EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr WYC Shing		University of the Arts London

Heard at: London Central (by video) **On**: 3, 4, 5, 6 and in chambers on 7 July 2023

Before: Employment Judge H Stout
Tribunal Member S Pearlman
Tribunal Member S Hearn

Representations
For the claimant: Ms N Mallick (counsel)
For the respondent: Mr A Ohringer (counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The respondent did not contravene ss 13 and 39(2)(c) Equality Act 2010 and the claimant's claim of direct race discrimination is dismissed.
(2) The respondent did not contravene ss 19 and 39(2)(d) Equality Act 2010 and the claimant's claim of indirect race discrimination is dismissed.
(3) The claimant's claim of unfair dismissal under Part X of the Employment Rights Act 1996 is not well-founded and is dismissed.

REASONS

1. Mr Shing (the Claimant) was employed by the University of the Arts London (the Respondent) from 1 September 2006 until 1 December 2020, latterly as a Senior Lecturer. He was dismissed summarily for what the Respondent classified as inappropriate professional behaviour. In these proceedings he

claims that his dismissal was unfair contrary to Part X of the Employment Rights Act 1996 (ERA 1996), that it was direct discrimination on grounds of nationality and/or ethnic origin contrary to s 13 and s 39(2)(c) of the Equality Act 2010 (EA 2010) and that the Respondent's policy on Personal Relationships indirectly discriminated against those who share his nationality/ethnic origin contrary to s 19 and s 39(2)(d) of the EA 2010.

The type of hearing

2. This has been a remote electronic hearing by video under Rule 46. The public was invited to observe via a notice on Courtserve.net. A member of the public joined. The only significant issue with connectivity was that Mrs Terry was not able to give evidence at the scheduled time because of an interruption to her broadband connection, which was resolved and then we resumed.

3. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

The issues

4. The issues to be determined had been agreed by the parties to be as follows:-

<u>Unfair Dismissal</u>

(1) It is accepted that the Claimant was summarily dismissed on 1 December 2020. What was the reason for dismissal? The Respondent contends that the Claimant was fairly dismissed for gross misconduct.

(2) Is the reason for dismissal a potentially fair reason for dismissal under section 98(1)(b) or section 98(2)(b) of the Employment Rights Act 1996, namely misconduct, or in the alternative, some other substantial reason?

(3) Was the Claimant's dismissal fair in all the circumstances? The Claimant alleges that:
   a. There was no act of gross misconduct
   b. The sanction was excessive
   c. The sanction was not consistent with the staff disciplinary code.
   d. The sanction was outside of the range of reasonable responses and unduly harsh
   e. Mitigation and his service was not taken into account
   f. There were procedural errors, namely
      i. Abuse of Process
      ii. Failing to obtain or losing evidence
      iii. Unreasonable delay

(4) If the Tribunal concludes that dismissal was unfair:
   a. what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would have been dismissed in time anyway? (Polkey v AE Dayton Services Ltd [1987] UKHL 8)
   b. would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to section 122(2) of the ERA 1996 and if so, to what extent? Did the Claimant by blameworthy or culpable actions cause or contribute to his dismissal to any extent and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory aware pursuant to section 123(6) of the ERA 1996?

Direct Race Discrimination

(5) Did the Respondent subject the Claimant to less favourable treatment because he is not white and/or because he is Chinese in the following respects:
   a. The investigation into allegations of sexual harassment and inappropriate professional behaviour made against the Claimant from June 2020 onwards.
   b. The sanction of summary dismissal imposed on 1 December 2020.

In relation to the dismissal and the investigation, the Claimant relies on the following actual comparators: G and H (who also had romantic/personal relationships with students but were subjected to less harsh sanctions) and/or a hypothetical comparator.

Indirect Discrimination

(6) The alleged provision criterion or practice was the application of the Personal Relationships UAL Policy and Professional Boundaries Guidance and/or the requirement that the claimant understand and adhere to this policy and guidance

(7) It is alleged that this put people of Chinese national origin at a particular disadvantage compared with others because the way the policy and guidance was written was not sufficiently clear and unambiguous for someone who was born and brought up in the Chinese culture and did not speak English as a first language

(8) It is alleged that this also put the claimant at that disadvantage

(9) If so, can the Respondent prove that it was a proportionate means of achieving a legitimate aim?

The Evidence and Hearing

5. We received a bundle of 1123 pages at the start of the hearing, to which the Claimant sought to add four further PDFs, without objection from the Respondent, and we permitted that.

6. We received witness statements and heard oral evidence from the Claimant and his witness, Ms Joughin (appearing in her capacity as his Trade Union representative).

7. For the Respondent, we received witness statements from Ms Schechter (Course Leader for BA Hons Interior and Spatial Design and the Claimant's line manager), Ms Terry (HR Director for Tenpin Ltd – investigator in the Claimant's disciplinary case) and Ms Woodhams (Governor for the University of the Arts London – chair of the appeal committee in the Claimant's disciplinary case).

8. This is an unusual case in that we have no witness statement or evidence from Professor Crow (who took the dismissal decision in the Claimant's case) because he unfortunately died in June 2022.

9. At the end of the hearing, the Respondent applied to admit an additional witness statement from Ms A Lechner (Head of HR Advisory Services for the Respondent). The Claimant did not object to the statement on condition that Ms Mallick could cross-examine on it, which was permitted.

10. The Claimant's witness statement, as far as we were aware at the start of the hearing, was a 10-page document that dealt only with his indirect discrimination claim. To remedy this obvious deficiency, it was agreed that he could also rely by way of evidence in chief on his ET1 and grounds of appeal. He therefore confirmed these documents at the start of his oral evidence and was cross-examined accordingly by Mr Ohringer for approximately two hours on Day 1.

11. At the start of Day 2, Mr Ohringer informed us that the Claimant had at 9.35am that morning forwarded to the Respondent and the Tribunal an email he had sent to the Tribunal and the Respondent on 14 September 2022 (in advance of the first listed hearing of this case) to which was appended a proper 20-page witness statement dealing with his whole case in the usual way which he had not realised previously had been omitted from the bundle for this hearing.

12. After hearing submissions from the parties as to what to do, we decided that, although the Claimant must take much of the blame for not realising earlier that his witness statement had been omitted from the bundle for this hearing, it had been a genuine oversight on his part and it was a statement that he had provided to the Respondent nearly a year previously and the Respondent accordingly also bore some responsibility for the failure to include it in the bundle for this hearing. Both counsel were in the same boat in not having seen the statement previously and having accordingly prepared for the

hearing on a different basis. We considered, however, that the prejudice to the Claimant of not permitting him to rely on his proper witness statement would be significant, while the prejudice to the Respondent as a result of Mr Ohringer not having the benefit of the statement to prepare cross-examination could be remedied by allowing him sufficient time (about 2 hours) to read and take instructions on it. This could be accommodated within the existing hearing timetable and accordingly we decided it was in accordance with the overriding objective to allow the Claimant to rely on his September 2022 witness statement. Although Mr Ohringer had remained neutral on the question of whether the statement should be admitted or not in the circumstances, he agreed that 2 hours was sufficient time to prepare. We made clear that if, having taken instructions, the 'new' statement posed any more significant problem, he should raise it when the hearing resumed. At 10.45am, we therefore adjourned to 1pm. In the event, at 1pm neither the Claimant nor his counsel rejoined the hearing and we had to wait while efforts were made to locate them so in the end the hearing resumed at 2pm, with no objections to continuing raised by Mr Ohringer or anyone else.

13. We explained our reasons for various other case management decisions carefully as we went along.

Rule 50

14. We raised of our own motion, and after taking instructions the parties agreed, that orders should be made under Rule 50, anonymising, and restricting reporting, in relation to certain comparators relied on by the claimant, and also the student who made the complaint that led to his dismissal. The reasons for these orders were given orally at the hearing, but were in short that, although the principle of open justice is important, the identities of these individuals were of little importance to the case, while the impact on the private lives of those individuals of making their identities public in this case in which they have had no opportunity (or reason) to participate would be unfair and likely to breach their rights under Article 8 of the ECHR.

15. Any party who did not have an opportunity of addressing the Tribunal before the orders were made has the right under Rule 50(4) to apply for a review of the Rule 50 order by making an application to the Tribunal for the attention of Employment Judge Stout.

The facts

16. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

The parties

17. The Respondent is a university and exempt charity delivering education in the areas of arts, design, fashion, media, communication and the performing arts. It has approximately 3000 academic, research, technical and support staff and approximately 2,500 associate lecturers. It comprises six colleges: Camberwell College of Arts, Central Saint Martins College of Art and Design, Chelsea College of Art and Design, London College of Communication and the London College of Fashion and Wimbledon College of Art. The colleges do not have separate legal status.

18. The Claimant was employed by the Respondent from 2006 onwards as a lecturer in architecture and spatial design at its Chelsea, Camberwell and Wimbledon Colleges. He was promoted to senior lecturer in 2012. He is of Chinese ethnic/national origin. He is a fluent English speaker. He is a dual Chinese and British national. He was the only ethnic Chinese lecturer at the Chelsea College of Arts. He received an award for his teaching in 2015.

19. The Claimant was one of six permanent members of staff (Senior Lecturers) engaged to teach on the BA Honours Interior and Spatial Design course, and there were approximately twelve additional hourly-paid members of staff (Associate Lecturers).

The historic matters

20. In November 2010, the Claimant was given an oral warning for inappropriate behaviour towards a female student in 2008 (p 115). The complaint was made 1.5 years after she had left the college and he thought it was because he had refused to help her further with work on her resubmission in 2010. He acknowledged at the time that the tone he used in his communication with the student may not have been appropriate and that this would be a 'lesson' for him (p 136). The Claimant understood that the student had threatened legal action against the Respondent and he had (he believed, and we accepted this was his genuine belief, although it may not have been factually correct) signed something in connection with that to help the Respondent.

21. In August 2018, the Claimant met with Professor Crow and Amanda Harcus (Associate Director HR). As part of the Respondent's response to the #metoo campaign they were looking back at historical matters and reviewing how they had been dealt with. The Claimant expressed concern at the historic allegation being brought up and he was assured that this was the last time it would be brought up. He was informed in this meeting, and it was confirmed in the subsequent letter, that the Respondent would be introducing a Relationship Policy and Professional Boundaries Guide (p 138-9), which the Claimant was noted as welcoming. Professor Crow relied on his own recollection of this meeting in making the dismissal recommendation in the Claimant's case (p 722).

22. In oral evidence, the Claimant made clear that he felt he should not have been at that August 2018 meeting, that it should not have happened at all

because it related to a prior oral warning that had expired years previously. He also maintained that the whole content of the meeting was irrelevant to his later dismissal and should not have been taken into account. Asked about this historic matter in cross-examination, he rejected the suggestion that he had behaved inappropriately. Asked further about it by his counsel in re-examination he said, *"it was never explained what was the inappropriateness, was it because of the message or the misinterpretations – I became a scapegoat because it is not something I should accept – if you allow me to say something personal as a Chinese character, when higher management come to us, there is power and authority and when they request agreement, I don't know my rights".*

23. Another 'historic' matter we need to deal with here is the evidence we have heard about the Claimant's relationship with his line manager, Ms Schechter. She was his line manager from January 2020, when she was appointed as Course Leader. Prior to that, they had worked together as Senior Lecturers. They did not have a good personal relationship, to the extent that in one email exchange following an incident in May 2019 where student work had been moved by the Claimant out of a room in which Ms Schechter had expected the student work to be allowed to remain for a short further period, she had written: *"In all honesty Cyril I hope I never have to work with you again"*. This was before she became the Claimant's line manager. After she became the Claimant's line manager, she was consciously making efforts to build bridges, but had had very little time to do so before the Covid-19 pandemic began and everything moved online. Ms Schechter said (and we accept) that if the Claimant had not felt happy speaking to her about a problem, there were more senior people in the department he could have spoken to, or HR is available for staff and she has spoken to HR about issues in the past.

24. In September / October 2020 there was also correspondence between the Claimant and Ms Schechter about a structure of support for students with mental health issues. The Claimant invited a UAL Senior Mental Health Advisor to give advice and guidance about delivering pastoral care sessions. Ms Schechter responded that it was not about delivering pastoral care so much as knowing how to signpost students to the mental health services available. Ms Schechter suggested that if the Claimant had any specific training needs he should raise them in his Planning, Review and Appraisal (PRA).

<u>The relationship with EA</u>

25. The Claimant was ultimately dismissed for what the Respondent regarded as inappropriate professional conduct, specifically a relationship with a student, EA. This was the subject of an investigation by Mrs Terry in the circumstances we describe below. What follows in this section just sets out some key elements of the relationship as the picture emerges from that investigation and from the evidence presented to us at this hearing. We are mindful that we have not received evidence directly from EA. Where there are disputes as to interpretation or significance of events, we deal with them

either in this section or in the section below dealing with the disciplinary process, or in our Conclusions as appropriate.

26. EA was a mature student (aged 28) on the BA Honours Interior and Spatial Design course. The Claimant in his own evidence and through his counsel Ms Mallick has placed great emphasis on EA having previously been employed as a Nurse, having had previous relationships and being in another relationship at the time of these events. All this has been advanced by way of evidence that she was a 'worldly' person.

27. The Claimant was at the time aged 50. He had been married, but his marriage had broken down in 2018, although he and his wife were still living in the same property.

28. The Claimant says he was not EA's allocated tutor at any point. EA, however, in the investigation said that he had been the tutor for digital media seminars that she attended in the first and second year. It is agreed that he was never responsible for marking or assessing her work. In the 2019/20 academic year, EA was in her third and final year of the course.

29. The broad outline of, and nature of, the relationship, is not in dispute. It began in December 2019 as a normal lecturer-student relationship when EA approached the Claimant for help with her dissertation. Over the course of January and February 2020, the relationship developed into an intense friendship, and by the end of February/beginning of March the Claimant accepts that it had become (briefly) a romantic relationship. The investigation report found that it was the Claimant who was first to declare romantic feelings for EA, but that she then reciprocated.

30. Throughout, the Claimant continued providing EA with assistance and support with her studies, in a way that he maintains he does for all his students. On 8 March 2020 EA expressed a wish for the romantic relationship to cease and for a normal professional relationship to resume, but was equivocal about that so that communications after that were not wholly work-related. On 16 March 2020 EA first sought help from the Respondent's Tell Someone support line, but remained equivocal about the relationship and it was not until the end of April that she raised a formal complaint and Mrs Terry was appointed to investigate.

31. We now deal with certain aspects of the relationship in more detail.

32. In early December 2019, EA approached the Claimant for a second opinion on her final year dissertation project. Their relationship began with exchanges of emails and discussions about her dissertation. The Claimant provided her with books and advice. These sorts of exchanges continued in January 2020. They also met to discuss her dissertation in various public spaces such as café, restaurant and library.

33. EA submitted her dissertation in January 2020 and after that they met for lunch on Saturday, 25 January 2020, when they talked through the dissertation and how it could link to her final year project.

34. During February 2020 their communications intensified. On 8 February 2020 they visited the Sky Garden. EA linked arms with the Claimant, she says when rushing out of the tube. The Claimant set up a Teams channel specifically to communicate with EA on 9 February 2020. Communications on Teams from this point on are intense both during the day and late at night. They cover topics related to EA's final project and personal matters.

35. On 13 February 2020 they went for dinner and on 14 and 15 February 2020 they exchanged poems, the Claimant having pointed out in a Teams message at 7pm on 14 February 2020 that it was Valentine's Day (p 452).

36. On 19 February 2020 the Claimant declared his love for EA, saying he could imagine her in a Chinese wedding dress and that he wanted to get married in the future. EA also declared love for the Claimant, although in her complaint she says that she felt uncomfortable with this conversation.

37. On 25 February 2020 EA told the Claimant she was experiencing thoughts of self harm and mental health difficulties in the course of a conversation in which she also asks to meet with him for a portfolio review (pp 491-498). He had previously shared with her that he was depressed and in this conversation he referred to that again and shared that he had also self-harmed (p 496).

38. Between 26 and 28 February the Claimant wrote a brief for EA's project.

39. On 29 February 2020 EA asked to meet the Claimant and they had dinner, after which they kissed. In EA's complaint she alleged that the Claimant had initiated this and she had 'eventually surrendered'. The Claimant in his disciplinary hearing denied 'making advances', that he was 'not forceful' and it 'was mutual', which we take to be acceptance that he initiated the kiss, but denial that there was any prevarication or resistance by EA.

40. On 1 March 2020 the Claimant was invited by EA to give her a tutorial at home.

41. On 2 March 2020 EA asked the Claimant to come to her house again and read him a document (referred to as a 'recipe book') telling him she loved him but was conflicted between her feelings for him and her then partner (transcript at p 1091). They kissed again.

42. They continued communicating between 3 and 5 March 2020, during which time the Claimant (on 3 March) bought EA a ticket for a flight to New York for a time after she would have graduated. This was bought as a gift for her, but the Claimant hoped that he would be in New York too if his paper was accepted for a conference and funding made available. Then EA suddenly stopped communicating.

43. On 6 March 2020, the Claimant admitted that he had driven to EA's home, and waited outside her house hoping to see her as he was worried about her. He subsequently sent lengthy personal messages to EA (pages 612-624 of the bundle).

44. On 7 March 2020, the Claimant sent a message to EA (p 620) in which he made clear that although he was concerned about the impact of strikes on other students *"most of the time, I am thinking about you. How can I help you in your project".* He said he had revised and restructured the briefs they had discussed so far, *"making a custom build booklet to help you in a pragmatic way. Like what I did to my students this morning."* We note that the custom build booklet appears to be the Claimant providing to EA the same assistance as he has provided to his own students. He said he was thinking of showing her the top students' work in her studio so that she would not feel 'so behind'. This appears to have been a personal offer to her. He acknowledged that *"At the end of the day, it has been me causing you all the distress. A tutor has caused a student in such stage. In UAL code of practice, I should be sacked by now. It is what it is. Well, let it be. I just want to help you and be motivate by seeing it potential."* He went on to refer her to additional books and resource materials to help her. The Respondent submitted that this particular message showed self-knowledge on the part of the Claimant that he had breached professional boundaries with the Claimant, but the Claimant did not accept this in oral evidence, and we note that the message is ambiguous. It could be read as meaning just that a tutor ought not to cause a student distress and, flippantly, observing that he could be sacked for upsetting a student to this extent.

45. Messages on 8 March 2020 (p 621) indicate that EA had told him she did not want to continue with a personal relationship, and wanted some 'space'. The Claimant told her that he was continuing work on her project booklet and he sent her the words of a psalm saying that *"God loves you, he wants to help and so do I. I need your help as well as I have never experience such things before"*. EA replied (p 624): *"You must stop contacting me at all if not for strictly university/Professional matters. The situation has been badly affecting my studies, my project and therefore undermining my future. I am concerned as I strongly believe you need professional help, and to talk to someone. Although, if this situation does not stop I'll find myself forced to ask for help at the university. Help which I already need."* The Claimant in response apologised and wrote *"thank you for this warning and I truly admit this is unprofessional. I will stop contacting you"*.

46. EA's next message was on 12 March 2020, *"I'm drowning"* (p 625), to which the Claimant understandably responded, but kept his messages professional at least initially until it became apparent that EA was equivocal about remaining professional.

47. On 15 March 2020 EA asked to meet the Claimant again and they arranged to meet on 17 March 2020. On 19 March they made arrangements to go somewhere together and EA asked him for a lift. It was during this period that

EA brought a bottle of her hair to give to the Claimant because he had said that he liked to smell her hair.

48. On 20 March 2020 they did a site visit together.

49. Between 21 and 24 March 2020 they continued to communicate on academic topics until the Claimant ceased communication from 24 March.

50. Between 24 and 31 March, EA sent numerous messages, culminating in a plea for him to contact her and attempts to call him at least nine times.

51. On 4 April the Claimant wrote an emotional 'good bye' message (p 639) describing her as his *"one and only love"*.

52. From 5 April to end of April they continued to communicate mostly on academic topics (but not exclusively).

53. At the end of April 2020 EA complained.

54. It is convenient to record at this point that the Claimant's position is that he provided no more assistance to EA than he provided to his other students, and that there was a failure by the Respondent at any stage either to consider the evidence of this that was available or to investigate it further. Ms Mallick has referred to much of this evidence in closing submissions, and we have considered the pages she has referred us to. Some of those pages do not evidence work with other students, but refer to discussions the Claimant and EA had about published books and work by other professionals (such as Walmer Yard: p 461), but it is clear from Teams Diary Entries on those pages that the Claimant did have tutorials with other students, including students not formally allocated to him, and there is reference on pp 448-449 to the Claimant working late with his tutorial group as he is so keen for everyone to 'nail' their projects.

55. It is thus clear that the Claimant does engage enthusiastically with other students about their work as well, although there is no evidence before us of him developing the sort of intense relationship that he developed with EA with any other student. We also observe that the Claimant was in some messages at pains to make clear to EA that he was giving more attention to her work than that of other students. His message of 7 March 2020 that we have quoted above is one example. There is another example at p 660 that is relied on by Ms Mallick. This is sent in reply to EA who has written (p 659), *"The fact that I'm not one of your students shouldn't have made you feel anymore entitled of treating me any differently from them"*. In response, he explains that he 'helps everyone who comes to him', that he has also set up a Teams page with another student in her studio and that he has also been providing *"support to her as to you* ***although in different level if you know what I meant****"* (our emphasis).

56. We also record here that the Claimant has also brought evidence of references and character statements from other students, all of whom clearly

regard him as a great teacher who really cares about his students and who puts a lot of effort into helping and teaching them.

The Respondent's policies

57. The Respondent's Personal relationships Policy was created at the end of 2018. The key parts of the policy are as follows:-

> **1. Introduction**
> …
>
> The university relies upon staff to support and protect its professional integrity, reputation, and to respect the boundaries between personal and professional life, at work and when acting on the university's behalf or attending related social occasions. It is recognised that personal relationships can develop in the work and academic environment. In situations where there is a personal relationship, the member of staff is required to:
> declare this confidentially
> take any other steps to avoid any actual or potential conflicts of interest, misuse of authority or inequitable treatment of others.
>
> **4. Definitions**
> In the context of this policy, a personal relationship is defined as:
> a marital or family relationship
> a romantic/sexual/emotional relationship
>
> Personal relationships are not restricted to these examples and anyone who considers that they are in a relationship that may result in a potential conflict of interest should declare it as outlined in Section 6.
>
> **5. Potential conflicts of interest**
> Conflicts of interest may arise where an opportunity exists through a personal or professional relationship at work, or when representing or acting on behalf of UAL in a work-related or social context, or where 'dependency' may arise from a financial relationship that allows or enables an individual to benefit from:
> …
> favouritism in relation to … advancement … at study
> …
>
> **6. Disclosing personal relationships**
> Where a personal relationship exists or develops, the individual must notify their line manager who will consider any potential conflict of interest. Where there is potential that a conflict of interest, breach of confidentiality or unfair advantage may occur as a result of a personal relationship, the manager will notify HR and the relevant senior manager or Dean. Any concerns should be discussed with the HR Consultant.
>
> Staff who are uncertain about whether they should take action regarding a personal relationship should seek guidance in confidence from their HR Consultant. All information disclosed will be held confidentially on the HR system and will not be shared further without the individual's consent.
>
> **8. Personal relationships between a student and member of staff**
> It is the responsibility of staff to recognise and adhere to the professional and ethical responsibilities inherent in the staff/student relationship whether in a study or social situation and to be mindful of our shared duty of care. UAL's expectation

of staff working with and for UAL is that they should avoid becoming personally involved with a student.

All UAL staff are in a position of trust but it is particularly important that those who teach or work closely with students or other young people and vulnerable adults understand and maintain appropriate professional boundaries required to protect and safeguard their interests both at work and in social situations outside work.

Any member of staff who is in a relationship with a student must not be responsible for, or involved in, the marking and assessment process, supervision, tutorials, teaching, pastoral care, or other university-related activities relating to that student.

12. Breach of policy and duty of care

A breach of this policy by a member of staff, student or third party may result in disciplinary action where:
 it is found that confidential information related to work or study has been shared inappropriately within a personal relationship, or
 the relationship is not disclosed and results in an unfair advantage or disadvantage to either party.

58. The Respondent also has Professional Boundaries Guidance, the key elements of which are:

Setting and maintaining professional boundaries
When you meet a student on a one-to-one basis for the first time, it is important to establish professional boundaries and to maintain those by being clear in:
 explaining your role and what the discussion will cover in the session
 confirming how and when you can be contacted
 establishing whether the individual has specific academic support needs, signposting on or helping them to access the relevant team
 arranging meetings in a neutral location, maintaining a distance in where you sit, being in a visible or open space or keeping the door open
 challenging behaviours that are inappropriate whether this relates to the degree of familiarity, the way you are spoken to or other behaviour that makes you feel uncomfortable
 respecting students' right to privacy around disclosures and the potential need to share information disclosed by a student to a third party. Normally you will need the student's consent (eg. if they declare a disability or health condition that you may want to refer them for support.)
 declining offers of gifts, hospitality or other benefits in accordance with the Gifts and Hospitality Policy.

If a student asks for help that is outside your role and expertise:
 be aware of the range of support UAL offers to students, signpost them to the appropriate team
 seek advice either from colleagues or from external resources to improve your understanding of the issues the student is facing, what support UAL has available and how you should support them

…

Social events or other meetings outside UAL
Meeting for study/tuition
UAL expects staff to arrange to meet students for study purposes at a UAL venue or other open, neutral location. It is not appropriate for staff to meet students in their home or at your home.

Personal relationships
In some cases, relationships develop between students and staff. While UAL does not seek to be prohibitive, UAL expects staff to avoid becoming personally involved with students. All staff working for and on behalf of UAL should be mindful of their professional and ethical responsibilities and our shared duty of care to students. Where, a personal relationship exists or develops, it must be disclosed as outlined in the Personal Relationships at UAL policy and steps taken to avoid any potential conflict of interest.

Dealing with inappropriate behaviour
As a member of staff, it is your responsibility for setting and maintaining appropriate boundaries with students as you are in a position of both power and trust.

However, there may be situations where professional and personal boundaries come under pressure from a student's behaviour and which require you to make a judgement of how best to proceed. Examples of inappropriate behaviour may include:
 overfamiliarity or intrusion through, for example, unacceptable numbers of emails/calls or visits
 inappropriate remarks
 expressions of anger, frustration, threats or coercion
 verbal or physical harassment or intimidation

If you feel uncomfortable or have concerns about a student's behaviour be open about this and re-establish professional boundaries. In some cases you may need to:
 advise the student that their behaviour or remarks are inappropriate
 remove yourself from the conversation or meeting/event
 refrain from responding to antagonistic or attention seeking behaviour, as any response may cause further frustration, send the wrong signals and exacerbate the situation
 respond to the study-related issues and confirm that you are not able to respond on personal or other issues raised but can signpost/seek advice/respond shortly
 inform the student that you will need to share the email with your manager if you feel uncomfortable about the behaviour, for example, if it seems threatening or coercive
 keep a note of your concerns
 seek advice from your human resources consultant or your manager

Some behaviours may be symptoms of underlying problems or health issues and the student should be encouraged to access specialist advice and support.

Persistent inappropriate behaviour needs to be managed and a plan or potentially an agreement may need to be put in place around behaviours and interactions, so that there is a shared understanding and expectation about what appropriate behaviour means.

Complaints
…
It should be noted that inappropriate behaviour may become a disciplinary issue. In serious cases, such as, excessive drunkenness, the use of illegal drugs, unlawful or inappropriate harassment, violence, serious verbal or physical abuse of either another employee, student or a third party, this may constitute gross misconduct and potentially result in dismissal for staff or exclusion for students.

59. Neither policy or guidance was well publicised. We have no evidence that anyone was informed about the introduction of the policy or guidance at all. Although she was not absolutely certain, Ms Schechter thought she had not

been aware of either document prior to her involvement in the Claimant's case. Ms Joughin in the Claimant's disciplinary hearing (p 708) said that many course leaders and directors did not know about it, and the first she had heard of it was when it was breached in 2019 (a reference to G's case with which we deal below). The Claimant for his part denies having been aware of either the policy or guidance, although he personally had in fact been told in the August 2018 letter that they were forthcoming.

60. The Respondent also has a disciplinary policy (p 76). The disciplinary policy provides for four stages of sanction: 1) oral warning; 2) written warning; 3) final written warning; 4) dismissal. It provides that the Respondent may move straight to dismissal in cases of gross misconduct. Breach of the personal relationships policy or professional boundaries policy is not identified in the (non-exhaustive) list of gross misconduct in this policy, and nor is 'inappropriate professional conduct', but sexual harassment is. We mention this latter point because it is potentially significant as the Respondent ultimately 'dropped' an allegation of sexual harassment against the Claimant in favour of dismissing him for inappropriate professional conduct.

The disciplinary process

61. Mrs Terry (an external HR consultant investigator) was appointed on 1 May 2020. She has carried out over 100 investigations for the University.

62. EA had produced a formal complaint document at this point consisting of a chronology from which Mrs Terry quotes in her report. This original complaint does not appear in the bundle in separate form, but we accept that it must have existed at this early stage and accept Mrs Terry's evidence that she was provided with that complaint document at the outset, and sent further documentary evidence by EA during May and early June 2020.

63. By letter of 20 May 2020, the Claimant was informed formally of the complaint made about sexual harassment and inappropriate professional behaviour in relation to a student (p 199). He had previously been notified orally of the complaint by Adrian Friend on 5 May 2020. He was told that Mrs Terry had been appointed to conduct the investigation.

64. On 29 May 2020, EA provided a written statement in support of her complaint (pp 1087-1088). In her complaint, she explains that she initially approached the Claimant for a second opinion on her dissertation. She complains that he had blurred his professional and personal life and felt that his behaviour and disclosure of information regarding UAL, other members of staff and students had put her in a situation of pressure and distress. She stated she felt the relationship was an imbalanced one, where she was worried about what the impact might be on her degree and career. She stated she considered he had disregarded the Personal Relationships Policy and 'possibly' the Bullying and Harassment – Students Policy. She asked for a further Extenuating Circumstances extension for completing her project work and suggested that the Claimant needed mental health support. We observe that there was never

in writing a clear allegation of harassment by EA. Nor was there in her written complaint documents any acknowledgement of the extent to which she became infatuated by the Claimant and 'pursued' him, particularly towards the end of March when she was evidently very conflicted about whether or not to end the relationship. However, these aspects of the facts were uncovered by Mrs Terry in the course of her investigation.

65. Mrs Terry met first with the Claimant on 15 June, then again on 17 June (p 204) and 19 August 2020 (p 300). The meetings were recorded and the Claimant was provided with a transcript, which was sent to the Claimant with the investigation report. The Claimant did not read it as he felt unable to as he was so depressed. The transcript shows that Mrs Terry checked at the start that he had read EA's statement. She then proceeded to ask him about what had happened between him and EA in an open way. After some questioning, the Claimant accepted that he had had a brief romantic relationship with EA, they had touched physically, that he had imagined her in a Chinese wedding dress, that they had kissed like boyfriend and girlfriend, the relationship was not sexual, that he had said that "we want to get married" (but denied saying he wanted children), that he bought EA a ticket to New York as a gift, but hoping that he might be accepted to an academic conference there so that they could go together. He said (p 217) that he was conscious she was still a student, suggested they should wait until after she graduates and that he was providing her with a lot of support with her dissertation and her final project through Teams conversations, putting in resources, guiding her online conversations, in parallel with the personal relationship. He described a visit to the Sky Garden and photography gallery and that they went for dinner on 8 February, when they had a conversation about the dissertation, that was he thought as tutor and student. He confirmed that he had visited her home twice, for academic support. He made clear that so far as he is concerned he gives all his students lots of help, that he sees himself as supportive to all students.

66. Mrs Terry also interviewed EA on 20 July and another student (EB, who was EA's friend) on 6 August. It was suggested to Mrs Terry in cross-examination that she should have started her investigation by interviewing EA in order to understand what parts of the complaint EA wished to proceed with. However, Mrs Terry said that she felt she had a lot of material from EA and she considered it was appropriate to hear from the Claimant before proceeding further. Our own views on this point are recorded in our conclusions.

67. EA was accompanied to the interview by Marie, who was the person at the Students Union from whom she had first sought support. EA in her interview (p 263) confirmed they had been 'just friends' to the beginning of February. Mrs Terry put to EA the 'recipe book' that she had written, but that she had not provided previously. EA accepted that after asking him to cease communication unless it was professional, she had brought a bottle of her hair to give to the Claimant because he had said that he liked to smell her hair. She had asked for the meeting and at the end of March was still taking steps to keep the relationship alive. Mrs Terry asked EA at the end about sexual harassment and whether she really thought there had been

harassment. She said she felt that there had been (p 281) because she had not wanted all the attention, and had not looked for it in the beginning, but that it became a love story or infatuation and it was really painful.

68. To provide context, Mrs Terry also spoke to Ms Shechter (Course Lead – BA (Hons) Interior and Spatial Design) and Ms Armstrong Programme Director (who taught on a different course).

69. During the course of the process, the Claimant provided annotated comments on the complaint (p 1088). From this it is clear that he regarded EA as an active participant in the relationship, that it was a *"two way"* relationship in which they both fell *"in love with each other"*, that it was EA who invited him to her home on 1 March 2020, that as a 29-year-old student who was a student representative and had a partner, he felt she ought to have known how to set boundaries. He accepted that he had waited for her outside her house one night after she stopped replying to his messages because he was worried whether she was okay. These comments, which he wrote himself, are broadly consistent with what he said (in much more detail) in the investigation meetings with Ms Terry.

70. On 17 September 2020, Mrs Terry produced her investigation report (p 325). It is a thorough and detailed report that demonstrates even-handedness in its approach to the case through the care with which she tested EA on her side of the story and her findings as to the complex emotional nature of what had happened, and that EA had not been frank in her complaint in disclosing her role in the relationship. Mrs Terry dismissed the complaint of sexual harassment on the basis (we summarise) that the relationship had been developed consensually between consenting adults, that feelings were apparently mutual, albeit that EA had been inconsistent towards the Claimant, declaring her love for him and pursuing him, then telling him there should be no further communication other than on professional matters, but then seeking his personal attention again.

71. Mrs Terry did, however, find that the allegation of inappropriate professional behaviour towards a student was made out because his relationship with EA breached professional boundaries. She considered that the attention he gave EA and help with her project gave her an unfair advantage over other students and that he ought, in particular as a result of the meeting in August 2018, to have been aware that his behaviour breached professional boundaries.

72. She recommended that he face disciplinary proceedings in respect of that second allegation of inappropriate professional conduct.

73. Mrs Terry accepted in oral evidence that she had not looked at how the Claimant interacted with other students and whether he had given the Claimant more help than other students, beyond the evidence of that which appears in the investigation report through the Teams messages.

74. By letter of 26 October 2020 the Claimant was invited by Professor Crow to a disciplinary hearing to consider the allegations in the report. The report and appendices were attached. This letter suggested that sexual harassment was an allegation to be considered at the disciplinary hearing even though Mrs Terry had not recommended this be taken forward. We have not been given an explanation for why this happened or whose decision it was, whether it was Professor Crow's or someone in Human Resources. It was, however, accepted by the Respondent's counsel at the hearing that it should not have happened and that an allegation that had been found to have no case to answer in the investigation report should not have been included on the invitation to the disciplinary hearing.

75. The Claimant submitted a written statement in advance of the disciplinary hearing (p 696). In this statement, he accepted that he had entered into a romantic relationship with EA, and stated he had never done this before. He was very confused by the behaviour and signals from EA and suffered enormously as a result. The statement included the following:-

> The report finds a case to answer in relation to unprofessional conduct, but these allegations also rely on EA's evidence and her account.
>
> There was no sharing of marks or of academic information.
>
> There was not favouritism, across my teaching, I ensure that all my students are fully supported, and I can show that many other students in the course (even I am not teaching them directly) have asked me for tutorials over the past years. Evidence of such requests was provided during the investigation process. It was not unusual for EA to request support, even though I was not her tutor and was not assessing her work. She was not a student of mine requesting 'high levels of support'. Working in the course for such long period, we have never been advised a guideline about the level of academic support we should only provide.
>
> With UAL championing inclusiveness and commit to reduce the attainment gap across course. I have received an impression that we should always welcome and offer our help to our students. This should be fully understandable.
>
> The unprofessional behaviour she alleges is entirely about private meetings with EA, which were part of the relationship between us. I can see with hindsight and distance that I made errors in this and I deeply regret that, but these are not part of my regular professional academic life.
>
> I made the mistake of becoming romantically involved. This was completely unforeseen and unexpected by me. I was very confused by the behaviour and signals from EA and I suffered enormously as a result.
>
> I have never entered into a romantic relationship with a student before this, on 15 years of teaching at UAL. I would never allow myself to be drawn into a personal relationship again. I was not aware of the "professional boundaries" policy at this time - and having done research among colleagues since this case, I now have evidence that they do not know about the existence of this policy.
>
> I am a BAME staff member, with English as additional language. I have taught in the UK for more than a decade, but there is a large cultural divide involved.
>
> EA is a white, European and mature - in an established relationship of a civil partnership. As well, she and [EB] were student's reps and close friend.

> There is a balance of power here which is not simply that of teacher-student, and the situation was unique. I feel I was exploited, and the allegation of unprofessional conduct was a way of covering up the lack of evidence of the original charge of harassment.
>
> I work very hard to support all my students. … I do not have 'favourites'. …
>
> I acknowledge clearly that I made unintentional errors in my relationship with EA. I am now aware of the "professional boundaries" policy. I am very keen to do any training available and to receive support on this policy.
>
> I do not accept that my action is gross misconduct as defined in the UAL Disciplinary Policy.

76. When asked in cross-examination at this hearing to clarify what it was he was saying in this document that he regretted, he said that what he regretted was not waiting until EA graduated to have any form of romantic relationship. It was then put to him by Mr Ohringer, *"yes because it was inappropriate between lecturer and student"*, to which the Claimant replied: *"no because I needed to let her focus on what she was good at and let her do what she wants – and this has never been prohibited in the relationships policy – any form of personal relationship is not prohibited"*.

77. The disciplinary hearing took place on 23 November on Teams. It was chaired by Professor Crow. Mr Culver (Human Resources (HR) Advisor) was present. The Claimant attended with his union representative, Ms Joughin and a notetaker was also present (p 699). Notes of the meeting were taken on a summary basis by a notetaker who was present. No recording was made of the hearing.

78. In the disciplinary hearing, Professor Crow began by noting that this was a "Stage 4" hearing, bringing with it the potential sanction of final written warning or dismissal. We observe that Professor Crow either misspoke or was mis-advised at this point because if, as he said, the sanctions being considered were either final written warning or dismissal this was under the policy a "Stage 3 **or** 4" hearing, not a "Stage 4" hearing. We reject the Claimant's argument that this indicated pre-determination, however. We have not heard evidence from the late Professor Crow, but we consider it evident both from the conduct of the disciplinary hearing and what we can see of his conduct afterwards that Professor Crow did not approach the disciplinary hearing on the basis that dismissal was the only possible sanction.

79. Professor Crow did not at the hearing clarify that the sexual harassment allegation was not being considered and at points 45 and 47 (p 704) he asks questions of the Claimant about whether he had tried to kiss EA and she had refused but (quoting the words of her complaint) 'eventually surrendered'. We infer that, however the harassment allegation came to be included (whether through mistake or otherwise), Professor Crow asked some further questions relevant to it because he was troubled as to whether the harassment allegation had been properly rejected by Mrs Terry and wanted to explore for himself what appeared on the face of EA's complaint to be a 'proper' allegation of unwanted sexual conduct. We also observe that the questions

were also relevant to the remaining allegation of inappropriate professional conduct because the extent to which the Claimant 'drove' the development of the relationship or, even, merely failed to take steps to avoid the development of the relationship, was relevant to whether the Claimant was acting appropriately to maintain professional boundaries.

80. In the course of the disciplinary hearing, the notes record that the Claimant 'did not deny his mistake' (line 8 of the notes), but argued that it was difficult to understand professional boundaries, that cultural differences were important and that his regret was 'doing something that I did not know was wrong and there was no intention of harm'. He questioned how boundaries could be known and how to learn where to stop (line 37). He expressed regret about engaging with exchanging poems on Valentine's Day (39). He said he would not go to a student's home again because he put himself in a vulnerable situation (55), but did not see a difficulty with meeting in a pub and was unsure about boundaries in terms of locations for meeting students, that he would meet students on Saturdays and wanted to help them (72). He said he had not done anything when EA raised mental health concerns as he did not know what procedures to follow (60). He said that the 2008 incident had been *"very small"* and did not acknowledge any wrongdoing or learning points from that (80).

81. At the end of the Claimant's cross-examination at the Tribunal hearing, the Claimant was asked what it was he was expressing regret for in his disciplinary hearing. He replied: *"the pain and the suffering that I have, the hurt of feeling, the trust I put on the student"*. The panel asked him further questions about this and he added that what he was sorry for was, *"getting very personally, emotionally involved in terms of trust because of the trust I give to all the students – my trust and my care there was no difference to EA and the other students, I cannot draw a line, my motivation to help EA was not because of my romantic relationship, it was purely them wanting to learn – I feel very bad because I make it to hurt myself which I can avoid"*. The panel asked: *"what are the errors"* and the Claimant responded *"putting too much trust on my student, a loss of trust"*. The judge asked him specifically about lines 38 and 39 of the disciplinary hearing notes where he was asked about the exchange of poetry between him and EA on Valentine's Day. He was asked what it was he was saying he would never do again and he said, *"I wish I had not put that trust in the student – I trusted the student would know that I am just kind to everyone – but when the kindness is misinterpreted and manipulated, that is hurt and I would never do it again"*.

82. On the Claimant's behalf in summing up at the disciplinary hearing, Ms Joughin accepted that he had made errors in allowing himself to enter into a personal relationship with his student in a work situation, but argued that there was mitigation and that it was important to be consistent in approach to such cases (86). Ms Joughin went on to try to remind Professor Crow that there have been other similar cases in college (alluding implicitly but not expressly to G's case, with which she and Professor Crow had also been involved and with which we deal with below). She evidently considered that G had 'got off lightly', and she argued forcefully (as she did in her evidence

to us) that there should be consistency in approach. She also complained about the reference to the prior 2008 incident and 2018 conversation.

83. By email of 25 November 2020, Mr Culver emailed Professor Crow asking him if he had made a decision in the Claimant's case yet and attaching template letters for the alternatives of warning/final warning or dismissal. Ms Mallick for the Claimant suggests that this was improper influence by human resources and complains that the actual attachments to this email have not been included in the bundle, but we consider it obvious that the letters that follow at pp 711-712 are the attachments but that they just have an auto-updating date feature so have the date the letters were printed for the bundle on them. Likewise, Mr Culver's subsequent email of 27 November 2020 (p 714) shows no improper pressure, he simply states that he understands from speaking to "Michelle", who it appears Professor Crow has also spoken to, that he is likely to pursue the dismissal route. The Claimant was informed there was a delay to the outcome. We observe that it is evident from this correspondence that Professor Crow had not pre-determined the outcome of the disciplinary hearing as Mr Culver left not knowing what Professor Crow's decision was and Professor Crow was evidently still deliberating over the following days.

84. Professor Crow then did reach his decision to dismiss. However, as the Respondent's internal processes require that the Vice-Chancellor formally take the decision, by memo of 27 November 2020, Mr Culver (on behalf of Professor Crow) recommended to Nigel Carrington (Vice-Chancellor) that the Claimant be dismissed for misconduct (p 722). Ms Mallick argues that the fact that Mr Culver drafted this document shows improper involvement by him in the dismissal decision. We disagree. The documentary evidence is consistent with Professor Crow having taken the decision and Mr Culver having drafted the memo on Professor Crow's instructions. In the absence of any oral evidence to indicate that was not what happened, we find that the memo properly reflected Professor Crow's views. The memo recommends dismissal on the basis that the relationship had crossed the bounds of a professional relationship, but no attempt had been made to manage the situation or follow University policy, despite the Claimant having been specifically made aware of the policies in the meeting with Professor Crow and Amanda Harcus in August 2018. By email of 30 November 2020 (p 724) Mr Carrington responded to Mr Culver (copying in Professor Crow and Ms Patel of HR) *"I am very sad to read this email because I remember very clearly that [the Claimant] was the subject of a disciplinary in 2018 and I equally clearly remember that he was counselled and warned. Accordingly, I endorse the recommendation for [the Claimant's] dismissal"*. No one appears to have responded to correct Mr Carrington's misapprehension as to the date of the disciplinary, which was 2010 not 2018 – 2018 being the year of the 'counselling' conversation.

85. The disciplinary outcome letter was signed by Professor Crow and sent to the Claimant dated 1 December 2020. On allegation 1 (sexual harassment), the letter noted that the investigation report had concluded there was no evidence of this, and that no further evidence had been revealed in the

disciplinary hearing, but nonetheless observed *"I am not entirely satisfied that the relationship between yourself and the student was not encouraged in the direction of a personal relationship by your actions"*. As to allegation 2 (inappropriate professional behaviour), we need to set out exactly what is stated in the letter. As Professor Crow unfortunately died last year, we only have the documentary evidence to show what was in his mind when he took the dismissal decision. The letter provides:

> The investigation report concludes that there is 'significant evidence' to support this allegation. This was confirmed at the disciplinary hearing as you were clear that you had made mistakes and you had clearly breached professional boundaries. Your responses to the interview with the investigator and the interview at the hearing also reveal that in the majority of interactions you were acting within a tutor/student relationship. This is supported by evidence of correspondence during this period between yourself and the student using university communication channels. I also conclude that when personal feelings were revealed which were beyond a professional relationship, you made no attempt to manage the situation or follow university guidance.
>
> We discussed the matter fully at the hearing and, having taken your explanations into account, I have concluded that there is sufficient evidence that your conduct constitutes gross misconduct.
>
> In mitigation you offer the explanation that you were not aware of policies or protocols relating to professional conduct and you did not seek guidance because you felt your relationship with your line manager was not a positive one.
>
> In making my decision I have considered that you were specifically made aware of the need to observe professional boundaries at a meeting in August 2018 with a senior member of the Human Resources team. I was present at this meeting and recall it being made very clear that the university had expectations around the role of its staff and their relationship with students. During this meeting you stated that you had recognised a number of learning points for you as an academic and as a result you had changed your approach and interactions and boundaries with students and the matter had left you with a more cautious nature.
>
> This meeting was followed by formal correspondence to yourself acknowledging your comments and reminding you that by September 2018, there would be a Relationship Policy and a Professional Boundaries guide for all staff, which you had welcomed when mentioned at the meeting.
>
> I conclude that you were fully aware that there were policies available covering staff conduct with students and guidance was available on professional boundaries. During the period covered by the allegations there was ample time to source these documents, had you not already done so, or to seek advice from a number of individuals and services in the university. In light of this I feel a warning has already been given and that dismissal is the appropriate sanction.
>
> This letter therefore gives formal notification of the termination of your employment without notice and this decision has been ratified by Nigel Carrington, Vice Chancellor.
>
> The final decision is to terminate your contract of employment at UAL for the reasons stated above.

86. We observe that Professor Crow did not refer in the disciplinary outcome letter to the Claimant's failure to react appropriately to mental health concerns about EA. We further observe that the inappropriate professional conduct for

which the letter states the Claimant was dismissed was because of his failure to maintain professional boundaries in accordance with the guidance, not because Professor Crow considered his conduct had unfairly advantaged EA.

87. The Claimant appealed by letter of 14 December 2020 (p 728). He argued that the sanction was too harsh, that the historic matter from 2008 should not have been taken into account and that Professor Crow's independence had been compromised by being involved in the 2018 #metoo 'follow-up exercise' (i.e. the conversation in August 2018). He provided further submissions in support of his appeal in a statement dated 2 February 2021 (p 753). In this he states: *"There is a question on the consistency of the outcome in any similar case. I believe the decision to issue the disciplinary was disproportionately harsh. The consistency of treatment between employees is yet to be evidenced to justify my dismissal is a fair decision."* He suggested that ethnicity may explain the difference in treatment as he is *"one of … very few"* academics of *"South East Asian descent"*. The submissions focus mainly on what he perceives to be the unfairness of referring back to the 2010 warning and/or counting the August 2018 conversation as a 'warning'. He complained about the lack of publicity and training on the policies. He also argues that there was a failure to take into account the poor nature of his relationship with his line manager, Ms Schechter, his cultural background and his length of service.

88. Professor Crow by report dated 3 February 2021 provided a written response to the Claimant's appeal. This on its face makes clear that Professor Crow unequivocally considered the harassment allegation not to be made out, and that he had not taken the 2010 warning into account, only the August 2018 meeting at which the forthcoming Personal Relationships policy and Professional Boundaries guide had been drawn to his attention. As to the proportionality of the sanction, Professor Crow wrote this:

> In making my decision I felt it was reasonable to assume that Mr. Shing was fully aware of the issues around professional conduct and had made no attempt to manage the situation as outlined in the guidance. I was also left with serious concerns about Mr. Shing's ability to manage his professional behaviour and concerns about the well-being of students in his care.
>
> Throughout the Hearing, Mr. Shing elaborated on how he has often met students outside the college in social settings such as coffee shops and bars. These meetings took place after #MeToo, where staff would have been more aware of the potential for being accused of inappropriate conduct. This caused me particular concern as Mr. Shing did not seem to pay any attention to the notion of professional boundaries nor fully consider the professional nature of the tutor/student relationship and the effect his actions might have on the emotional well-being of his students.
>
> I do not see that length of service or cultural background are mitigation. Mr. Shing's length of service at UAL would suggest that he was fully conversant with the support networks available to both students and staff, he would have known where to source university documents and had sufficient knowledge of the university to seek guidance beyond his immediate line manager if needed. Although English is Mr. Shing's second language he is a fluent English speaker and I would reasonably assume his service had made him aware of

> the need to observe professional boundaries in the cultural context of UK Higher Education.

89. Mrs Woodhams was the governor appointed to chair the appeal panel. She has sat on nine dismissal appeals before. She thought that she had upheld three appeals previously although accepted it may have been two. She did not know Professor Crow well. She had only met him in meetings where there always 10-20 other people present.

90. The appeal hearing on 18 February 2021 (p 787), was conducted by an appeal committee comprising Mr Fison (University governor), Ms Mitchell (senior staff member and Director of Health and Safety) and Ms Woodhams (an external governor) as chair. The appeal meeting minutes show it last 2.5 hours. The committee then adjourned for 45 minutes to consider their decision and then announced it. At the meeting, Professor Crow presented the management case and the Claimant and Ms Joughin responded.

91. The Claimant accepted that he had developed personal feelings for EA, although there was no sexual relationship. He accepted that he over-stepped the boundary of friendliness and professionalism with this particular student. He is also noted as accepting (p 790) that his conduct could be perceived as giving EA an unfair advantage as constituting extra tuition (although he denied when questioned by the judge at this hearing that he had said or meant this). The notes go on to record that he said it was usual for him to meet up with students who were not part of his tutorial group and that he was regarded by students as approachable and knowledgeable. He said that he was also a victim as he had lost the job he loved and had been doing for 14 years.

92. By letter of 4 March 2021, the Claimant was informed that his appeal had not been upheld (p 792). The outcome letter states that the appeal committee found no evidence of the 2010 warning being taking into account in the decision, that the purpose of the 2018 meeting was not to revisit that allegation but to give guidance. The committee acknowledged that the Relationships Policy and Professional Boundaries Guidance were not in existence at the time of the August 2018 meeting, but considered that he had nonetheless been forewarned of their existence and could have sought guidance about them if unclear. The committee noted that the Claimant had continued to conduct meetings with students in social settings such as bars and cafes, that he had failed to report the 'increased vulnerability' of the student (which we take to be a reference to her self-harming) and that they *"shared Professor Crow's concern that he could not trust [the Claimant] to respect professional boundaries with students in the future"*. The committee noted that Professor Crow had responded to the Claimant's complaint that his length of service and cultural background had not been considered, and that it was reasonable given his length of service and fluency in English that he would be aware of the need to observe professional boundaries with students. The committee did not consider that it had adequate evidence of the Claimant's difficulties with his line manager, but concluded that the Claimant could have escalated to other senior staff members if he did not

wish to speak to his line manager. The committee noted that the examples of gross misconduct in the policy were not exhaustive and that no evidence of discrimination had been produced. The committee dismissed his complaint that the decision was not proportionate. The committee also considered that it did not matter that Professor Crow was involved in the 2018 meeting.

93. In cross-examination at this Tribunal hearing, it was put to Mrs Woodhams by Ms Mallick that the Respondent's policy was personal relationships were *"not prohibited – to be avoided but not prohibited".* Mrs Woodhams agreed, but said her understanding was that *"you need to be telling other people about it and taking advice".* Mrs Woodhams elaborated that what she understood to be the inappropriate behaviour by the Claimant was the support he gave to EA, including the purchase of an airline ticket, that was *"way more than tutor should provide to a student"*, and that EA *"had started to have mental health issues and he did not report those"*. When asked how she formed the view that he had given EA an unfair advantage when there was no consideration of the amount of help that the Claimant gave to other students, she said, *"he could not offer that level of support to other students because there are not enough hours in the day – we do not do any kind of analysis to make that judgment but it was our opinion"*.

94. Challenged on the fact that inappropriate professional conduct is not listed as gross misconduct in the Respondent's policy, Mrs Woodhams said: *"it would be impossible to come up with a definitive list of everything that constitutes gross misconduct … there will be an expectation that people will understand what is acceptable behaviour and what is not – you cannot put every example in writing in a policy"*. Regarding the historic 2010 incident, Mrs Woodhams said that the fact that the committee knew about it did not mean that it had influenced their decision. What had influenced their decision was the fact that as a result of the 2018 meeting he had had knowledge that the policies were coming. (We interpolate here that, as a matter of credibility, we accept Mrs Woodham's evidence that, consciously, the appeal committee directed themselves not to treat the 2010 historic matter as a reason contributing to dismissal, but as relevant only to the Claimant's knowledge of what was right and wrong and the notice he was given about the policies. We accept her evidence because it is apparent from the documents that this is the 'line' that was consistently advised by HR and there is nothing in the documents themselves to indicate that either Professor Crow or the appeal committee failed to heed that advice. We consider as part of our conclusions whether, nonetheless, there was some improper unconscious influence as result of the historic matter.)

95. Finally, Mrs Woodhams stated that she had not considered that the Claimant's length of service and otherwise unblemished disciplinary record meant that there should be a different outcome, the committee had been dealing with the appeal points raised. Likewise, the committee had not considered how anyone else had been treated by the Respondent in similar circumstances because no evidence of other cases had been presented to them and she would have regarded such evidence as confidential in any event.

Comparator 1: G

96. G was a British National. We do not have evidence of his ethnicity, race or national origins, but we infer from his name, and from the reference to "BAME" in the investigation report, that he was not White and we know from the Claimant that he was not Chinese.

97. G was the subject of allegations in relation to one evening at a pub in June 2019. Allegations were made by three students that he had, after the final degree show, but before final work was marked (for which he would be responsible), accompanied them to the pub after an informal social event, played 'spin the bottle' and kissed a student when the bottle pointed to them in full view of other students. The allegations were investigated and a report produced in August 2019. The individual who had been kissed did not complain and was not interviewed.

98. The investigation report is exceptionally unclear. Indeed, as we were struggling with the document ourselves, we asked counsel to produce a document setting out what allegations were considered in the report and what the outcome was. Counsel were able to agree that seven of the eight allegations had been upheld, being allegations of: 1) "You have misused your power due to being in a position of authority"; 2) "Students have complained that they witnessed students being subjected to sexual harassment"; 3) "There has been inappropriate conduct relating to students"; 4) "Your conduct has brought reputational damage and potentially brought Chelsea College of Arts and University of Arts London into disrepute; 5) "There was inappropriate physical touching"; 6) "Dishonesty"; 7) "You have breached the terms and conditions of your suspension from duty on full pay". On the eighth allegation, ("You have coerced and harassed a witness and framed a student"), counsel were unable to agree what the report had concluded, Ms Mallick arguing that there were clear findings, while Mr Ohringer considered there were not.

99. We observe that on allegation 2) it appears that it may have been upheld (p 171) on the basis that the investigator considered the other students had been subjected to sexual harassment by seeing G kiss a student, even though there was no evidence that the conduct was unwanted by the student as the student herself had not complained. We accept that in principle a finding of sexual harassment as a result of 'unwanted' observation of sexual conduct between other people is legally possible, but it is an unusual type of harassment and the investigator does not in the report acknowledge the potentially significant difference between what began as an allegation that the conduct of G amounted to sexual harassment of the student he was alleged to be kissing, and ended up apparently as a finding that the harassment was of the other students who witnessed the incident.

100. We further observe that allegation 6) of 'dishonesty', which was added during the investigation, was at heart a 'parasitic' allegation in that it was added

because G was denying what had happened and the investigator believed the other witnesses and not him and therefore decided he was lying. Indeed, most of the allegations come down to the same thing: G kissed a student for a prolonged time during a game of spin the bottle: that was the misuse of power (allegation 1), the subject of allegation 2, the inappropriate conduct (allegation 3), the source of reputational damage (allegation 4), the inappropriate physical touching (allegation 5), and the dishonesty was (the investigator found) lying about this (allegation 6).

101. Allegation 7 (breach of terms of suspension) was different and linked to allegation 8 (coerced and harassed a witness and framed a student). We agree with Ms Mallick that the report on the face of it upholds allegation 8 as it is essentially a 'composite' of the other allegations, but it is unclear what happened with this allegation. It appears that the basis of it was G sending a text to another lecturer BC telling him what he was going to tell the investigator, part of which BC judged to be false on the basis of what other students had told him and possibly what G himself had told him previously (p 162), and that G told BC not to talk to PE. Although BC and PE were both interviewed as 'witnesses' to the incident, neither of them were actually present on the occasion in question as the report confirms (p 153) that G was the only member of staff present on the evening in question. That fact, although stated near the beginning of the report, is not referred to again, and members of staff interviewed are referred to as 'witnesses' to the incident elsewhere in the report despite not having been present.

102. G was suspended during the investigation, which lasted from June 2019 to November 2019. G was then invited to a disciplinary hearing, chaired by Professor Crow. This was done on the basis that the allegations amounted to gross misconduct. At the hearing, Professor Crow reduced the eight allegations from the disciplinary investigation to two main points, which in our judgment properly captured and summarised all of the overlapping issues and allegations in the investigation report: i) inappropriate conduct relating to students, specifically a) socialising with students at a pub on 7 June 2019; and b) afterwards on the same evening, kissing a student in front of other students; and ii) breach of the terms of suspension. The significant element of the allegations omitted was the allegation of dishonesty, but as we have observed that allegation could only stand if G was lying, and Professor Crow was not satisfied that he was lying.

103. Although the Respondent's relationships policies were referred to in the investigation report, the notes of the disciplinary hearing indicate that Professor Crow did not explicitly refer to them in the disciplinary hearing. The notes do, however, show that Professor Crow began the hearing by asking G about a previous 'talking to' he was alleged to have had from his line manager in 2016 about not socialising / going to the pub with students.

104. The outcome of the disciplinary hearing (sent to G by letter of 9 December 2019) was that the allegation of inappropriate conduct with students was upheld by going to the pub to socialise when he was due to engage in final year assessment of the students the following week. The kissing allegation

was not upheld on the basis that the allegation was denied and there was insufficient evidence. He was also found to have breached the terms of his suspension by meeting a work colleague and discussing the subject matter of the investigation. He was issued with a First Written Warning to remain on file for one year.

105. Ms Joughin represented G in his disciplinary proceedings. She was of the firm view that G had been treated more leniently than the Claimant. Ms Joughin also gave evidence G in his defence 'lodged a claim of racial discrimination and also lodged a claim of sexual harassment against Professor Crow', relating to Professor Crow's alleged inappropriate personal relationship with a work colleague (see below). We understand that the intended implication of Ms Joughin's evidence was that G may have received more favourable treatment because Professor Crow wished to avoid further investigation of those claims. We are not in a position to make any findings as to whether she is right about that.

Comparator 2: H

106. H was a professor. It is agreed he was White British.

107. A student complained that H had sent inappropriate/unwanted text messages to a student between 25 June and 30 June 2021 following a dinner that H had with that student and another student. The students had invited H to dinner after completion of their final project but before graduation. After dinner, he had started messaging one of the students asking her to visit him in Dorset and to go out for dinner, even asking when she asked whether he meant her friend too *"Can I have you all to myself"*. This latter message he deleted when she stated explicitly that it was inappropriate for them to have a relationship as he was a tutor and she a student. This followed her having sent some equivocal replies as she was (as she described in her email of complaint) unsure how to handle the situation as she felt really uncomfortable with it and the attention was unwanted by her. She stated she was disgusted by his behaviour but afraid of what the consequences might be of complaining as she stated that he 'was 30 years older than her', she had not graduated yet and he is 'quite famous in the industry'.

108. The allegations were investigated and found proven and H was invited to a disciplinary hearing, chaired by a Ms Brett who is (according to the Claimant) at the same management level as Professor Crow. The allegations were upheld (p 892) and noted to amount to gross misconduct that would ordinarily warrant dismissal, but in view of H's recognition of the impact his conduct had, his apology, acknowledgment of personal boundaries required, and his long service since 1998 with no previous disciplinaries, he was issued with a formal final written warning.

109. The notes of the disciplinary hearing for H show that he expressed complete and total regret for what he had done, said that it was a 'shock and a wake-up call', he felt sickened and saddened by what he had done and was in

counselling and therapy. This was all evidently accepted by Ms Brett at face value – and reasonably so based on the material before us.

110. Subsequently, a further allegation of harassment was made against H and on that second occasion he resigned before disciplinary proceedings were completed.

Professor Crow

111. Professor Crow was White British.

112. We received evidence from Ms Joughin that Professor Crow himself had a personal/intimate relationship with a subordinate staff member, who she considered he line managed, and that their relationship was not disclosed, in direct contravention of the UAL Personal Relationships Policy, until she (Ms Joughin) made a whistleblowing complaint about them in July 2019. Professor Crow and the colleague then admitted to the relationship and Ms Joughin believed that the colleague's line manager was changed as a result, but no other action taken.

113. Ms Lechner gave some evidence on this issue too. Her evidence was that, having checked HR records, there was no point at which the colleague's line manager had formally changed. She did not have access to documentation about the whistle-blowing complaint, however. Counsel for the Claimant put to Ms Lechner several other points about what had happened regarding this relationship, on instructions from Ms Joughin, but Ms Lechner was unable to confirm most of these points and as we never did hear these points given as evidence by Ms Joughin, it follows that none of the points that counsel for the Claimant put to Ms Lechner that were not accepted by Ms Lechner or outside her knowledge can be accepted as evidence in these proceedings.

114. We do, however, broadly accept the evidence of Ms Joughin about what happened with Professor Crow's relationship with another staff member as we found her to be a credible witness who despite her strong feelings about the Claimant's case gave honest evidence. The only element we do not accept is that there was any formal change in line management for the colleague: on that, although there might have been some informal change, there is no reason to doubt Ms Lechner's report of what is in the HR records.

Conclusions

Direct race discrimination

The law

115. Under ss 13(1) and 39(2)(c)/(d) of the Equality Act 2010 (EA 2010), we must determine whether the Respondent, by dismissing him or subjecting him to

any other detriment, discriminated against the Claimant by treating him less favourably than it treats or would treat others because of a protected characteristic. The protected characteristic relied on by the Claimant is his nationality and/or national/ethnic origin. He is a dual Chinese/British national and his national/ethnic origin is Chinese. These are all included within the definition of 'race' in s 9 of the EA 2010 and we will refer to them compendiously as such in this judgment.

116. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at [34]-[35] per Lord Hope and at [104]-[105] per Lord Scott. (Lord Nicholls ([15]), Lord Hutton ([91]) and Lord Rodger ([123) agreed with Lord Hope.)

117. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator is or would be. A person is a valid comparator if they would have been treated more favourably in materially the same circumstances (s 23(1) EA 2010). However, we may also consider how a hypothetical comparator would have been treated. In some cases construction of a hypothetical comparator may be difficult, and the Tribunal may instead focus on what is called the *"reason why"* question, using any evidence as to how others are treated (whether or not their circumstances are materially the same or not) to inform that assessment: see in particular *Shamoon* at [8] *per* Lord Hope and at [109]-[110] *per* Lord Scott.

118. The Tribunal must determine what, consciously or unconsciously, was the reason for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at [29] per Lord Nicholls). The protected characteristic must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at [78]-[82]). It must be remembered that discrimination is often unconscious. The individual may not be aware of their prejudices (cf *Glasgow City Council v Zafar* [1997] 1 WLR 1695, HL at 1664) and the discrimination may not be ill-intentioned but based on an assumption (cf *King v Great Britain-China Centre* [1992] ICR 516, CA at 528).

119. If a decision-maker's reason for treatment of an employee is not influenced by a protected characteristic, but the decision-maker relies on the views or actions of another employee which are tainted by discrimination, it does not follow (without more) that the decision-maker discriminated against the individual: *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010 especially at [33] per Underhill LJ. What matters is what was in the mind of the individual taking the decision. It is also important to remember that only an individual natural person can discriminate under the EA 2010; the employer will be liable for that individual's actions, but the legislation does

not create liability for the employer organisation unless there is an individual who has discriminated. As Underhill LJ explained in that case at [36]:

> 36. … I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation. If it were otherwise very unfair consequences would follow. I can see the attraction, even if it is rather rough-and-ready, of putting X's act and Y's motivation together for the purpose of rendering E liable: after all, he is the employer of both. But the trouble is that, because of the way [what is now the EA 2010 works], rendering E liable would make X liable too …. To spell it out: (a) E would be liable for X's act of dismissing C because X did the act in the course of his employment and—assuming we are applying the composite approach—that act was influenced 'Y's discriminatorily-motivated report. (b) X would be an employee for whose discriminatory act E was liable under [EA 2010, s 109] and would accordingly be deemed by [EA 2010, s 110] to have aided the doing of that act and would be personally liable. It would be quite unjust for X to be liable to C where he personally was innocent of any discriminatory motivation.

120. However, in that case the Court of Appeal also observed, that where a decision is taken jointly by more than one decision-maker, a discriminatory motivation on the part of one decision-maker will taint the whole decision: ibid at [32].

121. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at [56]). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. The Supreme Court has recently confirmed that this remains the correct approach: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 38

122. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at [32] per Lord Hope. In all cases, it is important to consider each individual allegation of discrimination separately and not take a blanket approach (*Essex County Council v Jarrett* UKEAT/0045/15/MC at [32]), but equally the Tribunal must also stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: *Qureshi v Victoria University of Manchester* [2001] ICR 863 per Mummery J at 874C-H and 875C-H.

Conclusions

123. The Claimant's claims of race discrimination as identified in the list of issues relate to both the investigation of the allegations against him and the decision to dismiss. He does not, however, make any allegation of race discrimination against Mrs Terry who carried out the investigation. The allegation is that the Claimant was discriminated against by the decision to dismiss him. We therefore have to consider whether the Claimant's race played a material part in the decision-making process of any of those individuals involved in the decision to dismiss the Claimant.

124. In this case, there is some lack of clarity about who the relevant decision makers were, but we find that the material decision-maker was Professor Crow. We accept on the basis of the documentary evidence we have seen that he was the primary decision-maker in relation to dismissal. That was his allocated role, reflected in the formal documents, and the background emails from Mr Culver indicate that Professor Crow did in fact make the decision himself. There have been questions before us as to Mr Carrington's role. On the basis of the documentary evidence, we find that this was essentially a formality. Although Mr Carrington's comments in his email endorsing Professor Crow's decision indicate that it was not an 'unthinking' formality, in that he evidently engaged with the material that was put before him on the Claimant's case, we do not consider that he can really be counted as a material decision-maker. He was simply endorsing Professor Crow's decision.

125. The appeal committee chaired by Mrs Woodhams did, however, do more, in the sense that they engaged with each of the specific points raised by the Claimant at the appeal stage and gave consideration to them, even though their conclusion was, on nearly all points, that they agreed with Professor Crow. There is, however, evidence of independent thought by the appeal committee about the Claimant's case in the mention in the appeal outcome letter of his failure to recognise the 'increased vulnerability' of EA, which we noted in our findings of fact we infer refers to EA's self-harming, which was not something that had been specifically mentioned by Professor Crow. We therefore accept that in principle Mrs Woodhams (representing the appeal committee) was an independent decision-maker against whom an allegation of discrimination could be made.

126. The Claimant does not, however, claim that there is any evidence that either Professor Crow or Mrs Woodhams (or, for that matter, Mr Carrington) was influenced by his race in their decision-making. His direct race discrimination claim is based on a comparison between his case and that of G and H.

127. So far as H is concerned, none of the decision-makers in the Claimant's case were involved with H's case so consideration of H's case does not provide any meaningful comparison against which to judge whether any of the decision-makers in the Claimant's case were influenced by his race. In any event, we find that a comparison between the Claimant's case and H's treatment does not reveal any less favourable treatment in materially similar

circumstances. In some ways what happened with H could legitimately be regarded as much less serious than what happened with the Claimant. While it is true that H's conduct unequivocally constituted harassment of a student, it was brief and relatively superficial in nature (the text messages were the heart of it), and he stopped as soon as the student objected. Despite this, Ms Brett made clear that she would have dismissed H had it not been for his long service, clean disciplinary record and – what seems to us to have been the most important factor – his apparent complete contrition and full acknowledgment of the impropriety of his actions, to the point where he had sought counselling.

128. It is the contrition, insight and acknowledgment of H which in our judgment constitutes the key material difference between H's case and the Claimant's. In the Claimant's case (as we discuss further below), although he expressed regret, occasionally in very fulsome terms, Professor Crow and the appeal committee were left in doubt as to whether he understood what he had done wrong. It is immaterial to this conclusion that H apparently demonstrated through his subsequent actions (resulting in a further harassment allegation and his resignation) that he was not a reformed character: what matters is how things appeared to the decision-makers at the time. The contrition and insight of H therefore explain the more favourable disciplinary outcome he received. There is no evidence that the difference in race between H and the Claimant had anything to do with it.

129. So far as G is concerned, Professor Crow was the decision-maker in both cases so the comparison with the Claimant's case is potentially highly relevant. We agree with the Claimant and Ms Joughin that the decision to give G only a First Written Warning for his conduct at first appears lenient. However, that is principally because at first blush it seems surprising that Professor Crow decided that there was insufficient evidence of kissing to uphold that allegation. We have not had the benefit of evidence from Professor Crow as to why he reached that conclusion, but as we noted in our findings of fact above, the investigation report is difficult to read and does appear to assume that other lecturers were 'witnesses' to the kissing when actually only other students were present. That in itself provides the beginning of an explanation for Professor Crow's conclusion about the kissing, given that G denied it. The fact that the student who was allegedly kissed never complained and was not interviewed for the investigation is further significant evidence. We cannot take our own findings of fact any further on this point, but we observe that a comparison of the fact-finding process in the two cases is not illuminating because in the Claimant's case he was not disputing any of the essential facts, whereas G was.

130. The main comparison that the Claimant seeks to make between his case and G's is between the sanctions that they were given, and sanctions must be compared by reference to the allegations found proved. As such, evidently there was less favourable treatment of the Claimant than G because he was dismissed while G was given only a First Written Warning. G was also more favourably treated than H, who received a Final Written Warning. However, the conduct of which G was found guilty was quite different. He was found

'not guilty' on the allegation of kissing a student in public. The allegation of inappropriate conduct with students that was upheld was 'just' going to the pub with them in the period shortly before he was due to mark their final work. Although that was serious (particularly given the potential impact on the appearance of fairness as regards the marking of work), unlike H, he was not guilty of harassment (and was not even accused of harassment by the student he was alleged to have kissed). Putting aside the breach of his terms of suspension (which seems much less serious than it appears from parts of the investigation report once it is appreciated that the members of staff he approached while on suspension were not actually witnesses to the incident as they were not present), it is possible to see why his conduct could reasonably be regarded as less serious than H's conduct.

131. The conduct of which G was found guilty was also quite different to the Claimant's conduct, and could (we find) reasonably be regarded as less serious than the Claimant's conduct, for the following reasons:-

    a. G's conduct took place on one occasion, the Claimant's conduct as regards EA took place more or less daily over the course of a term (albeit only intensely for about three or four weeks from mid February to mid March);

    b. G's conduct was overt and took place in public with many other students present. While that potentially presented a greater reputational risk both for G and the Respondent, it posed a lower risk of harm to the student(s) involved. The Claimant's conduct towards EA took place in private and in circumstances of trust where the risk of emotional and psychological harm to the student was much greater (and that risk to an extent eventuated in the reference to her self-harming and the distress that she appears from the documents to have suffered as a result of the relationship with the Claimant);

    c. Although in both G's case and the Claimant's case the student involved was found to (or was in G's case deemed to) have consented to the conduct so that there was no harassment of the student herself in either case, it was a significant difference between their two cases that in G's case the student did not complain, whereas in the Claimant's case EA did complain and ultimately came to the view that the Claimant's conduct had been improper in the context of a tutor-student relationship;

    d. G's conduct took place in an explicitly social context. Although he should not have been socialising with students in the period during which he was due to mark their work, he was not blurring the boundaries between work and personal life to the same extent as the Claimant who allowed work and personal correspondence, tutorials, dinner dates and home visits to become essentially one and the same;

e. The Claimant had had the existence of the Respondent's relationship policies drawn to his attention but still failed to heed them.

132. All of the above matters are material differences between G's case and the Claimant's which in our judgment reasonably explain the difference in sanction. There are also potentially other factors that explain the difference, including the muddled nature of the investigation report for G, the length of time the investigation took, the fact that G was suspended for that whole period, and G lodging a complaint of race discrimination and a complaint about Professor Crow's own conduct.

133. In closing submissions, Ms Mallick for the Claimant also argued that Professor Crow treated the Claimant and G differently as regards his approach to the disciplinary process. She argues that in the Claimant's case Professor Crow sought to 'go behind' the investigation report by 're-opening' the harassment allegation at the disciplinary hearing. However, we have already observed in our findings of fact that it is likely he did this because he was troubled as to whether the harassment allegation had been rightly rejected, or because the questions were relevant to the allegation of inappropriate professional conduct in any event. We further observe that this does not appear to mark a significant difference in approach by Professor Crow as between G and the Claimant. What we see in both cases is Professor Crow not regarding himself as bound by the findings of the investigation report, but taking the reports as 'starting points' for forming his own views about the facts of each case. In both cases, that approach was in our judgment reasonable: the report for G was flawed in the respects we have identified (a point, we note, that was forcefully argued on G's behalf by Ms Joughin at the time), and the questions that Professor Crow asked of the Claimant were reasonable and important questions to ask in the context of considering whether his conduct was inappropriate and whether, even if EA consented, his approaches to her had been overbearing or an abuse of power in the context of a tutor-student relationship.

134. We also do not see that there is any significance to be drawn from the fact that although the Respondent's relationships/professional boundaries policies are referred to in both G's investigation report and the Claimant's, Professor Crow did not ask G about his knowledge of those policies. The Claimant and G were not in the same position as regards those policies: the Claimant had been specifically told about them in August 2018. There was nothing to suggest that G ought to have been aware of them previously. Professor Crow did, however, question G about a previous incident he had been involved with in 2016 and whether he had understood from that that he was not to socialise with students in the pub. In that respect, therefore, Professor Crow's approach seems to have been even-handed as the 2016 incident was the equivalent for G of the 2010 incident and 2018 conversation for the Claimant.

135. For all these reasons, we find that the circumstances of G and H were both materially different to those of the Claimant and they are not comparators within the definition in s 26 of the EA 2010. Nor do we think that they assist

the Claimant as 'evidential' comparators. For the reasons we have set out, we do not consider that the Claimant was less favourably treated than them. Their conduct could reasonably be regarded as less serious than the Claimant's.

136. We further find that there is nothing about their cases that indicates that race was any factor in the treatment of the Claimant. The difference in race on which the Claimant relies (which essentially comes down to 'Chinese' vs 'not Chinese') also seems inherently unlikely to be significant given that the comparators are themselves of different ethnic origins. And, in any event, as the case law we have set out above makes clear, a difference in treatment and a difference in race are insufficient to found a claim of race discrimination.

137. We find that the Claimant has failed to discharge the burden of proof on him under s 136 of the EA 2010. There are no facts here from which we could conclude that race played any part in his disciplinary investigation, dismissal or appeal.

Indirect race discrimination

The law

138. By s 19(1) EA 2010 a respondent discriminates against a claimant if it applies a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic of the claimant's. By s 19(2) a PCP is discriminatory if: (a) the respondent applies, or would apply, it to persons with whom the claimant does not share the characteristic, (b) it puts, or would put, persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it, and (c) it puts, or would put, the claimant at that disadvantage. It is a defence (under s 19(2)(d)) for the respondent to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

139. The burden of proof is on the claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent has acted unlawfully. In an indirect discrimination case, this means that the claimant must prove the application of the PCP, the particular disadvantage in comparison to others and that the claimant was put at that disadvantage. The burden then passes to the respondent under s 136(3) to show that the treatment was justified.

140. Further guidance on the matters which the claimant has to prove was given by the Supreme Court in *Essop v Home Office* [2017] UKSC 27, [2017] 1 WLR 1343. The Supreme Court held that the EA 2010 s 19 did not require a claimant alleging indirect discrimination to prove the reason why a PCP put the affected group at a disadvantage. The causal link that must be established is between the PCP and the disadvantage. The proportion of those with the protected characteristic who can comply with the PCP must be

significantly smaller than the proportion of those without the protected characteristic. It does not matter, in this respect, that the PCP does not disadvantage all those who share the protected characteristic.

141. As to the question of justification, a respondent must normally produce cogent evidence of justification: see *Hockenjos v Secretary of State for Social Security* [2004] EWCA Civ 1749, [2005] IRLR 471. What needs to be justified is the rule itself (*Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] ICR 704). The Tribunal must focus on the proportionality of having a rule at all, rather than the question of reasonableness of applying the rule to the particular claimant (*The City of Oxford Bus Services Limited t/a Oxford Bus Company v Mr L Harvey* UKEAT/0171/18/JOJ).

142. In *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700 the Supreme Court (see Lord Reed at para 74, with whom the other members of the Court agreed on this issue: see Lord Sumption, para 20) reviewed the domestic and European case law and reformulated the justification test as follows: (1) whether the objective of the PCP (the alleged legitimate aim) is sufficiently important to justify the limitation of a protected right, (2) whether the PCP is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether the impact of the right's infringement is disproportionate to the likely benefit of the PCP. (We have adjusted the language used by the Supreme Court to fit with that used in the EA 2010.)

143. In other cases, the question of whether a particular aim is legitimate has been expressed as being whether it 'corresponds to a real need' of the employer: see *Bilka-Kaufhau GmbH v Weber von Hartz* (case 170/84) [1984] IRLR 317. While a tribunal must take account of the reasonable needs of a respondent's business, it is for the tribunal to assess for itself both whether or not an aim is legitimate, and whether it is proportionate. It is not a 'range of reasonable responses' test: *Hardy and Hansons plc v Lax* [2005] IRLR 726, followed in *MacCulloch v Imperial Chemical Industries plc* [2008] ICR 1334 at paragraphs 10-12.

Conclusions

144. The Claimant in this case identified the PCP about which he complains as the application of the Personal Relationships UAL Policy and Professional Boundaries Guidance and/or the requirement that the Claimant understand and adhere to this policy and guidance. He alleges that this put people of Chinese national origin at a particular disadvantage compared with others because the way the policy and guidance was written was not sufficiently clear and unambiguous for someone who was born and brought up in the Chinese culture and did not speak English as a first language. He alleges he was put at that disadvantage.

145. We do not accept that the Claimant has made out any of the elements necessary to establish a case of indirect discrimination.

146. First, the Claimant was not himself disadvantaged by an inability to understand the policy because, although he had been notified of the existence of the policy, he did not look at it until the disciplinary proceedings. This was not a case therefore in which he had read the policy and decided that it was permissible under the policy for him to embark on a relationship with EA in the way that he did.

147. Secondly, the difficulties with interpretation of the policy that the Claimant has identified in his witness statements for these proceedings and in the course of his oral evidence, are not difficulties of interpretation arising from cultural differences, but are in our judgment the kind of difficulties that anyone and everyone would experience with these policies. Relationships between consenting adults in the context of tertiary education can involve grey areas and it can be difficult for anyone to put their finger on the point at which an acceptable line is crossed. We consider the Respondent's policies in more detail below, but in short, they do not attempt to be comprehensive or wholly prescriptive. They provide a framework and leave room for discretion.

148. Thirdly, the Claimant has in any event produced no evidence at all that the policies would put other people who share his race at a disadvantage and we are not prepared to assume the policies would. This is not a case, in our judgment, that was dealing with a 'grey' area. The Claimant has referred to differing Chinese practices in teacher-student relationships and cultural differences which mean (we summarise) that teachers of Chinese origin will be more likely to 'give' more of themselves when teaching students and to engage with them more on a personal level. On the basis of the Claimant's evidence alone, we are not prepared to accept that there are such cultural differences. But even if we were prepared to accept that, this was not a case concerned with whether a teaching practice of that sort would or would not be permissible under the Respondent's policies. It was a case in which the Claimant had gone so far as to prompt exchanges of poetry on Valentine's Day, declare his love for EA, initiate kissing her, tell her he could imagine her in a Chinese Wedding dress, been to her house twice, out for dinner multiple times, bought her a plane ticket to New York, etc. As the Claimant himself accepted, he had never done any of that with a student before. This was not therefore a case in which the Claimant's general teaching practice was 'on trial'. It was a case about conduct of his which went well beyond his conduct with his other students and was not about the grey areas in the Respondent's policies at all.

149. Finally, we add that even if the Claimant had got over the first hurdles of an indirect discrimination claim, we would have found that the Respondent was justified in having such policies as it is important to give guidance to staff and students about what is and is not appropriate as far as relationships are concerned and what steps should be taken when relationships develop.

Unfair dismissal

The law

150. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason falling within subsection (2), i.e. conduct, capability, redundancy, or some other substantial reason (SOSR) of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss (cf *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, 330, cited with approval by the Supreme Court in *Jhuti v Royal Mail Ltd* [2019] UKSC 55, [2020] ICR 731 at [44]). (There are exceptions to that approach, as identified in *Jhuti*, but it is not suggested they are relevant here.)

151. Once a potentially fair reason for dismissal is established, the Tribunal must consider whether it was fair in all the circumstances, taking into account the size and administrative resources of the employer, to dismiss the employee for that reason: s 98(4).

152. Where conduct is relied on as the reason for dismissal, in determining whether dismissal is fair in all the circumstances under s 98(4), the Tribunal must be satisfied that the employer has a genuine belief that the employee committed the misconduct in question, and that that belief is held on reasonable grounds, the employer having carried out such investigations as are reasonable in all the circumstances of the case: *BHS Ltd v Burchell* [1980] ICR 303 and *Foley v Post Office* [2000] ICR 1283.

153. Ms Mallick for the Claimant has reminded us that for conduct to amount to gross misconduct justifying summary dismissal as a matter of common law, it *"must be regarded as so undermining the trust and confidence which is at the heart of a contract of employment that the employer should no longer be required to retain the employee in his employment, but should be entitled to accept that the contract for employment had been repudiated in its essence, permitting him to terminate it"* (*Dunn and anor v AAH Limited* [2010] EWCA Civ 183 at [40]). We have borne this in mind in our deliberations when considering fairness, albeit reminding ourselves that the contractual common law test is not part of the statutory unfair dismissal test (and we did not understand Ms Mallick to be submitting otherwise): *Hope v British Medical Association* (EA-2021-000187-JOJ).

154. In determining the fairness of a dismissal, it was held in *Haddijoannou v Coral Casinos Ltd* [1981] IRLR352 that the focus should be on the particular circumstances of the employee's case and that arguments based on disparity of treatment between one employee and another should be scrutinised carefully and can rarely be properly accepted. However, the EAT in that case accepted that inconsistency of treatment may be relevant in three

circumstances, and again the Claimant in this case relies on these exceptions:

> 'The first, employees may be led by an employer to believe that certain categories of conduct will be overlooked or will be more mercifully treated in the light of the way that other employees have been dealt with in the past. Secondly, it may show that the dismissal in the instant case is not for the reason put forward i.e. that the asserted reason is not the real or genuine reason. Thirdly, 'Evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances.' Waterhouse J continued: 'It is only in the limited circumstances that we have indicated that the argument [that is the disparity argument] is likely to be relevant and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar or sufficiently similar to afford an adequate basis for the argument. The danger of the argument is that a tribunal may be led away from a proper consideration of the issues raised by [the equivalent of s98 of the 1996 Act]. The emphasis in that section is upon the particular circumstances of the individual employee's case.'

155. Procedural errors may render an otherwise fair dismissal unfair, but not every procedural error does. The range of reasonable responses test applies to procedural aspects of the dismissal as well as the substantive: *Sainsbury Supermarkets Ltd v Hitt* [2003] ICR 111. The fairness of the process as a whole must be looked at, alongside the other relevant factors, focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee: *Taylor v OCS Group Ltd* [2006] ICR 1602 at [48]. A failure to afford the employee a right of appeal may render a dismissal unfair (*West Midlands Cooperative Society v Tipton* [1986] AC 536), and a fair appeal may cure earlier defects in procedure (*Taylor v OCS Group* ibid), but an unfair appeal will not necessarily render an otherwise fair dismissal unfair. Unfairness at the appeal stage is always relevant and may render a dismissal unfair even if dismissal was fair in all other respects, but not necessarily: it is a matter for assessment by the Tribunal on the facts of each case: *Mirab v Mentor Graphics (UK) Limited* (UKEAT/0172/17) at [54] *per* HHJ Eady QC. It follows from *OCS* that a fair appeal may remedy even wholesale unfairness at the first stage, but whether it does or not is a question of fact to be determined by the Tribunal in all the circumstances of the particular case.

156. In reaching a decision, the Tribunal must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

Conclusions

157. We have considered first what the Respondent's reason for dismissal was in this case. We have explained in our conclusions on the direct race discrimination claim above why we conclude that Professor Crow was the material decision-maker in relation to the Claimant's dismissal. As Professor Crow's death has meant that we have not heard evidence from him as to his reasons for dismissal, we must necessarily focus on what he wrote in the dismissal decision letter, together with what he wrote in response to the Claimant's appeal.

158. We have, of course, borne in mind the possibility that these documents do not properly set out what he had in mind at the time and (in particular) that there could be an element of after-the-event justification in the document he wrote in response to the Claimant's appeal. However, we have concluded in this case that there is no reason not to take the dismissal decision letter at face value, and we see no inconsistency between that and what he wrote in response to the appeal. We note that the response to the appeal expands to a certain extent on the reasoning contained in the dismissal letter, and that, in particular so far as the question of the role that the Claimant's historic conduct in 2010 and the 2018 meeting played in the dismissal decision, the response to the appeal clarifies what was not put as clearly in the dismissal letter itself, but nothing in the evidence that we have seen leads us to conclude that the dismissal decision letter and response to the appeal cannot properly be read together as compositely setting out the reasons for dismissal as they were in Professor Crow's mind at the time he took the decision to dismiss.

159. The reason for dismissal was therefore we find as set out in the dismissal decision letter that Professor Crow considered the Claimant had engaged in inappropriate professional behaviour, specifically that (as stated in the dismissal letter) his conduct in relation to EA had breached professional boundaries because in the majority of interactions between the Claimant and EA he was acting within a tutor/student relationship and that when personal feelings were revealed which were beyond a professional relationship, the Claimant had made no attempt to manage the situation or follow university guidance. Professor Crow considered that the Claimant's conduct in this respect amounted to gross misconduct. The reason for the dismissal was thus the Claimant's conduct, which is a potentially fair reason for dismissal.

160. We next consider whether it was fair in all the circumstances to dismiss the Claimant for that reason.

161. The first argument that Ms Mallick for the Claimant raises is that the conduct for which the Claimant was dismissed was not defined in the Respondent's policies as gross misconduct and would not have been sufficient in the common law context to constitute gross misconduct justifying summary dismissal. Ms Mallick is correct that inappropriate professional behaviour is not specifically identified either in the Respondent's Relationships Policy or in its Disciplinary Policy as amounting to gross misconduct, whereas harassment (the allegation that was dropped in the Claimant's case) is so identified. However, the Respondent's Disciplinary Policy does not purport to

set out an exhaustive list of the conduct that may constitute gross misconduct and so other conduct may under the policy legitimately be regarded as constituting gross misconduct. Further, the Professional Boundaries Guidance explains at the end that *"inappropriate behaviour may become a disciplinary issue"* and that *"in serious cases … this may constitute gross misconduct and potentially result in dismissal for staff"*. So, at least in the Professional Boundaries Guidance, 'inappropriate behaviour' is identified as being capable of constituting gross misconduct in serious cases. It is right to note that the list of examples of serious cases given in that paragraph does not include 'mere' failure by a member of staff to maintain professional boundaries in accordance with those policies so as to avoid a relationship developing in the first place, or mere failure to report a relationship that has developed, but the list of serious cases in that paragraph does not purport to be exhaustive and the principle is clear: serious inappropriate behaviour can be treated as gross misconduct.

162. We need to say a bit more about the Relationships Policy, which does read at Section 12 as if it is setting out the only circumstances in which breach of that policy will result in disciplinary action, neither of which appear to have been regarded by Professor Crow as applying in this case. Although some time was spent at the hearing on the second of those circumstances ("the relationship is not disclosed and results in an unfair advantage or disadvantage to either party"), and we will come back to it below, Professor Crow's reasons for dismissing the Claimant do not include any question of unfair advantage for EA or conflict of interest. The focus of both the dismissal letter and the response to the appeal outcome are Professor Crow's concerns about, as he put it in the response to the appeal: *"Mr. Shing's ability to manage his professional behaviour and concerns about the well-being of students in his care".* Professor Crow's concern was with the Claimant's actions as tutor towards EA before the romantic relationship developed. As he put it: "*I concluded that in the majority of interactions with the complainant Mr. Shing was acting within a tutor/student relationship. This is supported by evidence of correspondence between Mr. Shing and the student using university communication channels. I also concluded that when personal feelings were revealed which were beyond a professional relationship, Mr. Shing made no attempt to manage the situation or follow university guidance and that he had been made aware of this guidance both verbally during a meeting in August 2018 and afterward in writing".* In the response to the appeal he expanded on this by reference to the Claimant's general conduct with other students: "*Throughout the Hearing, Mr. Shing elaborated on how he has often met students outside the college in social settings such as coffee shops and bars. These meetings took place after #MeToo, where staff would have been more aware of the potential for being accused of inappropriate conduct. This caused me particular concern as Mr. Shing did not seem to pay any attention to the notion of professional boundaries nor fully consider the professional nature of the tutor/student relationship and the effect his actions might have on the emotional well-being of his students."*

163. Although the policies do not forbid personal relationships between staff and students, they do make clear (see Section 8 of the Relationships Policy and

the whole of the Professional Boundaries Guidance) the importance of maintaining professional boundaries because of the Respondent's duty of care to students and the relationship of trust and power that exists between staff and students. The policies put the onus on staff to avoid getting into personal relationships with students and to manage and deter behaviour by students that appears to be encouraging a personal relationship.

164. In this case, the evidence before Professor Crow showed that the Claimant had not made any attempt to manage his relationship with EA and that, far from taking steps to prevent a personal romantic relationship from developing, he had actually played a significant role in propelling the relationship in that direction, going so far (as we noted above when dealing with the indirect discrimination claim) to prompt exchanges of poetry on Valentine's Day, declare his love for EA, initiate kissing, tell her he could imagine her in a Chinese Wedding dress, go to her house twice, out for dinner multiple times, bought her a plane ticket to New York, etc. It was of course important that the relationship was consensual and did not amount to harassment, but it does not mean that the Claimant's behaviour was not seriously inappropriate given the evidence of the role that the Claimant had played in encouraging the relationship and his failure to make any attempt to maintain professional boundaries until EA asked him to.

165. Given the specific facts of this case, we are therefore satisfied that it was within the range of reasonable responses for Professor Crow to regard the Claimant's conduct as constituting inappropriate professional behaviour of a particularly serious kind, and that it was within the range of reasonable responses for him to classify this as gross misconduct. Doing so was in line with the Respondent's Professional Boundaries Guidance, and permissible under the Respondent's Disciplinary Policy. It is also evident from the dismissal letter that an important factor in Professor Crow's conclusion that the conduct amounted to gross misconduct was what he perceived as the Claimant's lack of insight. We return to this issue below and explain there why we are satisfied that Professor Crow's views on the Claimant's insight were reasonable, but at this stage we observe that it is apparent in particular from Professor Crow's response to the appeal that the Claimant's lack of insight caused him to have wider 'serious concerns' about the Claimant's ability to manage his own behaviour and the welfare of students in his care. We read that as Professor Crow expressing a loss of trust in the Claimant. Even as a matter of common law, the conduct that Professor Crow relies upon for the dismissal decision is conduct that he evidently regards as being conduct likely seriously to damage the relationship of trust that ought to exist between employer and employee – in other words, as meeting the common law test for repudiatory breach. In the unfair dismissal context the question for us is whether it was within the range of reasonable responses for Professor Crow to take that view, and we are satisfied that it was for all the reasons that he gave in his documents, and all the reasons we set out here.

166. Ms Mallick argues that the Claimant's conduct should not have been regarded as so serious because EA was 'worldly', being a mature student who had had a previous career in nursing, four previous serious relationships

a person who on her own account understood 'love'. While these are relevant factors, which we accept were capable of rendering the conduct less serious than it would have been if the Claimant had engaged in such behaviour with an 'ordinary' undergraduate, we do not consider they are such as to mean that it was outwith the range of reasonable responses for Professor Crow to treat the Claimant's behaviour as gross misconduct. We find that it was within the range of reasonable responses for Professor Crow not to regard these factors (which were obvious, and had been 'flagged' by Mrs Terry in the investigation report, so would have been clearly in his mind) as significant mitigation, or as reducing the need for the Claimant to seek to maintain professional boundaries in accordance with the policies. The Respondent's policies do not distinguish between mature students and other students, and EA was still a student, on a course that he was teaching (albeit that he was not directly 'officially' responsible for tutoring her or marking her work) and she was more than twenty years his junior. The trust and power balance issues that those policies seek to address, against the background of the #metoo movement, were still very relevant to the relationship between the Claimant and EA – and were, ultimately, on the face of it, the basis for EA's complaint about the Claimant's conduct.

167. Ms Mallick argues that a reasonable decision-maker would have taken into account that the Claimant was not actually aware of the terms of the policies and did not know that a relationship with someone he was not teaching/assessing would amount to gross misconduct warranting dismissal. However, it is apparent that Professor Crow understood that the Claimant's position was that he was not aware of the policies and did not know at the time that what he was doing was wrong. There was also no reliance placed by Professor Crow on the policies having been publicised to staff – rightly, given that there is no evidence that they *were* properly publicised to staff. But in the Claimant's case Professor Crow concluded that the Claimant's pleaded ignorance was unreasonable because of the prior 2010 incident, the conversation in 2018 and the follow-up letter that had specifically drawn the Claimant's attention to the forthcoming publication of the Relationships and Professional Boundaries Guidance. That was in August 2018, only just over a year before events between the Claimant and EA that led to his dismissal. In those circumstances, we find that it was within the range of reasonable responses for Professor Crow to conclude that the Claimant's ignorance of the policies was unreasonable.

168. We further note that Professor Crow appears to have approached the Claimant's case on the basis that, regardless of the policies, he ought to have been aware (as a result of the #metoo movement among other things) that his conduct in commencing a relationship with EA (or allowing a relationship to commence) was inappropriate. Again, we find that this was also within the range of reasonable responses. That it could be problematic for a tutor to enter into a relationship with a student on the course, during that course, ought to be obvious to anyone working in higher education, and that it was more than problematic but also potentially a disciplinary matter should have been obvious to the Claimant given that he had been spoken to about boundaries previously.

169. We have also seen from the cases of G and H on which the Claimant relied that in fact, when those cases are properly analysed as we have done above in considering his direct discrimination claim, the Respondent has taken a consistent approach to other cases. We identified above the factors that differentiate the Claimant's case from those of G and H and which provide a reasonable basis for regarding his conduct as meriting dismissal when their conduct did not.

170. There is an important issue in this case about the role that the Claimant's previous misconduct warning in 2010, and the subsequent conversation and follow-up letter in August 2018 about appropriate professional conduct in the light of the #metoo movement in 2018, played in his dismissal. Ms Mallick submits, in reliance on *Diosynth v Thomson* [2006] IRLR 284, that a dismissal will be unfair if an employer extends the effect of an expired warning so that it tips the balance in favour of dismissal in a case where the employer would not otherwise have dismissed the employee. She submits that this is what happened in this case. We accept that *Diosynth* is still good law, its correctness not having been doubted by the Court of Appeal in *Airbus UK Ltd v Webb* [2008] ICR 561, albeit that we are mindful of the limits placed on the applicability of the principle in *Diosynth* by [57]-[77] of the Court of Appeal's judgment in that case. (We acknowledge that neither party referred us to *Airbus UK Ltd v Webb*, but we refer to it because we checked it in the course of our deliberations. We have not invited further submissions on it as it does not change the substance of the arguments both on fact and law on this issue as they were advanced by the parties to us at the hearing.)

171. In this case, we are satisfied that the role that the prior warning and conversation played in the dismissal decision was not unfair. It is clear from a reading of the dismissal decision letter (in particular the first two paragraphs under "Allegation 2 – Inappropriate professional behaviour") that Professor Crow considered that the Claimant's conduct as regards EA amounted to gross misconduct – i.e. as meriting dismissal. The letter then moves on in the next five paragraphs to consider the Claimant's argument in mitigation that he was not aware of policies or protocols relating to professional conduct. It is in the context of consideration of the Claimant's argument on mitigation that reference is made to the prior incident and conversation, which are relied on to conclude that the Claimant's argument in mitigation should not be accepted because the previous incident and conversation show that the Claimant ought to have known better. The dismissal letter in this respect is consistent with Professor Crow's response to the appeal document, and the appeal decision.

172. We are satisfied therefore that this was not a *Diosynth* case. The prior warning/conversation did not tip the balance in favour of dismissal, their existence simply meant that the balance was not tipped *away* from dismissal by the Claimant's mitigation argument. We are satisfied that the Respondent's approach to the prior incident and conversation was in the circumstances well within the range of reasonable responses.

173. We add that we also reject Ms Mallick's argument that the conversation in 2018 should not have happened because the 2010 warning was expired at that point. There is nothing unfair or inappropriate in the Respondent having arranged what appears to have been conversations with a number of people in 2018, by way of a response to #metoo, to remind them of expected standards of behaviour. That was the conduct of a prudent employer and there was no unfairness in it. In any event, all of that was in the past by the time Professor Crow was considering the Claimant's case. The law does not require a reasonable employer to ignore history when approaching a dismissal decision. It is a decision that must be taken on the basis of the facts as they are at the time.

174. We do not find that Mr Carrington was the decision-maker in the Claimant's case for the reasons we have set out above in dealing with the direct discrimination claim. We also do not find that the failure by Professor Crow or Mr Culver to correct Mr Carrington's recollection of the date when the Claimant was previously warned about conduct with students renders the dismissal unfair. The Claimant was unaware of this correspondence at the time, and it has no material bearing on the dismissal decision, given that Mr Carrington was not the decision-maker and the substance of Mr Carrington's recollection was in any event correct: there had been a previous incident with the Claimant and he had as recently as 2018 had the forthcoming existence of the policies drawn to his attention and been reminded of the need to take care of boundaries in relationships with students.

175. We accept Ms Mallick's argument that an employer acting reasonably should take into account mitigating factors such as length of service and clean disciplinary record. However, it is plain that these factors *were* taken into account in the Claimant's case. As Professor Crow explained in his response to the Claimant's appeal (in a point echoed by Mrs Woodhams in her evidence to us), although the Claimant had a clean disciplinary record (and was treated as such), his length of service was a factor that counted against him because his long service meant he had had ample time to become aware of what was and was not appropriate professional conduct at the Respondent. That, together with the specific knowledge he should have gained from the previous incident in 2010 and the conversation and follow-up letter in 2018, meant that both Professor Crow and the appeal committee concluded he could not reasonably plead ignorance of appropriate professional conduct.

176. We add that it is also apparent from Professor Crow's reasons, and is a view shared by the appeal committee, that although the Claimant expressed remorse and regret, which would normally be mitigating factors (as they were for H), Professor Crow had insufficient confidence in the Claimant's insight, and insufficient confidence that the Claimant really understood what he had done wrong or that he would manage to avoid such a situation in future. The Claimant's evidence to us at this hearing (which we summarise as being to the effect that what he regretted was 'trusting' EA because he had ended up getting hurt) did not give us any confidence that he had the necessary insight either. That is especially so when it is coupled with his indirect discrimination

claim which is based on his view that the policy is 'unclear' when, in our judgment, it is not. We infer that the Claimant's attitude as it came across to us at this hearing was also apparent to Professor Crow from the Claimant's responses in the disciplinary hearing. We find that the Respondent's lack of confidence in the Claimant's understanding and ability to learn from what had happened was reasonable.

177. The potentially serious consequences for the Claimant's career of a gross misconduct dismissal are obvious and we reject Ms Mallick's submission that these were not weighed in mind by Professor Crow. The care with which the disciplinary hearing is conducted and the time he takes to deliberate following the disciplinary hearing in our judgment show that proper consideration was given before deciding on this most serious of sanctions.

178. As to the appeal, as we have not found there to be anything unfair about the dismissal decision either as a matter of substance or procedure, this is not a case where we need to consider whether the appeal 'cured' any unfairness that occurred at the dismissal stage. We are satisfied that the Claimant was afforded a fair appeal. Each of the principal points that he raised was considered by the appeal committee and dealt with in the appeal outcome letter. The fact that the appeal committee agreed with Professor Crow on all points does not mean that it acted unfairly. We have not found anything in Professor Crow's reasoning that it was not open to the appeal committee, acting reasonably, to accept. Fairness did not require the appeal committee to go off and conduct independent investigations as to what had happened in other cases. As Mrs Woodhams said in oral evidence to us, that would have been very difficult given the need for individual cases to be treated on a confidential basis. If the Claimant had raised a specific other case for consideration by the appeal committee that might have been different, but he did not. In any event, we have found that there is no evidence (even now) from which it could be concluded that there was direct or indirect discrimination in relation to the Claimant's dismissal.

179. Ms Mallick has argued that there were other unreasonable elements to the investigation and disciplinary process. We do not agree and deal with the main points of those further arguments as follows:-

    a. Ms Mallick submits that it was unreasonable for Mrs Terry to begin by interviewing the Claimant rather than going back to EA to see which parts of her complaint she wished to pursue. We do not consider that this choice was unreasonable. Indeed, starting with the Claimant was arguably fairer as it enabled her to hear his voice first rather than adding EA's physical voice and presence to the effect of what she had already set out in writing before hearing from the Claimant.

    b. Ms Mallick submits that it was unreasonable for the sexual harassment allegation to remain for consideration at the disciplinary hearing after it had been dismissed by Mrs Terry as the investigating officer. The Respondent accepts this was an error, but we do not

consider that it is an error that renders the dismissal process unfair. The questions that Professor Crow asked in the disciplinary hearing that could be said to pertain to harassment were also relevant to whether the Claimant had conducted himself inappropriately in cultivating the relationship and failing to maintain professional boundaries. And it did not ultimately make any difference because Professor Crow confirmed in the dismissal letter that the harassment allegation was not made out.

c. Ms Mallick complains that there was insufficient investigation into the question of whether the Claimant's conduct had given EA an unfair advantage over other students or not. However, as this was not the basis on which Professor Crow decided dismissal was warranted, nor the basis on which the appeal was upheld, this issue was not strictly relevant to the fairness of the dismissal. This element of the case took up a disproportionate amount of time in the hearing before us, given its limited role in the dismissal process and decision. There was some focus on it at the time because it features as a factor in the Relationships policy and was thus understandably addressed by Mrs Terry in the investigation and resurfaced briefly in the appeal hearing, but we do not consider that there was any shortcoming in the investigation or process on this issue. Even if it had been treated (or should have been treated – Ms Mallick's argument) as important to the dismissal decision, we share Mrs Woodhams' view as she expressed it in evidence to us. There was clear evidence of favouritism by the Claimant in respect of EA that could easily have given, or been perceived as giving, EA an unfair advantage over other students. There were not 'enough hours in the day' for him to give a similar level of assistance to other students, the plane ticket by itself was an 'unfair advantage' and the evidence of communications between the Claimant and EA includes him in his own words making clear to her that although he is also providing extra help to other students, he is mostly thinking about her and how he can help her.

d. Professor Crow did not invite the Claimant back for a second 'minded to dismiss' meeting to give him an opportunity to put forward further matters of mitigation, but the policy does not provide for such a process and we are satisfied that it is within the range of approaches not to provide for such a second meeting before a dismissal decision is taken. The ACAS Code of Practice also does not require a further meeting.

e. The reference in the appeal outcome letter to the Claimant's failure to report EA's 'increased vulnerability' (a reference to EA's self-harming) is not in our judgment an impermissible 'shoring up' of the dismissal decision, but a relevant factor that we infer was in Professor Crow's mind at the time he took the dismissal decision given what he says in the response to the appeal about his *"serious concerns about Mr. Shing's ability to manage his professional*

behaviour and concerns about the well-being of students in his care". The fact that Professor Crow chose not to make too much of this element of the case does not mean that he did not have it in mind, and we find that it is a further factual element about this case that was capable of rendering the Claimant's conduct in failing to maintain professional boundaries seriously inappropriate. EA was a vulnerable student and when she revealed self-harming, the Claimant's response was to sympathise and indicate that he had 'been there too' – that was further evidence that it was open to the Respondent as a higher education institution with a duty of care for its students to regard as inappropriate conduct.

f. We do not consider that the evidence about Professor Crow's involvement with another member of staff has any bearing on the Claimant's case at all. Although the Relationships Policy applies to relations between staff as well as between staff and students, the issue as to relations between staff is purely one of the need to declare and avoid conflicts of interest. What is said in the policies about the relationship of power and trust between staff and students and the need to maintain professional boundaries applies to relations between staff and students, not to relations between staff. There is therefore no hypocrisy in Professor Crow presiding in the Claimant's case, which is what we understand in essence to be the Claimant's complaint in this respect. We also observe that it could also be argued that Professor Crow's own 'transgressions' (if such they were) might have made him more sympathetic to the Claimant. In any event, we are satisfied that it was not unfair for Professor Crow to deal with the Claimant's disciplinary.

180. We need also to deal with a submission of Ms Mallick's that there was improper influence by human resources over the outcome in the Claimant's case. Ms Mallick relies on *Ramphal v Department for Transport* at [55], a decision of HHJ Serota QC, in which HHJ Serota QC held, purporting to apply principles from the Supreme Court decision in *Chhabra* quoted at [45] of the judgment, that the role of human resources should be limited to advice on law and process and should not stray to findings of culpability or decisions on sanction. Although we accept for present purposes that *Ramphal* is binding on us, we record that we are not satisfied that what the EAT said at [55] in *Ramphal* is a correct statement of the law as *Chhabra* was concerned with the application of contractual disciplinary procedures which required an investigation report to be the product of the appointed case investigator, so that where human resources had interfered to the extent that it was no longer the product of the case investigator that was a breach of contract and also unfair. We consider that the decision in *Chhabra* cannot properly be applied to all cases where there is no contractual disciplinary procedure. It ignores the fact that human resources is also 'the employer' for the purposes of the law on unfair dismissal and although in some cases involvement or influence from human resources may lead to unfairness, that cannot be an invariable rule. A dismissal decision taken jointly by a dismissing officer and a member of human resources, or even solely by human resources with just a different

officer's name on the bottom of the letter could still be a fair decision if the switch in identity or decision-maker was not unfair in the circumstances of the particular case. In any event, we are satisfied that there was no improper involvement by human resources in the disciplinary process in the Claimant's case for the reasons that we have set out in our findings of fact.

181. For all these reasons, we have therefore decided that the Claimant's dismissal was substantively and procedurally fair in all the circumstances.

182. We add this: although we have in the end been able unanimously to state our conclusions as we set out above, we did not find this an easy case to decide. Had we as individuals been charged with deciding whether or not to dismiss the Claimant, we would not all have reached the same decision as the Respondent. Despite all we have said, we have sympathy for the Claimant who was evidently hugely hurt by EA and whose career has been blighted by the dismissal. However, the law requires us not to consider our personal views, but to assess whether dismissal was within the range of reasonable responses fairly open to the employer in all the circumstances of the case. For the reasons that we have given, we are satisfied that it was.

Overall conclusion

183. The unanimous judgment of the Tribunal is:

(1) The respondent did not contravene ss 13 and 39(2)(c) Equality Act 2010 and the claimant's claim of direct race discrimination is dismissed.
(2) The respondent did not contravene ss 19 and 39(2)(d) Equality Act 2010 and the claimant's claim of indirect race discrimination is dismissed.
(3) The claimant's claim of unfair dismissal under Part X of the Employment Rights Act 1996 is not well-founded and is dismissed.

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Employment Judge Stout

19 September 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

20/09/2023

FOR THE TRIBUNAL OFFICE