EMPLOYMENT TRIBUNALS

Claimant: **Ms C Dozzell**

Respondent: **TCHC Group Limited**

Heard at: **East London Hearing Centre (Via Cloud Video Platform)**

On: **17 June and 3 September 2021**

Before: **Employment Judge John Crosfill**

Representation
Claimant: **Mr John a representative from the CAB**
Respondent: **Mr Hine a Solicitor from Peninsular Business Services Limited**

JUDGMENT having been sent to the parties on 6 September 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. Following a hearing on 3 September 2021 when I gave oral reasons for my decisions set out in the judgment dated 3 September 2021 and sent to the parties on 6 September 2021 upholding the Claimant's claim for unfair dismissal I received a request from the Claimant sent by e-mail on 20 September 2021 for full written reasons. On 24 September 2021 I received a request from the Respondent for full written reasons and an application for an extension of time for that request. As the Claimant's request was made in time I need not deal with that application.

Background

2. The Claimant was employed by the Respondent from 26 January 2015 until her summary dismissal which took effect on 18 September 2020. The Respondent company runs a number of educational centres where it offers courses to young people aged between 16 and 19. The students have been described as hard to reach students and the courses offered were principally vocational together with courses in English and mathematics.

3. This case has as its background the onset of the Covid Pandemic and the decision taken by central government that educational establishments would move from assessed examinations to Centre assessed grades whereby the educational provider would make an assessment of what grade a student would have achieved had a certain examination based on their past performance.

4. On 22 July 2020, at the request of a student who was applying for a Dental Nursing Apprenticeship, the Claimant sent an email to the Business Development Apprenticeship Admissions department of the Colchester Institute. That email was also copied to the student herself. The email refers to the predicted grades for the student but also refers to the fact that the Writing element of the city and Guilds functional skills in English was a Centre Assessment Grade ('CAG') and referred to a Pass.

5. When that email came to the attention of the Respondent a disciplinary investigation was conducted. In the course of the investigation a further allegation was made against the Claimant that she had told a parent of a student that her daughter had passed an examination. A disciplinary hearing was held on 10 September 2020 following which the Claimant was summarily dismissed. The Claimant appealed her dismissal but was unsuccessful.

6. The Claimant contacted ACAS for the purposes of Early Conciliation on 8 and 22 September 2020 and obtained Early Conciliation Certificates on 30 September and 1 October 2020. She presented her claim to the Employment Tribunal on 16 December 2020. The Claimant brings a claim of unfair dismissal.

The hearing

7. The hearing of this matter was conducted using the cloud-based video platform (CVP). Standard directions had been sent to the parties and the parties had agreed a bundle of documents running to 406 pages and had exchanged witness statements. At the outset of the hearing I indicated that I would read the witness statements and the documents referred to before hearing any evidence. Because I had the opportunity to do some reading before the hearing commenced I was able to complete my reading by 11am.

8. I heard from the following witnesses:

    8.1. Claire Jeens who is the Quality Director of the Respondent whose responsibilities include dealing with the examination bodies who set the exams for the students of the Respondent and the person who investigated the allegations of misconduct made against the Claimant;

    8.2. Amanda Collings who was formerly the Head of Apprenticeships and the person who chaired the disciplinary meeting on 10 September 2020 following which the Claimant was dismissed

    8.3. Dale Morgan the director and principal shareholder of the Respondent and the person who heard the Claimant's appeal against her dismissal.

    8.4. I heard from the Claimant herself

8.5. Finally I heard from Daniel Bell formerly a tutor in Customer Service who was directly managed by the Claimant and who commented on the circumstances prevailing in the assessment centre at the time of the alleged misconduct by the Claimant.

The issues

9. It was common ground between the parties that the issues that needed to be considered by the tribunal were as follows:

9.1. it was not disputed that the Claimant had sufficient continuity of service to entitle her under section 108 of the Employment Rights Act 1996 to present a claim of unfair dismissal; and

9.2. it was not disputed that the Claimant had presented her claim within the statutory time limit imposed by section 111 of the Employment Rights Act 1996

9.3. the first issue for the tribunal was whether the Respondent could establish that the reason, or if more than one, the principal reason for the dismissal was potentially fair. The Respondent says that the reason for the dismissal was conduct

9.4. if the Respondent establishes a potentially fair reason then the Tribunal need to consider whether the dismissal was fair or unfair applying the test in section 98(4) of the Employment Rights Act 1996

9.5. if the dismissal is found to be unfair the Tribunal needed to consider two issues in respect of remedy. Firstly whether or not the Respondent can establish that any compensation should be reduced on the basis that there would or might have been a fair dismissal in any event. Secondly whether the basic or compensatory award should be reduced to reflect any contributory fault by the Claimant.

Findings of Fact

10. Under this heading I set out my findings of fact. I shall not set out the entirety of the evidence that I heard but shall highlight the parts of the evidence necessary for me to make a decision and which seemed to me the most important. Just because I do not mention some piece of evidence it should not be assumed that I did not take it into account.

11. The Respondent is a company which provides education to what Dale Morgan referred to as *'the young people that nobody else would want to teach'*. It provides vocational courses to allow young people to enter the workplace. Examples of these included a course in customer service. It also provides courses in English and mathematics. The Respondent is subject to supervision by OFSTED and is working towards achieving an OFSTED rating of outstanding, at least in the Clacton centre where the Claimant worked.

12. The Claimant is a qualified teacher with over 20 years of experience of teaching young people. She joined the Respondent's business in September 2014 initially as an associate tutor but was given a permanent position as a GAPs Program Manager for the 16 to 19-year-old study program in January 2015. Until the incidents that led to this claim the Claimant was well thought of by her managers and colleagues. On 21 June 2020 Dale Morgan posted on the Claimant's LinkedIn profile a comment which said *'the pride you take in your work is truly inspiring'*.

13. At the material time the Claimant was the most senior employee at the Respondent's educational centre in Clacton. Prior to 2020, assessment of students would generally take place by way of conventional examinations. That was not true of all courses as a some were based on an assessed portfolio. Whilst ultimately the portfolio would be assessed, and that assessment moderated by the examination board, students' portfolios were not submitted unless their tutors were confident that they would pass the assessment.

14. In common with many other educational settings where students would move on to do further courses, prior to 2020 it was not uncommon for students to apply for a further course before knowing the results of any examinations. In those circumstances it was not unusual for requests to be made either by the student, or the proposed educational provider for a predicted grade. It was entirely usual to provide predicted grades in those circumstances.

15. In May 2020 the City and Guilds examination board sent an email to the Respondent attaching a draft letter to be sent to the students under a heading *'how will your grade be calculated?'* were the following passages.

    'For each of the different elements of your Functional Skills assessment, e.g. reading, writing, speaking, listening and communications or mathematics, your learning provider will be required to submit to City and Guilds the grade that they believe you would have been most likely to achieve if teaching, learning and assessment had continued under normal circumstances. This will be based upon what they know about you, along with your work and achievements on your course so far.

    In order to determine your grade teachers/tutors and assessors have been asked to take into consideration a range of activities such as practice or mock exams, partially or fully completed assignments, your performance in homework or other set work and tasks as well as general progress on your course. Your grade will be approved by the Head of Centre or Principle of your school or college before it is submitted to City and Guilds.'

16. Under further heading 'can I see the grades my school or college submits for me?' Is the following passage

    'Please don't ask your teacher/tutors, assessors or anyone else at your school or college to tell you the grades they will be submitting to City and Guilds. We have asked your learning provider to keep this information confidential until City and Guilds has completed its quality assurance checks and is able to confirm and release final results to your learning provider.'

17. On 27 May 2020 a copy of that letter was circulated by Claire Jeens by email to a number of individuals including the Claimant. An instruction is given not to send a letter out to anyone who the recipient did not think would pass their examinations. The email concludes with the following sentence *'Please note that CAG themselves are Not permitted to be shared with learners, including the results you may issue as this is against Awarding Body regulations'*.

18. On 29 May 2020 the Northern Council for Further Education published similar guidance which included an exhortation that the CAG grade should not be shared with learners or their family.

19. On 1 June 2020 the Claimant attended a meeting chaired by Claire Genes. The purpose of that meeting was to explain the CAG assessment process. Amongst the matters included within the presentation were two reminders that the CAG grade should not be shared. The minutes of the meeting were later circulated.

20. On 4 June 2020 the Claimant was offered a promotion to the position of 'GAPS Manager'. On 9 June 2020 the entire team at Clacton were placed on furlough. This came as a surprise to the Claimant and her colleague Danielle Bell because there was a great deal of work that had arisen as a consequence of the decision to move to CAG assessment. The Claimant was asked to return to work on 6 July 2020 however she was the only employee at Clacton who had been brought back from a furlough. On her return the Claimant was faced with a great deal of work. The ceiling of the Clacton centre had collapsed and the Claimant was solely responsible for what are described as 'progressions and destinations' which essentially means assisting learners into further education or apprenticeships. The Claimant was having to deal with Covid 19 guidelines all by herself. She was also dealing with recruiting and enrolling new learners. On a more personal level at the Claimant was distressed by the fact that a young learner had died in a motorcycle accident which caused her some personal distress. The Respondents witnesses who gave evidence did not dispute that the Claimant was under a great deal of pressure. However when asked about this their response was that everybody else was under similar pressures due to the Covid pandemic.

21. One of the students at the Clacton centre who I shall call 'B' had made an application to undertake a Dental Nursing Apprenticeship at the Colchester Institute. She informed the Claimant by a text message that the Colchester Institute needed to know her predicted grades indicating that if they were not received within five days they would withdraw her application. The Claimant prepared an email and sent it to the Colchester Institute and copied it into B That email read as follows:

    "Application for Dental Nursing Apprenticeships

    Billy has asked me to confirm her predicted grade yourselves, in order to support her Apprenticeship application.

    I can confirm that Billy studied with TC HC during the academic year 2019 to 2020

CNG functional skills English L2: Reading Pass

Sl&C Pass

Writing (CAG) Centre Assessment Grade Pass

CNG functional skills maths L2: Working towards-exam not taken"

22. After this email was sent there was further correspondence with the Colchester Institute who were making enquiries about whether or not B was able to complete her mathematics examination before the start of her new course. The Claimant was able to confirm that that was at least a possibility as B would be offered intensive support in order to take examination which might be sat on 1 August 2020. She copied in Roxanne Hobbs who was B mathematics tutor.

23. B then contacted the Respondent chasing up extra support in mathematics to support her application for an apprenticeship. That caused an employee, Ms Paine to telephone B. She then contacted Roxanne Hobbs who in turn forwarded her the email chain that the Claimant had sent to the Colchester Institute. A note signed by Miss Paine within the bundle outlines those facts and then goes on to say that she called B to ask her about her English exams she records that Billy said she had passed those examinations *'having been done on that thing where the teachers do it'*. The note says *'I asked how she knew she had passed that and she said she had been told she passes so had lots of her friends. She said that the Claimant had told her'*.

24. The fact that the Claimant had sent her email to the Colchester Institute came to the attention of Claire Jeens no later than 31 July 2020. She did not initially speak to the Claimant about it but reported a *'suspected case of malpractice within my centre'* to the investigation and compliance department of City and Guilds, the examination board.

25. Claire Jeens contacted the Claimant and asked her to attend a remote meeting on 5 August 2020. The Claimant had assumed that she was to be involved in an investigation into somebody else and had no idea that her conduct was being examined. There was a transcript of the conversation included in the bundle and it was not suggested that it was inaccurate.

26. The Claimant was told that there had been an allegation that she had shared Centre assessment results with a learner. She immediately denied that she had done so. Before any discussion about what had happened the Claimant raised her recent promotion and the work that she is doing. She commented that she had no staff and said that she was feeling overwhelmed. She was asked whether she had shared information with learners at all she said that she had not and had not even seen the results. She was then asked whether she'd sent any emails to learners recently or sending in any emails of predicted grades to learners. The Claimant then recalls having had emails from the Colchester Institute because asking for predicted grades she went on to say that student B had then not engaged with the maths tutor. Shortly after that there is an indication that the meeting was going to be concluded. The Claimant is recorded as saying that she'd like to know something a little bit more specific

because she was confused about the allegation against her. That apparently caused Claire Jeens to reconsider ending the meeting. She then informed the Claimant that there had been allegation she shared a learner result for B. The Claimant then repeated the fact she hadn't seen the results but referred to a predicted pass at level II for her writing because B had passed her reading exam. What then ensued was a debate about whether sharing a predicted result is the same as sharing a CAG grade.

27. During the meeting on 5 August 2020 there was no reference to any other allegation. Within the bundle there were a number of transcripts of telephone calls to learners. Some of his calls were made by Deborah Payne whereas others were made by Samantha Johnson. In addition there is an email from the mother of a student who I shall refer to as E. That email was sent at 11:30 on 5 August 2020 shortly after the initial investigatory meeting.

28. The first of those telephone transcripts was between Deborah Payne and a student A. There is nothing in that transcript which contains any criticism of the Claimant. The student had been told that she would not be put forward for a maths exam because she had failed the mock. Diane Payne suggests that she would be able to organise for the student to do the examination. I was not told why that conversation took place or what was being investigated. I note that amongst the questions asked are wide-ranging questions about whether the student had felt supported at Clacton.

29. I was shown a further note/transcript of a conversation between Deborah Payne and a student ‘S’. During that conversation S is asked what qualification she's taking and she said English and maths she had already sat her examinations in English and she said that she had got her "predicted grades in mathematics referring to somebody called Sarah she later refers to the Claimant saying only that ‘Cheryl said she's give me my predicted or something’. She was asked further questions. She went on to say she met her mate B in town who had told her that the Claimant had given her her "predicted'. She suggested that she then spoke to the Claimant who said that she would be given her ‘predicted’. She was asked in terms whether she had been told that she had a predicted grade or that she had passed she confirmed that she had only been told her predicted grade. She was also asked if she had felt supported during the course and confirm that she had done.

30. There is then a transcript of a conversation between Samantha Johnson and B. B is asked whether she knows what a Centre Assessment Grade is and she said that she did not. She was asked what results she got and said she passed her English but hadn't sat her maths yet. She was asked how she knew about her English results and she said that the Claimant had told her.

31. Samantha Johnson also telephoned E. She asked her what qualifications she had done and she was told that E had done level I customer service. She said she hadn't done her ‘maths thing’ thing yet but said ‘I think I was on level II for that’. She said she hadn't done her maths test thing and said ‘it's all a bit up in the air’. She was asked whether she knew what it CAG grading was and she said that she didn't. She said that the Claimant rang her mother the week

before. When asked about her learning experience she praised the Claimant for having called her every week.

32. The email from E's mother refers to the telephone call that she says took place on 20 July 2020. She said that she had no idea what was happening in respect of E's course or going forward. She said that she was told by the Claimant that E had failed her maths, only just passed level I customer service and she was not allowed returned to a level II customer service as she was not motivated enough. She complains about a lack of support. There is a further transcript of a telephone conversation that clearly took place after that email was sent because it refers to the email within it. The conversation that is recorded makes no reference to examination results but focuses on E's mother's complaints that E has not been properly supported by the Claimant.

33. On 6 August 2020 the Claimant was required to attend a further meeting. On this occasion the Claimant email to the Colchester Institute was shared with her. She was asked why she sent it and the Claimant said "because the Colchester Institute were putting pressure on B to get her predicted grades. She explained that B had told her she had five days to get them, otherwise she would be unable to undertake the dental apprenticeship. She said *'I had quite a few text from B that morning and an email saying I need these predicted grades'*. Claire Jeens then asked her why she had sent the grades. She said she was trying to understand why the Claimant sent the predicted grades when she was not allowed to.. The Claimant went on to explain that she did not realise that she was giving a CAG but had been giving a predicted grade bases on her knowledge of B's work throughout the year.

34. The Claimant is then asked about E. The Claimant immediately denied the suggestion that she said that E was not allowed to do level II customer service. She did agree that she said that she struggled with level I she accepted that because of this she was unable to confirm whether she could go on to level II. She was asked whether she told E that she had failed her maths. The Claimant said she had not but did say that as there was insufficient evidence E would not be put forward for an examination. She went on to say that E hadn't attended her maths lessons and in those circumstances nothing she could do. She said that she had not used the word failed because she had not taken the mathematics exam she said that she never used the word fail in any circumstances. There were no questions whatsoever about the student S.

35. After that meeting Claire Jeens submitted a further report to NCFE. That report includes an assertion that only one result, a level one Certificate in Customer Service, has been released improperly. That must refer to the student E and the suggestion that she was told that she had just passed her customer service exam. The NCF he wrote back on the same day. They indicated that they were content with the investigation are to be undertaken they indicated that subject to the outcome of any internal disciplinary procedure they were minded to issue the Claimant with a warning.

36. Both qualifications bodies (City and Guilds and NCFE) produce guideline sanctions which will be imposed on centre staff in respect of any malpractice. Those sanctions range from a warning, through training, special conditions and

ultimately a suspension. It follows that in the view of the NCFE the Claimant's conduct fell towards the lowest end of the scale even if it was established that she had informed a student of her examination results.

37. On 11 August 2020 the Claimant brought a grievance. In part the Claimant was complaining about the instigation of the disciplinary process and the manner in which it had been investigated and in part to do with other matters. The Respondent, through Amanda Collins decided to put the disciplinary proceedings on hold pending the outcome of a grievance procedure. Amanda Collins indicated that she would be hearing that grievance. A grievance meeting was held by Microsoft teams on 13 August 2020. The notes of that meeting are found within the bundle of though neither party suggested that anything of particular significance arose out of that meeting. It appears that investigating some of the issues raised by the Claimant fell to Cinzia Ricci . Who from email footers I infer is an administrator dealing with Human Resources. She sent various emails making enquiries about matters that the Claimant had raised. On 20 August 2020 the outcome was that the majority of the Claimants complaints were dismissed other two minor matters were upheld. Those are not material to my decision.

38. The Claimant then appealed the outcome of her grievance. An appeal hearing took place on 1 September 2020 via teams. It is sufficient for the purposes of this judgment to record the fact that on 7 September 2020 Barbara Morgan dismissed the Claimant appeal against the outcome of her grievance

39. On 7 September 2020 the Claimant was invited to attend a disciplinary hearing to be held on 10th of September 2020 and was to be conducted by Amanda Collins. The Claimant was advised of her right to be accompanied but chose to attend by herself. The meeting was recorded and there was a transcript within the bundle. The transcript of the disciplinary meeting shows that from the outset the Claimant sought to draw a distinction between sharing a predicted grade and giving an actual grade. It was put to the Claimant that she had in the original investigation denied providing a predicted grade. That was incorrect the Claimant had acknowledged that she had shared a predicted grade. The Claimant maintained that there was a distinction between giving a predicted grade and the actual grade.

40. Amanda Collins then went on to deal with the student E. Amanda Collins addresses the issue with the following question: *'what is said is a second malpractice also took place with another learner'*. It was suggested that the email from E's mother said that the Claimant had called and informed her of the grades. The Claimant denied this. She said that she had informed E's mother about her progress and said that she couldn't offer her the possibility of going on to a level II of customer service because she had struggled with her level I. She also says that she spoke about maths. She said that she told E's mother that she had attended about 18% of maths lessons and it was hard to motivate E to do any work. She said she did not tell E's mother that she had failed her maths be

41. Having had the Claimant's explanation, which in respect of E would have been a complete answer to the allegations concerning her had it been accepted,

Amanda Collins moves on to ask whether the Claimant understood that *'this malpractice'* could potentially put the Respondent's contract at risk along with the reputation of the company. The premis of this question is based on an assumption that what the Claimant had just said was untrue. I consider that indicative of a pre-disposition not to accept what the Claimant had just said. In response the Claimant said that she understands how malpractice can have a detrimental effect but, 'hand on heart' she did not intentionally inform parents or learners of their grades.

42. The Claimant had prepared a written statement in respect of each allegation and offered to send copies after the hearing. Within those statements the Claimant explained her position in respect of B she said that her prediction for B's grades were based purely on assessment throughout the year. She said she did not access the spreadsheet that held her centre assessment grade she said that the only involvement she had with the CAG grading was as a manager to sign off the tutors decision by ensuring they completed the spreadsheet correctly. In respect of the second allegation the Claimant repeated denials that she had ever told E's mother that she had failed her maths exam and said that she had gone no further than to say that she had struggled in her level I customer service qualification.

43. Nowhere during the disciplinary hearing was that any discussion about any of the other learners who were interviewed by telephone.

44. On 11 September 2020 Deborah Payne sent an email to Cinzia Ricci listing a number of issues had come to light at the Clacton centre. No explanation was given as to why this was relevant but it does appear from that email that a wider investigation into the Claimant's management of the Clacton centre was being undertaken. I consider that this indicates that the Respondent was looking for a problem rather than reacting to an issue that had arisen.

45. On 15 September 2020 Amanda Colins sent the Claimant a letter she said that further evidence had come to light that was relevant to the case in hand. The evidence was said to be a training video. The disciplinary hearing resumed on 16 September 2020 again via Microsoft teams. The Claimant was asked whether she had reviewed the training video and despite some technical difficulties the Claimant said that she was able to do so. The questioning surrounded the issue of whether there was a distinction between a predicted grade and a CAG grade. The Claimant maintained that the was such a distinction. The Claimant was then challenged about the contents of her email to the Colchester Institute where she had referred to CAG when giving a predicted grade. The Claimant was asked whether she had any explanation for that she goes on to say that she had in the weeks before that been under pressure and she had support she would put a little bit more time into writing the email. She suggested that she'd intended to simply indicate that the examination in English would not be taking place but that the outcome will be determined by a CAG.

46. On 18 September 2020 Amanda Collins wrote to the Claimant and informed her that she would be summarily dismissed. Her reasons are brief. They do not include any mention whatsoever of any other malpractice other than in relation

to B. She rejects the Claimants distinction between a predicted grade in a CAG grade and says *'in your email to the Colchester Institute you have used CAG therefore, you were sharing the CAG with the learner and an external Institute'*. In considering the appropriate penalty she says this *'having carefully reviewed the circumstances and considered your responses, I have decided that your conduct has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship. The appropriate sanction to this breaches summary dismissal. I refer to our standard disciplinary procedure were making the decision which does not permit the recourse to any lesser disciplinary sanction'*.

47. The Respondent's disciplinary procedure was included within the bundle. It suggests that only the managing director or CEO have the authority to dismiss. Some examples of gross misconduct are given these are theft, assault and criminal offences other it is made clear that these are not intended to be exhaustive. The disciplinary policy makes it quite plain that alternatives to dismissal will be considered. However the policy includes the sentence*: 'if, after investigation, it is confirmed that the employee has committed an offence which is considered to be gross misconduct the normal consequence will be dismissal without notice or payment in lieu of notice'*. There is nothing in that policy that would suggest that Amanda Collins discretion was fettered in the way that she sets out in her letter.

48. The Claimant appealed her dismissal by an email sent to Dale Morgan on 24 September 2020. On 28 September 2020 Claire Jeens sent an email to the City and Guilds qualification body. She states in that email that the internal process is now complete. That was not correct, there was an outstanding appeal. The email or letter includes the statements/transcripts of conversations with of B, S, E and A. As I have previously noted at no stage at this point had what S said in her telephone interview been discussed with the Claimant.

49. The appeal meeting took place on 1 October 2020. I have seen a transcript of that meeting. It was common ground that in the course of that meeting the Claimant became distressed. The Claimant maintained her position that sharing a predicted grade was not the same thing as revealing a CAG grade. She made the point that in the training meeting that took place in June and was videoed there was no reference to revealing predicted grades. Dale Morgan did not challenge the Claimant or ask her any specific questions about anything she said. He did not challenge her account of her conversation with E's mother or explore her account. When I asked him during his evidence whether he had thought of asking further questions he explained his failure to do so by saying that the Claimant had become upset. When I asked whether he had thought about adjourning the meeting he said that he had not. The meeting ends with Dale Morgan saying *'thank you darling thank you'*.

50. By a letter dated 9 October Dale Morgan dismissed the appeal. In his reasons he sets out only his conclusion that the reference to the word CAG in the email to the Colchester Institute was sufficient to establish malpractice. He decided to uphold the original decision.

51. After the disciplinary proceedings concluded the G & G examination board concluded that they too felt that a warning was the appropriate sanction for the Claimant's conduct as described to them by the Respondent. They wrote to the Respondent on 5 November 2020 they accepted that the Colchester Institute e-mail amounted to maladministration but go on to say that any suggestion that there was an intentional attempt to undermine the integrity of the qualification was unsubstantiated.

52. Danielle Bell gave evidence on the Claimant's behalf. Her evidence principally concerned the fact that the Claimant was under a lot of pressure in July 2020. That was not in dispute and I do not need to set out her evidence. However she was the Tutor on the Customer Services course at Clacton. She told me that that course was never assessed by an examination but by a portfolio compiled by the learners. She told me, and I accept, that before a portfolio was put forward for an assessment, she would have discussed it with the learner and if she felt that it was inadequate more work would be done before it would be submitted. What I take from that is that a portfolio that would result in the student failing the exam would not usually be submitted.

The law to be applied - Unfair dismissal

53. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) …..

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

54. For the purposes of Section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship': ***Thomson v Alloa Motor Co Ltd*** **[1983] IRLR 403**, EAT. It is not necessary that the conduct is culpable ***JP Morgan Securities plc v Ktorza*** **UKEAT/0311/16**.

55. Where the reason, or principal reason, for the dismissal is established as conduct then it will usually, but not invariably, be necessary to have regard for the guidance set out in ***British Home Stores Ltd v Burchell*** **[1978] IRLR 379**, which lays down a three-stage test: (i) the employer must establish that he genuinely did believe that the employee was guilty of the misconduct; (ii) that belief must have been formed on reasonable grounds; and (iii) the employer must have investigated the matter reasonably. Following amendments to the statutory scheme the burden of proof is on the employer on point (i) (which goes to the reason for the dismissal) but it is neutral on the other two points ***Boys and Girls Welfare Society v McDonald*** **[1996] IRLR 129.**

56. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

57. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty ***Sainsbury's Supermarkets Ltd v Hitt*** **[2003] IRLR 23**.

58. In terms of the reasonableness of the investigation and the procedure that was followed, the "relevant circumstances" referred to in Section 98(4) include the

gravity of the charge and their potential effect upon the employee ***A v B*** **[2003] IRLR 405**. ***A v B*** also provides authority for the proposition that a fair investigation requires that the investigator examines not only the evidence that leads to a conclusion that the employee is guilty of misconduct but also that which tends to show that they are not.

59. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. I considered the following passages of that code to be relevant to the decisions I had to take:

20. If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.

21. A first or final written warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with timescale). The employee should be told how the warning will remain current. The employee long should be informed of the consequences of further misconduct, or failure to improve performance, within the set period following a final warning. For instance that it may result in dismissal or some other contractual penalty such as demotion or loss of seniority.

22. A decision to dismiss should only be taken by a manager who has the authority to do so. The employee should be informed as soon as possible of the reasons for the dismissal, the date on which the employment contract will end, the appropriate period of notice and their right of appeal.

23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct.

Discussion and conclusions

60. In his submissions Mr Johns on behalf of the Claimant very sensibly conceded that there was no other reason for the Respondent's decision to dismiss the Claimant other than the reasons given in the decision letters. I find that that concession was rightly made. The fact that the Claimant is offered a promotion shortly before the events that led to her dismissal and the praise given to her in June by Dale Morgan is inconsistent with any suggestion that the Respondent was acting for any motive other than the one advanced in these proceedings.

61. Despite this concession I must make a finding as to the extent of the reasons for deciding to dismiss the Claimant. I need to make findings about what was or was not in the minds of the decision makers at the time. I note that in the dismissal letter and in the appeal outcome the only matter referred to is the e-mail sent by the Claimant to the Colchester Institute. The ET1 does not set out any detail of which allegations were upheld or taken into account in deciding to dismiss the Claimant. Whilst there is some discussion about E during the disciplinary meeting there no questions raised about this during the appeal. There is no discussion about any of the other learners interviewed during either meeting. I was not helped a great deal by the very brief witness statements of Amanda Collings or Dale Morgan. Neither set out what their findings were that supported their decision to dismiss the Claimant. In their oral evidence both suggested that they had both the Colchester Institute matter and the E matter in mind. Neither said anything about any other alleged disclosure of CAG results.

62. I consider that the most reliable evidence of the reason for the dismissal is the dismissal letter itself. That letter was written at the time and is the earliest record of the decision. The reason that is given relates solely to the e-mail to the Colchester Institute. I find that was the main reason why the Claimant was dismissed. However, I find that the E allegation must inevitably have played some part in the decision to dismiss the Claimant as it was discussed at some length during the disciplinary meeting on 10 September 2020. That leaves me with the question of whether any allegation relating to S or A was a reason for the dismissal.

63. The letter inviting the Claimant to the disciplinary meeting was couched in vague terms. The allegation is expressed as *'it is alleged that you have released estimated centre grades early to learners and a parent which is suspected malpractice'*. No details of what the Claimant is alleged to have done are set out. Given that the Claimant was potentially facing dismissal I find that the failure to make it clear what the allegations were was unfair. However I have had regard to the fact that the letter was accompanied by recordings of the interviews with all of the learners. That said it should not have been left to the Claimant to try and work out which aspects of her conduct the Respondent was concerned about.

64. During the disciplinary meeting noting is said about S or A. I can understand why the Al interview was not discussed because A does not suggest that the Claimant spoke to her about exam outcomes. That rather begs the question why she was interviewed at all. I find that the question of whether the Claimant had revealed a 'predicted' grade to S, as her interview might suggest, was not a reason for the Claimant's dismissal at all. If it had been it would have been discussed at one of the two disciplinary hearings, referred to in the decision letter or mentioned in the appeal. Subsequently I would have expected reliance on this allegation to have been explained in Amanda Collings witness statement – it was not.

65. I conclude that the reason for dismissing the Claimant was principally the content of her e-mail to the Colchester Institute and in smaller part that Amanda

Collins accepted that the Claimant had told E's mother that she had failed her maths exam and just passed her level 1 customer service qualification.

66. I accept that these reasons can be properly catagorised as 'conduct'

67. I shall deal with the question of whether there was a reasonable investigation before asking whether the product of that investigation provided reasonable grounds for the Respondent's conclusions.

68. I find that Claire Jeens did adequately investigate whether the Claimant had been made aware of the need to keep CAG grades confidential. In fact that was never contentious. The Claimant readily accepted that she should not disclose the tutor assessments that made up the CAG predicted grade.

69. At the investigatory meeting of 5 August 2020 the Claimant was asked whether she had disclosed any CAG grades and immediately said that she had not. Claire Jeens clearly had the Claimant's e-mail at that stage but did not ask the Claimant about it or provide her with a copy until the later meeting. When the Claimant was asked if she had given any predicted grade she readily acknowledged that she had done so. I do not understand why Claire Jeens did not simply read out the e-mail that she had presumably to hand. In any event I find that the Claimant made no attempt to conceal what she had done during the investigation into that allegation. Given that the extent of what the Claimant had or had not done was set out in an e-mail it was unnecessary to investigate the issue of what was sent – again this was not contentious.

70. I find that Claire Jeens and in Turn Amanda Collings did ask the Claimant why she thought that the contents of her e-mail were not a breach of the requirement not to disclose a CAG grade. The Claimant gave the same response consistently. She drew a distinction between giving a predicted grade relying on her judgment and disclosing the actual grade that had been submitted, but not yet released, by the exam board. Whilst the Respondent never accepted the distinction made by the Claimant I do not think the matter could have been explored any further.

71. The real issue was whether in sending the E-mail to the Colchester Institute in the terms that she has used the Claimant had acted improperly. I am satisfied that that matter was explored as far as was reasonable to do so.

72. The manner in which the 'E' allegation was investigated is far less satisfactory. E's mother's e-mail did suggest that she had been told that E had passed her Level 1 customer service exam and failed her maths. The Claimant accepted that there had been a telephone conversation but her recollection was different. She accepted that she had said that E had struggled with her level 1 customer services qualification. She does not accept that she said whether she had passed the exam. She flatly denied saying that E had failed her maths. Her position was that E had not attended sufficiently and had not taken any test. When Samantha Johnson spoke to E the transcript records her saying 'I havn't done my maths thing yet'. I note she is asked whether she has had any results and said 'No, I have done my maths test thing' . It seems to me that it would have been an easy task to resolve any inconsistency. It seems overwhelmingly

likely that the second 'have' is actually a 'havn't'. That ought to have been obvious to an open minded decision maker.

73. There is a broad area of agreement between what the Claimant says and what E's mother says. A reasonable employer ought to have recognised that E's mother might equate not being put forward for a CAG assessment as a 'fail'. In one sense it is. Equally a conversation about somebody having struggled to complete a level 1 customer services qualification may well be taken as an indication that they had managed to complete the course but only just. Given that there was a real possibility that there were crossed wires and that the Claimant was being truthful about the conversation I consider that a reasonable investigation would have included putting what the Claimant had said to E's mother to see whether she did or did not agree. I do not consider that to have been onerous. E's mother had spoken on the telephone twice and had sent an e-mail. There was no suggestion that she was unwilling to discuss the matter with the Respondent.

74. Furthermore, the Claimant gave a clear account that E had not attended more than 18 % of her classes and was therefore never going to achieve the qualification at that time. It appears perfectly proper to me to have discussed this with E's mother. I was provided with the sign off sheet for the CAG assessments at Clacton and see that it does record that E failed to obtain the qualification. However, I do consider that there is a valid distinction between failing to obtain a qualification through non-attendance and failing through ability. I cannot see that the allegation that the Claimant told E's mother that she had failed her maths exam was ever reported to the exam boards. The Claimant's account that E did not attend and had not obtained the qualification on that basis was either not investigated or if it was her account was not contradicted by any evidence. Telling E's mother that E had not attended sufficiently and could never have passed the exam is not the same as telling her that she had failed through her ability. Nobody would expect to pass a course if they had not attended.

75. If what S had said about the Claimant either formed a separate reason for her dismissal, or whether what she said was taken into account as supporting evidence in respect of any other allegation, then I consider it fundamentally unfair not to have raised this during the disciplinary process. This is a clear danger with a vague and unparticularised allegation of wrongdoing as there is in the disciplinary invitation letter in this case. I find that if this matter was to be taken into account at the very least the Claimant ought to have been invited to comment upon it.

76. I turn to the question of whether there were reasonable grounds for the Respondent's conclusions. I assume for these purposes that Amanda Collings did conclude that the Claimant had revealed the CGA assessments of both B and E.

77. I consider that the Claimant's e-mail to Colchester Institute is ambiguous. She does clearly refer to giving 'predicted grades'. On the other hand she expressly states that the English qualification will be assessed by a CAG process. By that stage the CAG assessment had been done. She has rightly accepted that she

could have worded this more carefully. I do not accept that the Respondent had reasonable grounds for dismissing the Claimant's explanation that she intended to give her own assessment (as she would have done in all previous years) rather than reveal the CAG assessment. However, giving a predicted grade in these circumstances might well lead anybody who read the e-mail to conclude that the CAG assessment would be the same as the predicted assessment. It appears that B herself understood it in that way. I therefore conclude that the phrasing of the e-mail did provide a reasonable basis for concluding that a CAG assessment had been revealed both to the learner and to the Colchester Institute although unintentionally. That was the conclusion of the exam board and it seems to me it is the only reasonable conclusion that could be drawn from these facts.

78. I consider that a reasonable employer reaching any conclusion in respect of this matter would have considered it important that the Colchester Institute clearly did not believe it improper to ask for a predicted grade. It is also important that there was no evidence to dispute the point made by the Claimant that she understood the offer of a place to B would be withdrawn unless predicted grades were given.

79. There was evidence to support the 'E' allegation. E's mother's e-mail did expressly refer to passing and failing. I have set out above my reasons for concluding that the investigation into this was inadequate. The failure to ask E's mother whether she agreed or disagreed with the account of the Claimant affects the weight that could reasonably have been given to that evidence. I accept that the manner in which the Claimant expressed herself in her e-mail to the Colchester Institute might be taken into account in assessing whether she was abiding by the requirement to keep matters confidential. There is only a slight difference in emphasis between 'struggled with' and 'just passed' and failing to achieve a pass because of non-attendance and failing to achieve a pass because of ability. I do not consider that Amanda Collings had a reasonable basis for preferring E's mothers written account over that of the Claimant. In the absence of any evidence that E's mother disputed the Claimant's account of their conversation I do not accept that there was any reasonable basis for rejecting the Claimant's account. I consider that the manner in which Amanda Collins followed up the Claimant's account of her conversation with E's mother with a question based on an assumption of wrongdoing demonstrates that she was not approaching the disciplinary hearing in an even handed manner and was pre-disposed to accept the evidence of E's mother.

80. I turn to the approach taken in respect of the penalty that should be applied. I find that there were several aspects to this that were unfair or unreasonable.

81. The first is the clear statement in the letter of dismissal that Amanda Collings considered that it was not open to her to impose a sanction short of dismissal. That is not supported in any way by the Respondent's policy. However, I find that that was how she approached the matter. I find that she gave no thought whatsoever to imposing any lesser penalty.

82. The next matter that concerned me was the approach taken to the pressure the Claimant was under at the time. I was told that *'everybody was under pressure at that time'*. I have no doubt that that was the case. The country was 3 months into lockdown. The method of assessing students had been altered overnight. There must have been great pressure on many employees in the sector as well as outside it. The Claimant had explained the particular pressure she was under. The ceiling had fallen in at the Clacton centre, she was working by herself and she had to deal with the death of a student amongst other matters. The fact that other people did not make mistakes does not mean that the Claimant did not deserve some understanding for the manner in which she conducted herself. I find that no reasonable employer would have failed to have regard to the fact that any errors made by the Claimant took place against the background of exceptional circumstances. This employer did disregard them completely.

83. I accept the evidence given by Dale Morgan that he is very anxious about the Respondent's reputation. I accept that having to report matters to the exam board is something that he would dearly wish to avoid.

84. Mr Hines urged me to pay little heed to the assessment by the two exam boards as to the gravity of the Claimant's conduct. I accept that I should not pay any heed at all to the assessment by the C & G exam board as its decision was not known at the time of the dismissal. However, I do consider that a reasonable employer would have had at least some regard to the assessment of the NCFE who decided to impose a minimum sanction. I find that the Respondent disregarded that entirely.

85. The Claimant made the point throughout the disciplinary process that whilst she had been told in terms that she should not reveal a CAG assessed grade nothing had been said about predicted grades. She was right about that. The evidence before me was that the practice of giving predicted grades had up to that point been entirely normal. It seems that the Colchester Institute thought it appropriate to ask. It was an important point made by the Claimant that there was a tension between the need to deal with enquiries about predicted grades (as had always been done) and the requirement to keep CAG grades confidential. There may have been solutions where the two requirements could co-exist but the Claimant had not been told what to do if an enquiry was made. When she acted as she did she was attempting to assist a student find a place on a course that may have led to future employment.

86. The respondent had no clear disciplinary rule to deal with this situation. I accept that a teacher would know that breaching the requirements of an exam board would amount to misconduct but, given the wide range of ways in which the requirements could be breached a teacher could not be expected to realise that any breach would result in dismissal. That is particularly so in the light of the far more nuanced approach taken by the exam board itself.

87. I must consider the whole disciplinary process including the appeal. I do not consider that the appeal cured any of the defects of the original process. Dale Morgan hardly asked the Claimant a question during the appeal and he did not engage with her in any meaningful way. His explanation was that she was

upset. He added in his oral evidence that anything that could have been said had been said. That is unimpressive. The simple solution to the claimant becoming upset was to offer her a break or postponement. The fact that he believed that anything that could be said had been said demonstrates that he believed that the outcome of the appeal was a forgone conclusion. It may have been, but in my view that was because Dale Morgan was seeing matters only from his own perspective and was not open to any contrary arguments. That is not a fair and balanced approach to an appeal.

88. As the ACAS code makes clear it would be unusual for an employer to dismiss an employee for a first disciplinary offence. It might do so and do so fairly where gross misconduct is established.

89. I must not substitute my view for that of the Respondent. The question is whether the Respondent acted reasonably. I have no hesitation in concluding that the Respondent acted in a way no reasonable employer would have done. The decision to dismiss the Claimant even on the basis of the Respondent's own conclusions was not just harsh it was manifestly inappropriate and outwith the range of reasonable responses. I find that in the respects identified above there were significant procedural failings in respect of the 'E' allegations. I have found that there was no reasonable basis for rejecting the Claimant's account of the conversation with E's mother. I have found that both Amanda Collins and Dale Morgan approached their respective tasks with insufficiently open minds. Finally I have considered the approach to sanction. I find that no reasonable employer would have acted in the way that this employer did. For completeness less I have fallen into any error I would have found the dismissal outside the band of reasonable responses even had I considered that E matter had been properly investigated. No reasonable employer would have dismissed the Claimant for such an error of judgment in the extraordinary aftermath of the Covid pandemic. No reasonable employer would have regarded these actions as gross misconduct and dismissed for a first offence.

90. Accordingly I have concluded that the Claimant's claim of unfair dismissal was well founded.

91. Having announced the reasons above at the outset of the hearing on 3 September 2021 I told the parties that I had not reached any conclusions on the final issue of contributary fault or whether there should be any reduction in compensation to reflect the possibility of a fair dismissal. I left it open to the Respondent to make any further submissions on these points. Mr Hine indicated that, in the light of my findings, he did not seek to persuade me that there should be any deductions.

92. We then proceeded to deal with matters of quantum. These were dealt with by consent following a substantial, and to some extent unexplained, concession by the Claimant about the period over which she wished to claim loss. At the date of the hearing she had not found work at a similar salary but expected to do so in the near future. Mr Hind recognised the benefit of that concession to his clients and the calculation of the compensatory award was undertaken by consent as reflected in the Judgment.

93. These written reasons were requested some time ago and I must apologise to the parties for the delay. The Claimant has asked for written reasons in time although as she succeeded I am unsure of her reasons. The Respondent asked for written reasons apparently to resolve internal issues with its insurer. I confess that I have prioritised providing judgments and reasons for parties who have been unaware of the outcome of their cases over this case in these particular circumstances. I am sorry for any inconvenience but the Tribunal has limited resources which need to be shared as fairly as possible.

Employment Judge Crosfill

Dated: 8 June 2022