh the real needs of the employer against the discriminatory effect of the proposal. (see most recently, DWP v. Boyers UKEAT/0282/19).

### **Reasonable adjustments.**

113. The claimant raises claims under s20(3) EqA. This imposes a duty on an employer “*where a provision criterion or practice of [the employer] 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.*”

114. We note that, in order for the duty to make reasonable adjustments to apply, a claimant needs to show that s/he has been put to a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled.

### **Discussion and Conclusions**

The Unfair Dismissal claim.

115. In this final section, we discuss the various issues from the agreed List of Issues in so far as they remain relevant and we note our conclusions:-

*Was the reason for dismissal the conduct of the claimant?*

116. The Disciplinary Panel concluded that the claimant had committed gross misconduct in that the claimant's conduct and behaviour towards Student X were inappropriate, unwanted and breached professional boundaries. We find that this was the reason why the Disciplinary Panel dismissed the claimant.

*Has the respondent followed all required procedures?*

117. In his submissions the claimant raises concerns about not being told, in advance of the suspension meeting, what the meeting was about. The claimant also notes instances where invitations and information were sent late. Importantly, the claimant knew what was alleged in advance of the disciplinary hearing and had been provided with all relevant information sufficiently in advance of the disciplinary hearing in order for the claimant to consider the information and take advice.

118. We find that the terms of the respondent's Disciplinary Procedure were followed. The claimant was suspended in accordance with the procedures, the appropriate people were appointed to investigate the concerns, to sit on the Disciplinary Panel and the Appeal Panel. There was some delay in the process but this was due to the respondent agreeing to and supporting an appointment with Dr Larkin as noted above.

119. In his submissions, the claimant is critical of the note taking at the hearings. We note that the claimant was permitted to audio record the hearings and that, when correcting the notes, he had the benefit of that recording. The notes, with corrections, became more of a transcript of the hearing. The respondent was willing to accept the claimant's corrected versions as the notes of those hearings. The corrected versions were provided to the Tribunal. This had no impact on the fairness of the claimant's dismissal.

*2. Did the Respondent conduct a reasonable investigation?*

120. In his submissions the claimant raises concerns of bias, particularly by RW, the investigating manager.

121. We do not agree that there was bias. Prior to these allegations, there is no indication that the respondent (RW in particular) wanted the claimant to leave the University or be dismissed. We note the claimant's long service, no evidence of dissatisfaction in the claimant's performance (other than the issues raised with him about interactions with students) and, in relation to information previously received about the claimant's relationship with students, a willingness to believe the claimant.

122. The claimant also raises the respondent's use of certain terms. One of these is the term "grooming." We note that this term was not initially used by Student X to describe the claimant's behaviour. However, it was not initially used by one of the

respondent's employees either. The term was used in the meeting with Student X on 9 January 2019 by the former student who accompanied Student X. When the term had been used, it was the respondent's HR manager who checked with Student X whether that was the right term to use, rather than assuming that it was. Student X confirmed that it was.

123. The claimant also notes that the respondent was willing to accept the report from Student X as true in that documents such as the witness statements and the dismissal letter include wording used by Student X. As noted above, the respondent did conclude that the information provided by Student X was true. Not only did the respondent find that the claimant breached professional boundaries in his relationship with Student X, but that the relationship was unwanted and in reaching this finding, it accepted the account of Student X.

124. We accept that some of the documents will have made uncomfortable reading for the claimant. The respondent was provided with an unsolicited account of a relationship between the claimant and an undergraduate student (Student X). That account made a number of serious allegations against the claimant and was extremely critical of the way that the claimant conducted himself with Student X. Aspects of the account were repeated including in witness statements. The claimant was asked questions relevant to the account.

125. In his submissions the claimant indicates that a large document into which text messages between him and Student X had been copied (Appendix K to the Investigation report) was not initially contained in the report. However, as we note in our findings of fact, the Disciplinary Panel and Appeal Panel had been provided with these text messages in advance of the hearing and they were reviewed by those panels. The claimant states in his submissions that his analysis provided examples of the relationship not being inappropriate or unwanted.

126. In his submissions, the claimant notes that RW had been provided with an audio recording of him reading the Letter aloud to Student X. Neither Panel listened to the recording. However, both Panels had the Letter itself and were able to read it in full. This does not make the investigation unreasonable or otherwise impact on the fairness of the dismissal.

127. The claimant also refers to inaccuracies in words and phrases used by the respondent. We have considered the claimant's submissions on inaccuracies but do not agree them. We note here:-

- (1) That claimant is critical that the dismissal letter made reference to the claimant "bombarding" Student X with compliments, noting how few compliments actually appear in the 1400 or so pages of text messages. We note that this description was included in the allegations first seen in the Suspension Letter and considered by the Disciplinary Panel. The term was used following the meeting with Student X who gave an account of the claimant "talent spotting" her in their first meeting. We have seen for ourselves the compliments the claimant paid to Student X in the Letter (see particularly extract 4) and the compliments/pressure from the claimant to Student X around expected results for her academic work. We do not find

that was unfair to use the word. The use of the word reflected Student X's account to RW on 9 January 2019.

- (2) That the claimant's the term "Merrisonian attention" in the Letter was inaccurately reported by RW as "Merrisonian Treatment" (comparing the wording of Extract 4 with the wording of incident One). We do not consider that this inaccurate wording had any bearing on the decision made by either Panel and has no bearing on the fairness of the dismissal.

128. We have considered whether the respondent should have taken additional steps to question or test the account provided by Student X and whether, in not doing so, the investigation was not sufficient. We note that the respondent saw Student X on 2 occasions. Neither Panel met with Student X. They did have a full note of the meeting between Student X and RW at which an HR adviser was also present. RW provided her account in the investigatory report and at the Disciplinary Hearing. There was corroboration of Student X's account (1) from the other former student accompanying her, (2) from the Letter, (3) from the Texts as well as (4) some evidence from the claimant himself. We find that the investigation in to Student X's account was sufficient.

129. We have also considered whether the respondent should have interviewed additional witnesses. The claimant suggested other members of staff. The respondent did interview one (former) member of staff as he was the only witness amongst those suggested by the claimant who could provide evidence that he had seen the claimant and Student X together. The respondent did not interview any of the former students suggested by the claimant as there was no indication they could provide evidence about the claimant's relationship with Student X. The decision not to conduct these further interviews fell within the range of reasonable responses (applying Sainsbury).

*Did the Respondent have reasonable grounds to believe that the Claimant was guilty of the misconduct?*

130. In her submissions, Ms Tharoo noted that what was key to the dismissal was that the rules and boundaries applicable to the claimant were clear to the claimant at the time, that he accepted that he knew what the boundaries were and what they meant:

- (1) That he knew there was a power imbalance in the relationship between student and lecturer (we note Extract 4 from the Letter)
- (2) That he knew that certain relationships, whilst not sexual or romantic, would need to be disclosed (we note the claimant accepted this in cross examination)
- (3) That the relationship with Student X had, from the claimant's perspective, crossed that point and needed to be disclosed (we note the claimant also accepted this in cross examination)
- (4) That he had then either kept it a secret, knowing that it should have been disclosed or not told the respondent that the relationship had been one that needed disclosing even though it had subsided (we note the claimant

accepted in cross examination that he knew that he should be disclosing the relationship if the intensity of his feelings did not reduce in the few weeks after sending the Letter).

131. Dr Bourne's evidence was that the Panel concluded that the claimant was aware of the professional boundaries and that he knowingly breached them. There were reasonable grounds for this conclusion, in the content of the Letter and texts and having regard to the discussions that had taken place between RW and the claimant in 2016 and 2017.

132. The claimant has claimed that his autism makes it more difficult for him to recognise rules and boundaries. As far as the relationship with Student X was concerned however he was aware, during that relationship, that professional boundaries were breached.

133. The Panel also made a finding that the claimant's behaviour was unwanted by Student X. There was clearly a period of time when the claimant and Student X appeared to have a close relationship but there was a power imbalance in that relationship. In his evidence (which we accept-see findings of fact above) Dr Bourne noted the pressure placed on Student X to respond to the letter, her feeling unable to say no to the claimant when he said he would accompany her to her medical assessment and her comments that the relationship was calculated and coercive. There was sufficient evidence available to the Disciplinary Panel to support the finding.

*Did the Respondent believe that he was guilty?*

134. We find that the respondent did believe that the claimant's conduct and behaviour towards Student X was inappropriate, unwanted and breached professional boundaries.

*Was dismissal within the range of reasonable responses open to the Respondent?*

135. We find that it was. The respondent did consider sanctions short of dismissal but this was against a background of the findings of gross misconduct that they had made. It is clear that the respondent was not prepared to allow the claimant to return to his academic teaching role, even with a mentor in place to help to guide the claimant. This does not take the decision to dismiss outside of the range of reasonable responses in this case.

*7. Did the Respondent and the Claimant comply with the ACAS Code of Practice?*

136. Neither party has argued that the other has not complied. There was a disciplinary and appeal process and the claimant participated fully in this.

**Contributory Conduct**

137. As we have made a finding that the dismissal was fair, we do not need to consider issues relevant to remedy for unfair dismissal. However, having heard the evidence we note the following findings in relation to the claimant's conduct:-

- (1) The claimant knew that his relationship with Student X should have been disclosed and he chose not to do so. He knew that his conduct and behaviour towards Student X was unprofessional and inappropriate. He knew that he should not have taught Student X, whilst engaged in such an intense relationship with her.
- (2) The claimant hid the true nature of the relationship from his colleagues. He did this on purpose so that he may continue teaching Student X whilst continuing the relationship
- (3) The relationship was unwanted by Student X. Whilst the claimant did not know that the relationship was unwanted, his decision not to disclose it and the power imbalance of the relationship (which the claimant recognised) meant that the relationship did continue even though Student X did not want it to; for example, Student X did not want the claimant to attend her medical appointment but felt unable to say no to him.
- (4) The claimant's misconduct was very serious. It had a profound adverse impact on Student X, possibly on other students in the same class/tutor group (possibly through favouritism and/or perceived favouritism and/or being the subject matter of inappropriate comments from the claimant) and on the reputation of the respondent as a University.
- (5) Had we made a finding that the dismissal was unfair, it would have been just and equitable to have reduced the basic and compensatory award by 100% (applying sections 122 and 123 ERA).

## ***DISCRIMINATION - DISABILITY***

### ***Discrimination arising from disability***

*Did the Respondent know/could the Respondent reasonably have been expected to know that the Claimant had a disability? If not, when ought the Respondent to have been aware of the Claimant's disability?*

138. Yes. An initial assessment had been carried out by Dr Larkin and the respondent had been informed of this. The respondent was aware of the claimant's disability when the decision was made to dismiss the claimant.

*What is the "something arising" as a consequence of the Claimant's alleged disability upon which he relies?*

*The something arising is alleged to be the claimant's difficulty in understanding and interpreting rules and boundaries in the same way as*

others who do not have the condition. In particular, the respondent's policy on relationships/boundaries between staff and students.

139. Yes. Here we note Dr Larkin's comments that it is typical for a person with an ASD to have a lack of awareness of boundaries (see 41(1) above).

Was the Claimant treated unfavourably because of the "something arising" as a consequence of their alleged disability?

The unfavourable treatment alleged is the dismissal.

140. No. The claimant was not treated unfavourably because of his difficulties in understanding rules and boundaries. The claimant was dismissed for the reasons stated. The claimant was aware that he had breached professional boundaries in conducting his relationship with Student X.

141. The claimant was not dismissed because he unwittingly breached rules and boundaries having not understood them. He was aware of the professional boundaries applicable to him and he chose to disregard them. He chose to hide the relationship from colleagues. His comments to RW that he "loved" a number of his students including Student X, camouflaged his strong, intimate feelings for Student X. In making such a comment he intentionally gave the impression that he was a theatrical person, a "lovey" as GT, his longstanding friend and colleague had described him (see 42 and 43 above).

### **Reasonable Adjustments**

*31. What was the provision criterion or practice which put the claimant at a substantial disadvantage – the claimant's case is that the provision, criterion or practice was the application of respondent's policy on staff and student relationships and the decision to dismiss the claimant?*

142. The Policy did not put the claimant at a substantial disadvantage. The claimant knew that his behaviour towards Student X was unprofessional; he knew that the intense feelings he had in his relationship with Student X should have been disclosed to RW in September 2016. He chose not to do this.

*32. Did the respondent fail to take such steps as it would have been reasonable to avoid the substantial disadvantage of dismissal?*

*33. The claimant says that the respondent should have taken into account the report and recommendations from Dr Larkin and not dismissed the claimant.*

143. It is not necessary for us to reach conclusions on these 2 issues.

### **Wrongful Dismissal**



34. Was the claimant guilty of gross misconduct that was a repudiatory breach of contract entitling the respondent to dismiss the claimant without notice?

144. We find that the claimant was guilty of gross misconduct, that was a repudiatory breach of contract entitling the respondent to summarily dismiss him.

Employment Judge Leach

Date 2 March 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

3 March 2021

FOR THE TRIBUNAL OFFICE

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