EMPLOYMENT TRIBUNALS

Claimant: **Michael Barbrook**

Respondent: **New City College Limited**

Heard at: **East London Hearing Centre (via CVP)**

On: **14, 15 ,16 June and 28 July 2023 and 31 August 2023 (in chambers)**

Before: **Employment Judge Howden-Evans**
Members: **Ms S Jeary**
Mr J Webb

Representation:
Claimant: **In person**
Respondent: **Mr Pickett, Counsel**

RESERVED JUDGMENT

The Tribunal's unanimous decision is that:

1. The Claimant's complaint of unfair dismissal is well founded. The Respondent has unfairly dismissed the Claimant.

2. The Claimant's complaint of breach of contract in relation to notice pay is well-founded.

3. The Claimant's complaint of disability discrimination by unfavourable treatment because of something arising in consequence of disability, is not well founded and is dismissed.

4. The Claimant's complaint of disability discrimination by failure to make reasonable adjustments, is not well founded and is dismissed.

REASONS

1. References to the hearing bundle appear in square brackets throughout this Judgment.

Background

2. The Respondent is a further and higher education provider (based in East London and Essex) that has grown in size, following a series of mergers between six colleges. The most recent merger was in August 2019 when Havering Sixth Form College (based in Hornchurch, England) was taken over by the Respondent.

3. The Claimant commenced employment with Havering Sixth Form College on 1st September 1997. He was employed, initially as a Tourism Lecturer and subsequently as Course Leader for Sport. His employment transferred to the Respondent under the Transfer of Undertakings (Protection for Employment) Regulations ('TUPE') on 1st August 2019.

4. Following a disciplinary hearing on 15th January 2021, on 22nd January 2021 the Respondent's Deputy CEO wrote to the Claimant confirming his decision to summarily dismiss the Claimant on grounds of gross misconduct. The Claimant appealed this decision. Following an appeal hearing on 12th February 2021, on 16th February 2021 the Claimant was informed his appeal had been unsuccessful.

5. On 2nd March 2021 the Claimant contacted ACAS. ACAS early conciliation procedures continued until 8th April 2021.

6. The Claimant presented his ET1 claim on 20th May 2021 [p2 to 32]. This alleged unfair dismissal and disability discrimination (unfavourable treatment because of something arising in consequence of disability and failure to make reasonable adjustments) and sought notice pay and holiday pay.

7. The Respondent submitted an ET3 Response [33 to 56] contesting the claims. A preliminary hearing by telephone took place on 29th November 2021 following which Employment Judge Allen QC agreed a List of Issues and listed a 4 day final hearing.

The Hearing

8. The case was heard by an Employment Tribunal siting remotely via video link. At the final hearing, the Claimant presented his own case; at earlier points in the proceedings, he had been represented by solicitors (who had helped the Claimant to draft his Particulars of Claim). Mr Pickett, counsel, represented the Respondent.

9. At the outset of the final hearing, we discussed the List of Issues with the parties and agreed the timetable and order of evidence. We discussed whether any witness needed adjustments to be able to fairly participate in the hearing; no adjustments were identified, but we explained we would take regular rest breaks and confirmed that any witness or party could ask for a rest break at any point during the hearing.

10. There was an outstanding application for some of the disability discrimination allegations to be struck out as being presented out of time. Parties agreed we should determine this application at the outset. Having heard submissions from both parties the Tribunal considered its decision and determined that elements of the disability discrimination claim had not been presented within the applicable time

limit, but it was just and equitable to extend the time limit. Full reasons were provided orally at lunchtime on Day 1.

11. Prior to starting to hear evidence, the Tribunal read the bundle of documents of 240 pages (244 pages electronically) and the 5 witnesses' statements. Having found it was just and equitable to extend time in respect of some of the disability discrimination allegations, the Tribunal permitted the Respondent to call a further witness (Mr Armah) and his 2-page witness statement was provided and read on the morning of day 2 prior to his giving evidence that afternoon. On Day 2 and 3, by consent, a small number of additional relevant documents were added to the bundle.

12. We heard evidence on oath as follows:

Day 1 (and morning of Day 2)

12.1 The Claimant (formerly the Programme Leader for Sport);

Day 2

12.2 Mr McDonald, CEO, who considered the Claimant's Appeal;
12.3 Ms Leaves, Senior Curriculum Manager for Sport and the Claimant's line manager;
12.4 Mr Armah, Group Executive Director of HR, who took the decision to suspend the Claimant;

Day 3

12.5 Mr Smithers, Assistant Principal Student Support and investigating officer;
12.6 Mr Araniyasundaran, Deputy CEO, who took the decision to dismiss the Claimant.

13. All witnesses gave evidence on oath. In relation to each witness, the procedure adopted was the same: the Tribunal had read each witness's statement, there was opportunity for supplemental questions (or in the Claimant's case, for the Claimant to address matters raised in the Respondent's witnesses' statements) before questions from the other side, questions from the Tribunal and any re-examination (or in the Claimant's case, opportunity for the Claimant to clarify anything he felt he had not been able to explain fully in answering questions).

14. At the end of Day 2, by consent and to assist the parties, the employment judge updated the List of Issues and provided a written copy to both parties. To assist the Claimant (a litigant in person) the Respondent's Counsel kindly added comments to the Updated List of Issues (explaining the Respondent's case in relation to each issue) and circulated this prior to the start of Day 3.

15. The case originally had a time estimate of 4 days for the final hearing, but only 3 days were available to us in June 2023. During this time, we were able to hear all the witness evidence but there was insufficient time for oral closing submissions. By consent, parties exchanged written submissions and then exchanged and filed

their final written closing submissions. We also had the benefit of a list of authorities from the Respondent.

16. The Tribunal met on 28th July 2023 and hoped to conclude their discussion in the morning to be able to give parties an oral decision with reasons that afternoon. Unfortunately, on 28th July 2023, it became apparent that medical records and GP fit notes relevant to the issues of whether the Claimant had a disability by reason of anxiety and depression and whether the Respondent was aware of this had accidentally been omitted from the bundle. The bundle was missing 5 pages of an 11-page document; there appeared to have been an administrative error in providing the notes from the GP to the Claimant or from the Claimant to the Respondent's solicitors. When the hearing resumed in the afternoon, as disability was a key issue, it was agreed both parties would check all GP fit notes and relevant medical records were exchanged and added to the bundle and parties would confirm in writing whether there was any objection to these documents being added to the bundle, whether there was any request for a witness to be recalled and parties also had permission to amend their final written closing submissions.

17. Parties complied with these directions and the Tribunal completed their chambers discussion on 31st August 2023, taking into account the additional medical evidence that had been provided. There was no objection to these documents being added to the bundle; nor was there any request for a witness to be recalled.

The Issues

18. By closing submissions, the Issues to be determined (as set out in the Updated List of Issues) were:

Disability

1. Was the Claimant disabled within the meaning of section 6 Equality Act 2010?

The Respondent accepts the Claimant had a disability by reason of his prostatectomy (and Respondent was aware of this condition at the material time).

The Respondent <u>does not</u> accept the Claimant had a disability by reason of his Anxiety and Depression, so the Tribunal will answer these questions relating to disability:

a) Did the Claimant have a mental impairment (namely anxiety and depression) at the material time (ie from November 2020 onwards)?

b) If so, did anxiety and depression have a substantial adverse effect on his ability to carry out his normal day to day activities?

c) If so, was the effect long term? In particular, when did it start and:

i. Had it lasted at least 12 months;
ii. was the impairment likely to last at least 12 months?

d) Were there any measures (eg medication) taken to treat or correct the impairment? But for these measures (ie without that medication) would the impairment have been likely to have had a substantial adverse effect on the Claimant's ability to carry out normal day to day activities?

[Due to a typographical error there was no Issue 2 or 3 in the List of Issues]

Discrimination Arising from Disability

4. Did the following thing arise in consequence of the Claimant's disability? ("the something arising"): See Particulars of Claim para 107(a) and (b)

a. (107(a)) did the Claimant have a higher absence rate than other employees who did not suffer from his disabilities? The Respondent accepts this in their closing submissions.

b. (107(b)) did the Claimant suffer additional stress and anxiety in the workplace in the midst of a global pandemic which affected his decision making when carrying out his role? The Respondent contests this assertion.

5. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of his disability? Specifically, did the Respondent decide to dismiss the Claimant because of his higher absence rate and/or because his additional stress had affected his decision making?

6. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim:

The Respondent asserts the legitimate aim was of ensuring that the register was kept in a lawful manner and/or was of maintaining high teaching and safeguarding standards for the pupils in its care including teaching for full timetable periods and fulfilling the policy for coaching sessions.

7. Can the Respondent show that it did not know and could not reasonably have been expected to know that the Claimant had a disability?

Failure to Make Reasonable Adjustments

8. Did the Respondent operate the following provisions, criteria or practices (PCPs)? (See Particulars of Claim para 111)

1. *A policy of automatically suspending an employee where an alleged offence may constitute gross misconduct (per para 9 R's disciplinary policy)? (PCP 1) The Respondent does not accept this was a PCP adopted by the Respondent.*

2. *A policy of refusing to postpone disciplinary processes to allow a grievance to be investigated and concluded? (PCP 2) The Respondent accepts this was a PCP adopted by the Respondent.*

3. *A policy of refusing to postpone disciplinary processes when the employee is unfit to attend? (PCP 3) The Respondent does not accept that this occurred or was a PCP adopted by the Respondent.*

9. *Did the application of any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? (See Particulars of Claim para 111)*

    1. *Did PCP 1 put the Claimant at a substantial disadvantage in that he was placed under undue stress and worry which exacerbated his anxiety? If PCP 1 is established, the Respondent does accept PCP1 would exacerbate anxiety and depression in an employee who has anxiety and depression.*

    2. *Did PCP 2 put the Claimant at a substantial disadvantage in that it exacerbated his stress and anxiety due to the fear he was not being given a fair chance to defend himself? The Respondent contests this assertion.*

    3. *Did PCP 3 put the Claimant at a substantial disadvantage in that it exacerbated his stress and anxiety due to the fear he was not being given a fair chance to defend himself and/ or he was not fit to adequately prepare for the disciplinary hearing? The Respondent contests this assertion.*

10. *Did the Respondent take such steps as were reasonable to avoid the disadvantage? (See Particulars of Claim para 111)*

    1. *For PCP 1, would it have been a reasonable adjustment to dispense with the need to suspend? The Respondent contests this assertion.*

    2. *For PCP 2 would it have been a reasonable adjustment to put the disciplinary process on hold until the grievance outcome and grievance appeal had been concluded? The Respondent contests this assertion.*

    3. *For PCP 3, would it have been a reasonable adjustment to put the disciplinary process on hold until the Claimant was confirmed fit to*

attend? The Respondent asserts all reasonable adjustments were made.

11. *Did the Respondent not know, and could the Respondent not reasonably have been expected to know, that the Claimant had a disability, or was likely to be placed at the disadvantage set out above? The Respondent accepts it knew of the Claimant's mental health condition in Spring 2020, but understood it to be short lived episode rather than a disability.*

[Due to a typographical error there was no Issue 12 in the List of Issues]

Unfair Dismissal

13. *What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct which is a potentially fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.*

(Para 99 Particulars of Claim–

a) or was the disciplinary process a sham to facilitate his dismissal?
b) or was dismissal based on the Claimant's sickness record?
c) or was dismissal based on the Claimant's decision not to pursue voluntary redundancy?

14. *Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following a reasonable investigation?*

<u>The Respondent asserts it had a genuine belief the following were misconduct:</u>

i. *Altering the timetable for sports lessons on 9th Oct and 16th Oct without permission;*

ii. *Irrespective of the time these sports lessons took place, not teaching them for the full duration of 2 x 70 minutes each and leaving the site early as a result;*

iii. *Cancelling coaching sessions scheduled for 9 Oct and 16 Oct and instead converting these to informal optional drop in sessions; and*

iv. *Falsifying the register related to these coaching sessions to show attendance which had not actually taken place.*

<u>Reasonable investigation</u>

(Particulars of Claim, Para 101 – did any of the following occur? If so did it mean the investigation was beyond the range of reasonable investigations:

a) *Did the Respondent fail to consider mitigation put forward by the Claimant?*

b) *Did the Respondent fail to interview the Claimant's colleagues to establish:*

   i) *whether working through lunch break without management permission was common practice?*

   ii) *Whether marking registers a few days after the lesson was common practice?*

   iii) *Whether it was common practice to mark students as present if they were on campus during coaching sessions and studying independently?*

   iv) *Whether it was common practice to hold drop in sessions for the coaching sessons?*

   v) *Whether they too had on occasions curtailed lessons slightly earlier provided the students had carried out the required work?*

c) *Did the Respondent fail to provide the Claimant with minutes and notes from Mr Smither's meetings with Ms Leaves, Ms Arnell, Mr McGeoghegan, the students from the sports classes as part of the investigation report?*

d) *Did the Respondent fail to take any minutes and notes from Mr Smither's calls to the three students from the coaching sessions?*

e) *Did the Respondent fail to ask students from coaching sessions whether they felt they had received adequate guidance and support?*

f) *Did the Respondent fail to ask the coaching students what they had told Ms Arnell in the corridor?*

g) *Did the Respondent fail to interview Mr Allotey?*

h) *Did the Respondent fail to show the Claimant the CCTV footage?*

i) *Did the Respondent fail to establish the facts?*

j) *Did the Respondent fail to carry out a preliminary investigation before suspending the Claimant?*

k) *Did the Respondent fail to establish reasonable grounds for a belief in gross misconduct?*

15. *Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with those facts?*

    Particulars of Claim - Para 103 – At the time of taking the decision to dismiss the Claimant / dismiss the appeal was the Respondent aware that any of the following had occurred? If so, did it mean the decision to dismiss was <u>beyond the range of reasonable responses of a reasonable employer</u>?

    a) *Did Mr Crossley send an email regarding working through lunch breaks (with no mention of obtaining management permission) which gave the Claimant the understanding he only had to obtain student's permission to do so? Alternatively, was this common practice in the Sixth Form before it was taken over by the Respondent in the summer of 2019 and the Claimant was not informed the practice had changed?*

    b) *The Claimant had only left campus 25 minutes early on 9th and 16th October 2020 after students had completed the work required. There wasn't any further work to be carried out and the Claimant had fulfilled his duties – does leaving 25 minutes early in this situation amount to gross misconduct, in light of keeping students on campus unnecessarily during a global pandemic?*

    c) *The Claimant did not falsify registers?*

    d) *The Claimant was not aware he had to obtain permission to provide drop-in sessions for the allocated coaching sessions and obtaining permission for drop-in sessions was not common practice at the sixth form?*

    e) *The Claimant did not cancel the coaching sessions. Students visited him during sessions and emailed him when they had questions?*

    f) *The Respondent failed to follow their own disciplinary policy?*

    g) *If there were genuine capability or performance issues the Respondent should have provided support training and guidance?*

16. *Did the Respondent adopt a fair procedure?*

<u>Was dismissal pre-determined?</u>

a) *Did the Respondent fail to consider any evidence put forward by the Claimant?*

b) *Did the Respondent fail to carry out an adequate investigation and fail to establish the facts?*

c) *Was a job advert released for the Claimant's department which would have replaced his teaching hours?*

d) *Did the Respondent fail to adequately deal with the Claimant's disciplinary and grievance appeals?*

e) *Did the Respondent prevent the Claimant from asking questions and putting forward his case before suspending him?*

f) *Was the Claimant's suspension unnecessary?*

g) *Was the investigation not even-handed?*

17. *If it did not adopt a fair procedure, would the Claimant have been fairly dismissed in any event and / or what is the possibility of such a fair dismissal and when might it have taken place?*

18. *If the dismissal was unfair, should the Claimant's compensation be reduced on the basis of his conduct and or contribution?*

Notice Pay

19. *It is agreed that the Respondent dismissed the Claimant without notice.*

20. *Can the Respondent show that it was entitled to dismiss the Claimant without notice because the Claimant had committed gross misconduct?*

21. *It is agreed that if the Claimant was entitled to notice, the Claimant was entitled to 12 weeks' notice.*

Holiday pay

22. *The Claimant accepted the holiday pay he was seeking was for school holidays that would have occurred during the 12 weeks following his dismissal. I explained that this would be awarded as part of the Notice Pay claim (if the Claimant succeeds with that claim).*

Findings of Fact

Background

19. The Claimant commenced employment with Havering Sixth Form College (in Hornchurch, England) on 1st September 1997. He was employed, initially as a Tourism Lecturer and subsequently as Course Leader for Sport. His employment transferred to the Respondent under the Transfer of Undertakings (Protection for Employment) Regulations ('TUPE') on 1st August 2019. This merger meant the Respondent, a further and higher education provider (based in East London and Essex) operated six colleges across a number of campuses.

20. At the time of his dismissal the Claimant had 23 years continuous employment with the Respondent and an unblemished disciplinary record.

Findings of Fact relevant to Unfair Dismissal complaint

21. In this part of the judgment, we are considering only the evidence that the dismissing officer and appeal officer had seen at the time of taking their decisions.

22. Relevant extracts from the Respondent's disciplinary policy include:

> ***"Misconduct***
>
> *Examples of misconduct include but are not limited to:*
>
> *…• Persistent failure to follow college procedures*
> *• Unauthorised absence*
> *• Regular failure in following employment rules…..*
>
> ***Gross Misconduct***
>
> *Examples of gross misconduct include but are not limited to:*
>
> *…..• Persistent unauthorised absence*
> *• Failure to perform the major requirements of the job*
> *Falsification of documents likely to benefit the employee or others e.g. registers, time sheets, expenses, qualifications"*

23. It is common knowledge that in March 2020, the Covid 19 pandemic caused all schools and colleges (including the Respondent) to be closed for a number of months (to the majority of students) as the UK went into a national lockdown.

24. In September 2020, like all education providers, the Respondent was navigating changing circumstances; trying to deliver education to students in person in classrooms (rather than students / staff working from home) whilst reducing the risk of transmission and managing incidences of Covid 19.

25. It is clear that the Claimant, his colleagues and the Respondent's managers were working in very difficult conditions. At this point in time, vaccinations were not yet

available and staff were very concerned that cases of Covid in London were rising (see Mr MacDonald's briefing of 14th September 2020).

26. Despite the Tribunal requesting copies of the Respondent's operating procedures that were in place in Autumn 2020, we only have limited documents relating to the procedures and guidance that was given to staff, namely 4 "All Staff Briefing" emails from Mr MacDonald the CEO dated 2nd September, 6th September, 14th September and 18th September 2020. Despite requesting it we have not been provided with the comprehensive risk assessment that was provided to staff on 6th September 2020.

27. From the All Staff Briefings, we note, all staff were given the following directions:

27.1 On 2nd September 2020 Mr MacDonald wrote

"The return to teaching and the start of term will give rise to anxiety for some staff. That is understandable and I wanted to update you on the ongoing discussions with unions which continued yesterday. It is important to note that we don't have a blueprint for this or a one best way of approaching the complexities that the start of term presents.

We are, however, as an SMT, keen to avoid immediately moving to on-line learning, however tempting that might be. Our assessment is that we don't yet know our students or their circumstances and that while we are not ruling out on-line as an option, we do not wish to start the year with that approach.

From Monday 7 September, masks will be mandatory for all staff and students in common areas (social spaces and corridors)

We will continue with a room audit (this started yesterday) that will make practical assessments about room capacity. This will not be a mechanistic approach based purely on room size but will look at other issues such as ventilation

Each teaching room will have an indicated 2m teacher zone which can be used to keep a member of staff apart from students if desired by a teacher.

….<u>Subject to the need to provide cover where necessary, teachers will only need to be on campus when they are actually teaching if they choose to undertake marking and preparation at home</u> [Tribunal emphasis]

We will investigate the possibility of splitting times not groups where we have no other alternative. This could for example mean splitting a two hour lesson into two one hour sessions with half the class attending each hour

This is a work in progress. The issues here are complex and as I have said there is no one right way to bring students and staff back safely".

28. On 6th September 2020 Mr MacDonald again repeated:

"We have agreed that teachers do not need to be on campus when they are not teaching subject to cover requirements"

29. On 18th September 2020 Mr MacDonald noted

"we have now had three cases, all in different campuses…We all know that cases are rising and that testing is a problem. The number of hospital cases in London has risen from a low of 65 a month ago to 145 now. There were 819 when reporting started in late March and 4800 by 8 April. We speak to our local health authorities daily and are in contact with senior officers in all the Boroughs in which we operate. We should take some comfort from the very low number of reported cases in our college community so far. But we should also know that if we need to close a campus, we will do so"

and gave the following guidance to all staff:

"….to help us with the start of adult provision next week, we have taken two important steps. First, for our adult learners, next week's lessons will be face to face except where groups exceed the calculated COVID room capacity. For these larger groups, an initial two-week model of blended learning, based on 50% in college and 50% home learning, will be implemented. We will use these two weeks to establish best room utilisation against real learner numbers and then review the approach. We expect this to apply to about 20% of adult classes.

Second, from next Monday, business support staff will have the option to work from home on occasion where a) the role allows and b) their Group Director or AP agrees. This will not be the primary working arrangement for any staff member and the team and service will be considered in any request. This arrangement will be for an initial six week period, until the end of October."

30. On 3rd November 2020, the Claimant was suspended on full pay, pending investigation into allegations of gross misconduct. Mr Smithers conducted an investigation and prepared a 5-page investigation report (dated 13th November 2020) setting out the terms of reference for the investigation, the enquiries he had made, his findings and conclusions [123 – 127].

31. By letter of 18th November 2020 Ms Blackburn wrote to the Claimant, inviting him to attend a disciplinary hearing that would be considering the allegations

"that you have falsified register marks, specifically those relating to coaching sessions on a Friday morning. It is alleged that these sessions were cancelled without the permission of a college senior manager. Further, it is alleged that you left work early on at least two occasions without permission from your line manager when you were expected to be teaching meaning that students did not receive their allocated teaching hours. It is alleged that your alleged actions fail to meet our expectations of proper conduct by a college employee and breach the trust and confidence which goes to the heart of any employment relationship".

32. The tribunal note the allegations of misconduct were:

32.1 cancelling Friday morning coaching sessions;
32.2 falsifying registers for Friday morning coaching sessions;
32.3 leaving work early without permission; and

32.4 not providing students with their allocated teaching hours.

33. The Claimant confirmed that prior to the disciplinary hearing, he was provided with the

33.1 Minutes of his investigation meeting [120 to 122]

33.2 The investigation report [123 to 127]

33.3 Registers for the 9th October 2020 and 16th October 2020 morning coaching sessions which confirm the session was taken (without noting who has attended) [128 and 129]; and

33.4 the registers for the Friday afternoon sessions on 9th and 16th October 2020 [115 and 116].

34. The Claimant confirmed that at some point (possibly during the investigation meeting or the disciplinary hearing) he may have seen the 2 photos of the CCTV images that show a white car (obscured numberplate and no view of driver) driving towards the gate with time stamps of 09-10-2020 13:00 and 16-10-2020 13:02 [109 and 110].

35. In oral evidence, the Claimant was very clear that, prior to these proceedings, he had not seen

35.1 any CCTV footage of the white car leaving site;

35.2 Minutes of the investigation meeting with the focus group of 6 students who confirmed the Claimant's afternoon lessons on 9th and 16th October had ended at 1.30pm to 1.45pm [117];

35.3 Minutes of the investigation meeting with Ms Leaves, the Claimant's line manager in which she admitted she had given verbal permission for the Claimant to bring forward his afternoon lesson on Friday afternoon on two occasions in September 2020 [118 to 119];

35.4 Minutes of the investigation meeting with Mr Mcgeoghegan in which he confirmed that one Friday (he was unsure of the date) at "early lunchtime" he was looking for the Claimant and the Claimant wasn't in his room [130]; or

35.5 Minutes of the investigation meeting with Ms Arnell in which she stated two coaching students had told her "they didn't have to go" to coaching sessions with the Claimant [131]

36. It is agreed that there are no minutes of any meeting with any coaching students, nor are there any witness statements for any coaching students.

37. In oral evidence, Mr Araniyasundaran confirmed prior to making his decision to dismiss the Claimant, Mr Araniyasundaran had considered:

37.1 Mr Smither's investigation report [123 to 127] which identified the terms of reference as being an investigation into allegations the Claimant had

"*Left work early on at least two occasions when you were expected to be teaching and have completed registers to confirm that sessions were fully attended and took place despite your absence. It is alleged that you had cancelled these classes without management permission and then falsified registers in retrospect."*

and concludes:

"*My investigation suggests that [the Claimant] has moved sport lessons on at least two occasions: the 9th and 16th of October to being delivered earlier in the day, without the permission of the SCM for Sport who is also his line manager. He failed to take the registers for these sessions on these days.*

[The Claimant] has finished these sport lessons early on both dates and not give the students the full 70- minute lesson time as per the timetable. I believe he did this in order for him to leave site early at approximately 1pm when he should have been teaching in the class room.

[The Claimant] has cancelled five coaching session for two students and four sessions for another student so far this term, leading to these students not receiving appropriate advice and guidance in completing their UCAS applications. He has falsified the registers suggesting that these sessions did take place and that students were in full attendance".

37.2 Registers for the 9th October 2020 and 16th October 2020 morning coaching sessions which confirm the session was taken (without noting who has attended) [128 and 129]

37.3 Minutes of the investigation meeting with Mr Mcgeoghegan in which he confirmed that one Friday (he was unsure of the date) at "early lunchtime" he was looking for the Claimant and the Claimant wasn't in his room [130]

37.4 Minutes of the investigation meeting with Ms Arnell in which she stated two coaching students had told her "they didn't have to go" to coaching sessions with the Claimant [131]

37.5 Minutes of the investigation meeting with the Claimant – both the first draft and the version that had been corrected by the Claimant [120 to 122]

37.6 Photos of the CCTV images that show a white car (obscured numberplate and no view of driver) driving towards the gate with time stamps of 09-10-2020 13:00 and 16-10-2020 13:02 [109 and 110].

38. Subsequently during oral evidence Mr Araniyasundaran confirmed he may have seen:

38.1 the registers for the Friday afternoon sessions on 9th and 16th October 2020 [115 and 116]; and

38.2 the occupational health report dated 12th January 2021 (following a telephone consultation earlier that day) which confirmed the Claimant was signed unfit for work with work related stress and was taking antidepressants but was fit to attend the disciplinary hearing [149 to 152]. However, Mr Araniyasundaran was adamant he was not aware of the Claimant's health history and had not considered the Claimant's health history as part of his decision.

39. On 15th January 2021 the Claimant attended the disciplinary hearing (which was conducted online by TEAMS) and was accompanied by his trade union representative Mr Delaney. The hearing was chaired by Mr Araniyasundaran and attended by Ms Blackburn and Mr Smithers.

40. From the minutes of the disciplinary hearing, the Tribunal note the following oral submissions were made during the disciplinary hearing:

41. Mr. Smithers, investigating officer presented his investigation report and

41.1 referred to CCTV footage which showed a white car which he believed to be driven by the Claimant leave college at 1.00pm on 9th October and 1.02pm on 16th October;

41.2 noted that the Friday afternoon class sports students had confirmed their lessons had not been cancelled (which had been the original allegation), but had been brought forward and the lesson time moved;

41.3 noted that the Friday morning coaching students had said they had very few coaching sessions and had been told to work independently on UCAS statements;

41.4 reported that the claimant's explanation was the sports lesson had been moved forward and ended early due to COVID for increased cleaning time and that it was custom and practise at the college to work through breaks with students to finish a lesson early, but the Claimant accepted he had not gained his line manager's permission;

41.5 reported that the claimant had said he'd finished the Friday afternoon lesson between 1:15 and 1:20pm; and

41.6 reported the Claimant had denied cancelling the coaching sessions but had given students the option to study independently.

42. The Claimant made the following oral submissions:

42.1 he said the Friday afternoon sports class would work through lunch and the lesson finished at 1.30pm;

42.2 he emphatically denied he had only taught 1 or 2 coaching sessions (as Mr Smithers had asserted) and explained a parent complaint had been received about a student having to attend college for coaching sessions given the situation with COVID and so the Claimant had run coaching sessions as drop in sessions;

42.3 said he had changed one student's mind during coaching sessions and had persuaded her to apply to university - how could he have done this if he wasn't running the coaching sessions?;

42.4 he reported that during the investigation meeting Mr Smithers had asked the Claimant whether the Claimant could prove he (the Claimant) was in room O106 for coaching sessions and the Claimant had offered Mr Allotey's name as a witness to the fact that the Claimant had been in room O106 for coaching sessions as Mr Allotey called to the Claimant in room O106 during a coaching session. During the disciplinary meeting, Mr Smithers could not recall this comment [although the Tribunal note it is referred to in the minutes of the investigation meeting with the Claimant]. During the disciplinary hearing it was confirmed that Mr Smithers had not spoken to Mr Allotey as part of his investigation; and

42.5 asked Mr Smithers whether he had checked who had taken the registers for the coaching session, as some of the register marks had been changed and these changes had not been made by the Claimant. Mr Smithers said he hadn't checked the register marks; *"the issue he had focused on was that the coaching sessions had not taken place rather than fraudulent registers. His findings were that coaching sessions had been cancelled and [the Claimant] had told students he would mark register*".

43. During the disciplinary hearing Mr Delaney, the Claimant's trade union representative submitted

43.1 the Respondent was using this process to remove a member of staff they considered surplus to requirements and referred to the Claimant being offered a full redundancy package outside of union involvement in March 2020;

43.2 said there was hostility towards the Claimant (from his line manager and others) given the suspension from work which didn't follow the Respondent's disciplinary policy which stated the Respondent would, at first, seek to informally resolve issues via the line manager, which had never happened;

43.3 stated gossip that the Claimant had a history of leaving work early was untrue and pointed out there was no suggestion of this in the Claimant's PDR reviews;

43.4 said the sports students clearly respected the Claimant, there has been no prior complaints and the Claimant has an unblemished record;

43.5 submitted the Claimant should have a degree of autonomy as a subject leader;

43.6 asked how staff (including the Claimant) were supposed to know the requirements of running coaching sessions;

43.7 submitted the CEO had endorsed more flexible working in his September 2020 all-staff briefings;

43.8 read out a character witness statement from one of the Claimant's colleagues that included "*there is a precedent of teachers starting the final lesson of the day during the lunch break that precedes it in order to engineer an early finish (with the consent of the students involved). The college will be aware of this informal practice.";*

43.9 Submitted the Claimant was working within what he understood to be the boundaries of discretion allowed by the college;

43.10 Submitted marking registers at a later date was not a major issue and was common practice;

43.11 Submitted the College was not certain it was the Claimant that had completed the registers; and

43.12 Submitted this did not amount to grounds for gross misconduct or dismissal

<u>The decision to dismiss the Claimant</u>

44. The tribunal note that, far from having an open mind and looking for evidence that might support the Claimant, Mr Araniyasundaran was completely incurious in his approach to considering the disciplinary allegations. In oral evidence he confirmed that his approach was that he would only consider something if it was said during the disciplinary hearing itself. For instance Mr Araniyasundaran did not make any attempt to check the Claimant's personnel file.

45. In oral evidence, Mr Araniyasundaran was very clear that <u>he had not seen</u> the following documents, prior to his decision to dismiss the Claimant:

45.1 Minutes of the investigation meeting with the focus group of 6 students who confirmed the Claimant's afternoon lessons on 9th and 16th October had ended 1.30pm to 1.45pm [117];

45.2 Minutes of the investigation meeting with Ms Leaves, the Claimant's line manager (in which she admitted she had given verbal permission for the Claimant to bring forward his afternoon lesson on Friday afternoon on two occasions in September 2020) [118 to 119];

45.3 the Claimant's solicitor's 7-page letter of 27th November 2020 which set out a comprehensive account of their concerns about the procedures that had been adopted, extensive submissions as to whether the Claimant had

committed acts of misconduct and mitigation that ought to be considered [134 to 140];

45.4 the Claimant's personnel file; and

45.5 the Claimant's disciplinary record, however Mr Araniyasundaran confirmed he assumed it was a clean record.

46. By letter of 21st January 2021, Mr Araniyasundaran wrote to the Claimant confirming his decision to dismiss the Claimant. His findings were as follows:

46.1 *That on at least two occasions, 9th and 16th October 2020 [the Claimant] had moved sports lessons to an earlier time without the permission of [his] line manager and had failed to take registers of these sessions on that day;*

46.2 *That on at least two occasions, 9th and 16th October 2020 [the Claimant] did not deliver the 70 minute lesson as per [his] timetable and left the college site whilst [he] should have been teaching according to timetable and registers completed after the event;*

46.3 *That [he had] cancelled a number of coaching sessions without permission; and*

46.4 *That [he had] falsified registers to suggest that these coaching sessions had taken place and were fully attended.*

47. Mr Araniyasundaran's findings included

47.1 *"…You also raised concerns about the integrity of the investigation, specifically that [Mr] Smithers had failed to speak to [Mr] Allottey as you claim you had suggested in your meeting. You explained Mr Allottey had come to see you in O106 on 25th September 2020 during a coaching session. I am satisfied that [Mr] Smithers investigation focussed on two particular dates 9th & 16th October 2020 and therefore the date in question that you suggested Mr Allottey witnessed your attendance at work was not subject to investigation".*

47.2 *"I find that you did on at least two occasions move sports lessons without the permission of your line manager. I accept that your mitigation that the campus management team had allowed a degree of flexibility in bringing forward lessons, or working through schedule breaks with student consent, but this should also been subject to management approval. This should have been discussed with and agreed by the Deputy Principal. The lessons were scheduled to take place between 1:00 pm and 2:10 pm. You had moved them forward to begin at around 12:20 pm which indicates the lesson should therefore have finished 70 minutes later at approximately 1:30 pm. In mitigation you presented a character witness statement from a colleague that suggests you, and he, considered that there is a precedent of teachers starting the final lesson of the day during the lunch break that precedes it in order to engineer an early finish (with the consent of the students involved). It is not in the scope of my role as hearing manager to*

consider the implications for this arrangement and I shall speak to Janet Smith, Principal at the Havering campuses to investigate this arrangement further. However, whilst this may be common practice the allegation is that you left college during scheduled teaching time - even considering an earlier start time - and therefore I cannot accept this as reasonable mitigation."

47.3 *"I find that you did not, on at least two occasions, deliver the 70-minute lesson as per the timetable and left the college site whilst you should have been teaching according to your timetable. CCTV shows your vehicle leaving the college at 1:00 pm and 1.02 pm on the respective dates if the lesson had been brought forward and started at 12.20 pm you could only have delivered 40 minutes of that session not allowing for time for you to collect your belongings and exit the college. You did not offer any explanation or mitigation with regard to this allegation"*.

47.4 *"I find that you did cancel a number of coaching sessions without permission. This is substantiated by student testimony both to Ms Arnold in an informal context and Mr Smithers as part of this investigation. Further there is evidence in the form of e-mail correspondence that you inform the learner but she did not need to attend coaching as she was not submitting a UCAS application on at least three occasions. There is also evidence that you have asked learners to remote work on the UCAS application rather than attend a coaching session. In mitigation you stated that a CEO briefing in September 2020 had suggested staff worked flexibly and that parents had complained about coaching which they deemed unnecessary. I did not accept this mitigation – the briefings from the CEO and other college senior managers in September to November 2020 were clear that the majority of sessions should be delivered on site and be face to face sessions. Any exceptions to this arrangement were to be agreed by SMT. You did not have the authority or permission to cancel these sessions or agree to continued remote delivery."*

47.5 *"I find that you have falsified registers to suggest that these coaching sessions had taken place and were fully attended. I accept your argument that registers are commonly taken after the event however the registers completed for both the coaching and sports sessions are not accurate with regards to attendance or delivery. There is evidence in the form of emails that you have asked students to confirm their attendance on e-mail and then marked them as present despite not having delivered the coaching session. An example of this is an e-mail to student on 23rd September 2020 that states "if you e-mail me to say that you're in and attending your sociology lesson P1 I'll mark you as present". Another e-mail dated 2nd October 2022 to a student states she does not need to attend coaching that day. Registers show that the same student was marked as present at the coaching session. Further registers for the sports lesson on the 9th and 16th of October marked as fully attended between 1:00pm and 2:10pm despite the full session not having been delivered as indicated by your departure from the college at 1:00pm and 1:02pm*."

47.6 *"In conclusion I uphold the allegations made against you and consider your actions to amount to gross misconduct. In mitigation I have considered your long standing employment with the college and the fact that you have not been subject to any formal sanction prior to your suspension from work. I also considered the occupational health report which determines that you have had a difficult period in your personal life in recent years*."

47.7 *"Nevertheless this does not adequately mitigate the seriousness of your actions and I was disappointed that you did not appear to take ownership of your actions and did not appear to be remorseful or reflective of the incidents and how your actions may have impacted on your students. Considering all the facts and mitigating circumstances I've decided that you should be dismissed from the college with immediate effect on the grounds of gross misconduct without notice or payment in lieu of notice."*

The appeal

48. By email of 28th January 2021 the Claimant appealed this decision. His grounds of appeal contained the following:

48.1 *" The origin of the complaint – I raised concerns regarding the legitimacy and origin of the complaints raised against me. However, my concerns were simply dismissed in [the dismissal letter] dated 21st January 2021 without any investigation having been undertaken"*. The Claimant referred to the timings of the incidents and conflicting accounts that were said to have led to the investigation and asserted that his line manager had been "*digging around to try to find evidence to use against me".* He pointed out that Ms Blackburn's assertion *"It came to our attention through student complaints that Friday afternoon lessons were not taking place"* was not correct as no student had made any complaint.

48.2 "*the integrity of the whole procedure"* The Claimant pointed out that Mr Smithers had not indicated that any particular dates were being considered in relation to the cancelled coaching sessions allegation and yet the dismissing officer had chosen to disregard the Claimant's evidence that there was a witness to the Claimant being in room O106 at the time of a coaching session as "*the date in question that you suggested Mr Alloyte witnessed your attendance was not subject to investigation".*

48.3 The dismissing officer not giving mitigation evidence sufficient weight. In his appeal letter the Claimant referred to the dismissing officer accepting that bringing forward lessons and working through breaks was common practice but choosing not to give any weight to this mitigation. In his appeal letter the Claimant asserted this proved the gross misconduct decision was pre-determined.

48.4 In his appeal letter the Claimant explained the need for the Respondent to

48.4.1 look at practices that had historically been adopted by Havering Sixth Form; and

48.4.2 ensure all employees understand and follow the same practices – for instance, the Claimant stated he had never been told he needed to obtain management approval (Deputy Principal or line manager approval) to work through scheduled breaks or change the time of a lesson; this had never been required at Havering Sixth Form.

[As an aside, the Tribunal notes that the Respondent seems to be confused about it's own requirements – sometimes the dismissing officer says the Claimant needed senior management approval (eg from the Deputy Principal) and on other occasions it is said it was his line manager's approval that was needed. This demonstrates there was no clear and consistent policy as to the approval that was needed before a teacher could bring lessons forward and work through a rest break.]

48.5 The dismissing officer's finding that the Claimant had not offered any mitigation for not delivering a full 70 minute lesson had not taken account of the Claimant's explanation (noted in the investigation minutes) that *"the point of the lesson was to get all of his students to the same point across his classes and he had achieved that".* The Claimant explained he had three classes undertaking the same subject and wanted to get all learners to the same point each week.

48.6 The dismissing officer's finding that the Claimant had cancelled a number of coaching sessions was based on "*student testimony to Ms Arnell in an informal context and to Mr Smithers as part of the investigation"* without any there being any student witness statements or minutes of meetings with coaching students.

48.7 The dismissing officer giving insufficient weight to the Claimant's account that he had held the coaching sessions as drop in sessions as:

48.7.1 one parent had complained about their child having to come to college for an hour before lessons as the parent was concerned about their child's health and safety during a pandemic; or

48.7.2 the Claimant's explanation that he did not have a computer room for coaching sessions and coaching students needed to use a computer for their UCAS application.

48.8 The statement that the dismissing officer was disappointed that the Claimant did not appear remorseful or reflective ignored the fact that the Claimant <u>had</u> admitted he had moved the Sports sessions forward and had held coaching sessions as drop in coaching sessions and again suggested the Respondent was trying to reach a particular outcome.

48.9 Procedural irregularities – the Claimant had previously requested notes from the focus group between the line manager and students. In his letter the dismissing officer noted he had asked for copies of this notes and was

"satisfied no such focus group was held". The Claimant asked why he had been told this focus group had taken place.

48.10 Breach of the Respondent's disciplinary policy – the Claimant asserted there had been a breach of paragraph 9.2 which provides "The College will consider temporary redeployment moving the employee to another area or amending their duties before any suspension takes place".

48.11 Ms Blackburn's email to Mr Armah of 13th November 2020 where she states *"there is one element I'm a bit concerned about and that's the suggestion it is usual practice at sixth form to record learners as present in a lesson when they are working elsewhere independently."* which the Claimant asserts demonstrates Ms Blackburn was herself aware of the practice of recording learners as present in a lesson when they were working elsewhere independently, proving this could not amount to gross misconduct.

48.12 The Claimant explained that during the investigation meeting he had told Mr Smithers that if students were present at the College site during the scheduled coaching session then he would mark them as present because this was the fairest way to do it. The alternative was to mark the students as absent even if they were at the College. In his appeal letter the Claimant explained *"In the past it has been accepted practice at the sixth form to ask students to email their teachers if they were present on site for coaching sessions – the email correspondence would be accepted as evidence to prove attendance. Previously we were also able to mark the students as "S" on the registers for study leave and this didn't affect their attendance, however, this is not an option when marking the registers anymore."*

48.13 In his appeal letter the Claimant confirmed he was always available during the coaching sessions should any student need to ask any questions or discuss any concerns they may have had and many students did come and see him during the sessions. In his appeal letter he stated it was common practice to hold drop in sessions and allow students to work on their UCAS application, especially if based in a non-computer room as he had been.

49. The Claimant's 8 page appeal letter came to an abrupt end (clearly cutting off the final part of the letter). The appeal letter was clearly a draft version; it had "track changes" on and highlighted sections. There was no correspondence from the Respondent checking whether the Claimant had accidentally submitted the wrong document. The draft nature and unusual layout for this document evidenced the fact that the Claimant was not well at the time of the disciplinary and appeal process.

50. On 12th February 2021 the Claimant's appeal hearing took place (via TEAMS meeting). The Claimant attended alone. The Appeal hearing was chaired by Mr McDonald and attended by Mr Araniyasundaran, Mr Armah and Ms Crump. There are no minutes for the appeal hearing.

51. In oral evidence Mr McDonald the appeal officer confirmed he didn't undertake any fresh investigations as part of the appeal. During oral evidence it was evident Mr McDonald had a very superficial understanding of the Claimant's acts of misconduct – for instance, Mr McDonald had not appreciated that the Claimant was teaching the same class before and after lunch on Friday afternoon – the Claimant had merged their two lessons rather than moving a different classes' lessons forward.

52. Given that the Claimant's appeal letter was 8 (densely typed) pages, the Tribunal were surprised

    52.1 the appeal outcome letter was only 1 page and 1 line long.

    52.2 The appeal officer had condensed the grounds of appeal to 2 sentences:

    "That the alleged misconduct was an accepted way of working at Havering Sixth Form College pre-merger; and that the sanction of dismissal was not fair or appropriate".

53. The Appeal officer's findings (in total) were

"The investigation carried out by [Mr] Smithers was sufficient and that his findings were justified by the evidence arising from his investigation.
[Mr] Araniyasundaran, in his capacity as chair of the disciplinary hearing, considered the issue of precedent and working practices fairly in reaching his decision.
The sanctions imposed by [Mr] Araniyasundaran, dismissal with immediate effect on the grounds of gross misconduct, was fair and reasonable."

54. These findings could have applied to almost any disciplinary appeal and demonstrate the very limited extent to which the Claimant's grounds of appeal were actually considered.

55. Turning to the relevant factual issues included in the List of Issues, we find as follows:

56. Did the Respondent fail to consider mitigation put forward by the Claimant? The Tribunal accepts the Dismissing Officer and the Appeal Officer did not adequately consider the following mitigation that was presented by the Claimant:

    56.1 The established custom and practice of starting the final lesson of the day during the lunch break to engineer an early finish;

    56.2 The established custom and practice of taking registers after the event;

    56.3 The lack of guidance given to the Claimant on the requirements of running coaching sessions;

    56.4 The Claimant's explanation that coaching sessions were converted to drop in sessions in response to a parental complaint about students having to

attend college for coaching sessions in light of the situation with Covid at that time (September / October 2020);

56.5 The Claimant's explanation that he did not have a computer room and students needed to use computers during coaching sessions to complete their UCAS application

57. Further the Tribunal accept the Appeal Officer did not adequately consider the following mitigation presented by the Claimant in his appeal letter:

57.1 The Claimant having never been told he needed management approval to work through scheduled breaks (which was a departure from Havering Sixth Form practices);

57.2 The Claimant's explanation that he was trying to get all his students (across 3 classes) to the same point in their learning each week and this had been achieved;

57.3 The custom and practice (at sixth form) of recording learners as present in a lesson when they were working elsewhere independently;

57.4 The custom and practice (at sixth form) of asking students to email their teachers if they were present on site and their teacher accepting that email correspondence as evidence of attendance;

57.5 The change in electronic registers which removed "S" for study leave; and

57.6 The custom and practice of holding sessions as drop in sessions especially if the session was based in a non-computer room

58. The Tribunal accept the Respondent did not interview the Claimant's colleagues to establish:

58.1 whether working through lunch break without management permission was common practice.

58.2 Whether marking registers a few days after the lesson was common practice. The dismissing officer accepted this was common practice in his decision letter.

58.3 Whether it was common practice to mark students as present if they were on campus during coaching sessions and studying independently.

58.4 Whether it was common practice to hold drop-in sessions for the coaching sessions.

59. The Tribunal accept the Respondent did not provide the Claimant with minutes and notes from Mr Smither's meetings with:

59.1 Ms Leaves;
59.2 Ms Arnell;

59.3 Mr McGeoghegan; and
59.4 the students from the sports classes,
all of which were relied upon for findings in the investigation report. The Tribunal note that the first time the Claimant saw these documents was during the Employment Tribunal proceedings.

60. The Tribunal accept the Respondent did not take any minutes and notes from Mr Smither's calls to the three students from the coaching sessions. Mr Smithers refers to having had conversations with these students in the investigation report but did not take minutes of these conversations.

61. In the absence of any minutes or evidence from Mr Smithers, the Tribunal cannot make any findings as to whether the Respondent failed to ask students from the coaching sessions:

61.1 whether they felt they had received adequate guidance and support; and /or
61.2 what they had told Ms Arnell in the corridor.

62. The Tribunal accept the Respondent did not interview Mr Allotey. Mr Smithers had wrongly believed the Claimant had received a phone call from Mr Allotey rather than been visited in person in the classroom. The Claimant had corrected this in the corrected minutes of his investigation meeting and returned these to the Respondent's HR department. Mr Smithers was not provided with these corrected minutes, but Mr Araniyasundaran was provided with a copy of the corrected minutes and was aware that the Claimant was saying that Mr Allotey had visited him in room O106 and was a witness that the Claimant was attending the coaching sessions he was timetabled to deliver. This was crucial witness evidence that may have supported the Claimant's account that the Claimant was delivering coaching sessions (rather than cancelling them as had been alleged). Mr Araniyasundaran chose not to follow up this line of enquiry. His reason for not making further enquires with Mr Allotey was Mr Araniyasundaran's assertion that the coaching session investigations centred on 9th and 16th October 2020 and the Claimant had suggested Mr Allotey had visited him on 25th September 2020. The Tribunal note that at no time prior to the dismissal letter had the Respondent given the Claimant <u>any date for coaching sessions that were alleged to have been cancelled</u>. In the dismissal letter Mr Araniyasundaran was choosing to focus on two specific dates that had not previously been provided to the Claimant.

63. The Tribunal accept the Respondent didn't show the Claimant the CCTV footage that it relied upon to find the Claimant had left site at 1.00 and 1.02 on two consecutive Fridays.

Findings of Fact relevant to the discrimination and wrongful dismissal claims

64. In addition to the findings of fact in the unfair dismissal claim, we note the following facts – this includes facts that may not have been known by the dismissing officer and/or appeal officer at the time they took the decisions they did.

65. At the time of his dismissal the Claimant had 23 years continuous employment with the Respondent and an unblemished disciplinary record. Whilst the Claimant

worked at a college in Hornchurch England, his family and home was in Caerphilly, South Wales, a 3 hour drive away. The Claimant had a longstanding agreement with Havering Sixth Form College that his "offsite time" would be timetabled on a Friday afternoon so the Claimant could leave college early on a Friday to facilitate his drive home.

66. It is agreed that the Claimant was diagnosed with prostate cancer in July 2017 and had a radical prostatectomy in September 2017, which meant he was on sick leave during the period September 2017 to April 2018. In December 2018 he was absent from work for a few days following the death of his father. In March 2019 he had a 1-week absence caring for a family member and in January 2020 to April 2020 he had a 6 week absence from work which was precipitated by a family member suddenly becoming acutely unwell.

67. Ms Leaves (Senior Curriculum Manager for Sport) became the Claimant's line manager in September 2020. She had worked for Havering Sixth Form College since 2016 and had shared an office with the Claimant between 2016 and 2019.

68. On 21st September 2020 the Claimant asked if he could work from home as all the students in the sports classes had been asked to work from home due to 5 positive incidents of Covid 19 in those classes. The Claimant's request was denied. Subsequently the grievance officer that considered the Claimant's grievance found this particular request to work from home was a reasonable request and the college could have done more.

69. On 21st October 2020 a colleague approached Ms Leaves questioning whether the Claimant had been running coaching sessions timetabled for 9.55 to 11.05 on Friday mornings (in this part of the judgment we will refer to this as "Allegation 1 - Friday morning coaching session concern"). Ms Leaves felt awkward speaking to the Claimant about this – instead she reviewed CCTV footage with Ms Blackburn (Head of HR) and noted that on Friday 9th October 2020 a white car left campus at 13.00 and on Friday 16th October 2020 a white car left campus at 13.02. The numberplate is not clear on the CCTV, but Ms Leaves and Ms Blackburn assumed it was the Claimant's car. They noted the last lesson the Claimant was timetabled to teach on Fridays was a lesson timetabled to take place 13.00 to 14.10 and assumed the Claimant had cancelled his Friday afternoon lessons on two occasions. (In this part of the judgment we will refer to this as "Allegation 2 - Friday afternoon cancelled class concern").

<u>The Decision to Suspend the Claimant</u>

70. Mr Armah, Group Executive Director of HR's evidence was that he believed the Claimant had falsified 2 registers for the 13.00 to 14.10 lesson on Friday 9th and on Friday 16th October 2020 (in this part of the judgement we will refer to this as "Allegation 3 - Falsification of Friday afternoon registers concern") and decided this was an allegation of gross misconduct and it was appropriate to suspend the Claimant pending investigation into the incidents. He considered if the Claimant was not suspended there was a possibility of him canvassing support from the students and staff.

The Suspension meeting and letter

71. On 3rd November 2020, Mr Smithers (who at the time was an Assistant Principal) was contacted by HR and asked to investigate the allegations. Mr Smithers was the line manager of Ms Leaves. The Tribunal note Mr Smithers had not worked at Havering Sixth Form College prior to its merger with New City College - Mr Smithers had previously worked at a different college/campus namely Havering College of Further & Higher Education prior to the merger with New City College.

72. On 3rd November 2020, Mr Smithers, Ms Blackburn and Ms Ruse (HR Business Partner) met the Claimant and told him he was being suspended from work on full pay as

"*It is alleged that you have left work early on at least two occasions when you were expected to be teaching and have completed registers to confirm that sessions were fully attended and took place despite your absence. It is alleged that you had cancelled these classes without management permission and then falsified the registers in retrospect." [minutes of meeting p110]*

73. The Tribunal note the Claimant was not told on which dates he was alleged to have left work early.

74. The Claimant was being suspended pending investigation into
    74.1 Allegation 2 - the Friday afternoon cancelled class concern; and
    74.2 Allegation 3 - the falsification of Friday afternoon registers concern.

75. During the suspension meeting the Claimant was told he was to have no contact with managers, colleagues or students in any way with the exception of Ms Ruse (HR Business Partner).

76. Ms Ruse wrote to the Claimant (on 4th November 2020) confirming the suspension, repeating (identically) the allegations that were being investigated and confirming if the allegations were proven it may result in disciplinary action including dismissal on the grounds of gross misconduct and/or some other substantial reason without notice. Ms Ruse explained suspension was not punitive and repeated the Claimant should not contact *"any of the College's customers, suppliers, students/learners or your work colleagues save for [his] trade union representative*".

77. The Claimant's trade union representative, Mr Delaney, wrote to Ms Blackburn on 5th November 2020

"I have learnt of [the Claimant]'s suspension with some shock. The college has suspended him pending an investigation into the false completion of his register. You have classified this as gross misconduct.

….It is [the Claimant]'s contention that the class in question were registered at the appropriate time…it is not gross misconduct to start your lesson early in order to finish it early. You may complain about the manner it was done but you are doing something extraordinary by suspending him.

[The Claimant] already feels that the college is trying to push him out. It did not help that when his home base in Caerphilly was put in lockdown and he asked if he should still come to the college (a reasonable question given concerns about transmitting the virus) he was told he would not be paid if he stayed off work and there would be no compensation for any extra expense such as having to find alternative accommodation. It seems as if you had a prepared answer for a question that was never asked, which had the effect of making [the Claimant] feel unwanted and unsupported. Even more recently when all the students and all the teachers in his department were isolating he asked to work from home as well (a statement by Mr MacDonald had led him to believe it would not be a problem). The request was refused.

I hope the college will reflect on its treatment of [the Claimant]. There is no justification for suspending him and I expect you to reinstate him as soon as possible."

78. Ms Blackburn responded on 5th November 2020

"It came to our attention <u>through student complaints</u> that Friday afternoon lessons were not taking place. Registers have been completed for these classes to state that all students were present. We have CCTV evidence of [the Claimant] leaving the campus at 1pm by car which is during the time this lesson would be expected to take place." [Tribunal's emphasis – the Tribunal note there had been no student complaint]

79. Being suspended, particularly after 23 years' unblemished service, had a profound impact on the Claimant's health. In oral evidence the Claimant explained that as an education professional, suspension usually implies someone is not safe to work with young people. Whilst the Tribunal accept that suspension is a neutral act, being suspended can carry negative connotations, particularly in an education setting.

80. On 12th November 2020, the Claimant was signed unfit for work for 28 days because of stress at work. He sent his sick note to Ms Blackburn and on 13th November 2020 she emailed Mr Armah noting the Claimant's sick note was *"for one month (stress at work) so I suggest we speak to [Mr] Delaney as his rep to say we will make a reasonable adjustment and allow him to provide written submissions if he is unable to attend".*

<u>The Investigation</u>

81. In his investigation report [123 to 127], Mr Smithers identified he had been appointed to investigate whether the Claimant had

"left work early on at least two occasions when you were expected to be teaching and have completed registers to confirm that sessions were fully attended and took place despite your absence. It is alleged that you had cancelled these classes without management permission and then falsified the registers in retrospect."

82. The investigation report terms of reference had identified the investigation was into:

82.1 Allegation 2 - the Friday afternoon cancelled class concern; and
82.2 Allegation 3 - the falsification of Friday afternoon registers concern.

83. Mr Smithers noted the allegations had been brought to the college's attention by Ms Leaves. In oral evidence Mr Smithers confirmed that at the point of being asked to investigate the incidents he had been told that on two Friday afternoons the Claimant had left site at 1pm which meant he could not have taught the 13.00-14.10 lesson and had marked the registers as if that lesson had been taught.

84. In evidence, Mr Smithers confirmed during his investigation he considered the following:

84.1 He watched the CCTV footage of a white car leaving at 13.00 on 9th and 13.02 on 16th October 2020. During oral evidence, Mr Smithers explained why, in his investigation report, in relation to the CCTV images, he had said *"It is believed that this is [the Claimant] driving the white BMW leaving site"* – Mr Smithers explained he was looking at a balance of reasonable probability. He could not read the whole number plate from the CCTV and had been told the Claimant drove a white BMW by the security officers and the Claimant hadn't said it wasn't his car. He had checked the clock on the CCTV was working correctly and had found it to be a couple of minutes out. He had looked at CCTV footage during the period 12.45 to 13.30 for both dates and hadn't seen another white BMW leave in that time. He hadn't checked how many white BMWs had driven into the car park.

84.2 He looked at the electronic register entries for the 13.00-14.10 lessons on 9th and 16th October 2020 [115 and 116] which showed the 9th October register had been marked on 14th October 2020 and the 16th October register had been marked on 20th October 2020.

85. On 6th November 2020, Mr Smithers and Ms Ruse met and interviewed a focus group of 6 students that were in the Claimant's Friday 13.00-14.10 classes. The Tribunal note from the minutes of this meeting [p117]:

85.1 The students stated the Claimant had never cancelled a class;

85.2 The students explained "*on Friday they have one lesson with [the Claimant] at 11.05 which finishes at 12.15 and then a 45 minute break, before the next one which is due to start at 1.00pm. [The Claimant] brings that lesson forward, they have a quick break and the lesson starts about 12.25-12.30…and they finished between 1.30pm and 1.45pm";*

85.3 When Mr Smithers asked specifically about classes on 9 and 16 October he was told [the bringing forward of the second lesson] happens every week;

85.4 When Mr Smithers asked if they had ever finished before 1.30pm students responded *"Generally [finish] between 1.30pm and 1.45pm";* and

85.5 The students all agreed they were keeping up to date with their work.

86. The Tribunal note the minutes of Mr Smithers investigation meeting with the 6 students [p117] were not provided to

    86.1 the Claimant,
    86.2 Mr Araniyasundaran, who took the decision to dismiss the Claimant, or
    86.3 Mr McDonald, who considered the Claimant's Appeal.

87. During his oral evidence, Mr Smithers admitted he hadn't given much weight to the students' evidence. The Investigation Report noted "*The sports students I spoke to asserted that [the Claimant] did not cancel his 1pm lesson with them on the 9th and 16th of October, rather he has been bringing the lesson forward so that they were able to finish early. They said they could not be sure what time the lesson normally finished, they guessed that it normally finished at approximately 1.30 or 1.40".*

88. On 10th November 2020, Mr Smithers and Ms Ruse interviewed Ms Leaves. The Tribunal note from the minutes of this meeting [p118-119]:

    88.1 When asked why she had raised concerns about the Claimant, Ms Leaves said:

        88.1.1 on 25th September 2020, when Ms Leaves was working from home, she had received a call from Mr McGeoghegan who was looking for the Claimant and couldn't locate him. The Tribunal note this is a completely different concern ("the Claimant not being located on 25th September 2020")

        88.1.2 Subsequently Ms Leaves had a conversation with Ms Arnell during which Ms Arnell told Ms Leaves that Ms Arnell had asked a student how their coaching sessions were going and the student had told Ms Arnell they had only had one session and the remaining had been cancelled; this is where the Friday morning coaching session concern had started. The tribunal note "coaching sessions" were timetabled to take place at 9.55 on Friday mornings and were completely unrelated to the Friday afternoon classes. During oral evidence Mr Smithers explained Ms Leaves had said that it was the lack of coaching sessions that had caused her to look at the CCTV footage for Friday afternoons.

    88.2 In the investigation meeting with Ms Leaves, Mr Smithers returned to the allegations he was investigating and asked whether Ms Leaves had given the Claimant permission to move the Friday afternoon classes, Ms Leaves responded that on *"18th and 25th September….she had given verbal permission for [the Claimant] to bring forward the later class but it would then finish at 1.25pm"* The Tribunal note that Ms Leaves was telling Mr Smithers that there had been occasions when she had given the Claimant permission to bring his Friday afternoon lessons forward. This was key evidence that would have assisted the Claimant during the disciplinary hearing. Crucially, the Tribunal note

88.2.1 The Investigation Report made no reference to this mitigating evidence that, on occasion, the Claimant had previously been given management permission to bring forward the Friday afternoon; and

88.2.2 the minutes of Mr Smithers investigation meeting with Ms Leaves (which contained this key evidence) were never provided to:

(i) the Claimant,
(ii) Mr Araniyasundaran, who took the decision to dismiss the Claimant, or
(iii) Mr McDonald, who considered the Claimant's Appeal.

The Investigation Meeting with the Claimant

89. On 11th November 2020, the Claimant and his trade union representative attended an investigation meeting (online on Teams) with Mr Smithers, Ms Ruse and Ms Williams (who took notes) [120 – 122].

90. At the start of the meeting, Mr Smithers explained he was investigating,

"the allegation [the Claimant] left work early when he was expected to be teaching, that he has completed registers to confirm that sessions were fully attended and took place despite [the Claimant's] absence…..it is alleged [the Claimant] cancelled these classes without management permission and then falsified registers in retrospect"

91. Mr Smithers had again stated the investigation was into
91.1 Allegation 2 - the Friday afternoon cancelled class concern; and
91.2 Allegation 3 - the falsification of Friday afternoon registers concern.

92. The minutes of the investigation meeting note, the Claimant said

"they worked through lunch, says this is common practice and as students were saying due to current climate (Covid 19) they would prefer to work through lunch than to hang around in communal areas".

"the lesson started at 11.05am – 12.15pm and then instead of taking lunch, they continued teaching from 12.15pm – 1.15pm"

93. The Claimant said they may have taken a 5 minute toilet break. He admitted he must have forgotten to take the register on the day and had completed it at a later date, but would put this down to absent mindedness.

94. The Claimant believed he had left campus at around 1.15pm on both days. When Mr Smithers said "*they have CCTV of what they believe to be MB's car leaving the campus at 1pm",* the Claimant responded he was *"surprised that the time is so early but the point of the lesson was to get all of his students to the same point across his classes and he had achieved that….he has three classes and wanted to get all learners to the same point".*

95. During oral evidence, Mr Smithers accepted he had not made any further enquiries about whether there had been a common practice (at Havering Sixth Form College) of merging 2 lessons or bringing a lesson forward.

96. Then, the investigation meeting moved away from the Friday afternoon lessons and the Claimant was asked questions about the Friday morning coaching sessions. The Tribunal note that the investigation was now moving to a completely different allegation, one that had not previously been raised with the Claimant.

97. The Claimant said he had held the Friday morning coaching sessions as drop in sessions "*as one parent complained about their child having to come in [to college] an hour before lessons….students were dealing with UCAS applications. [The Claimant] says he got students to email him if they were in [college] and could communicate with them via email, or they could drop in to see him…he would be emailing students to make sure they were in [college] and would run a drop in centre" [121].* The Claimant told Mr Smithers students were working on their UCAS applications during some of these coaching sessions so needed to use computers which were not available in his classroom.

98. Mr Smithers asked the Claimant why he had marked the coaching session students as "present" on the electronic registers. The Claimant responded *"this was the fairest way, as the alternative is to mark them as absent, when they were at college"*. The Claimant told Mr Smithers that at Havering Sixth Form College, email communication was accepted as evidence of a student's attendance when they were working independently in the college, and teachers could mark the student as 'S' for study leave which didn't [negatively] affect their attendance record. He explained the new electronic marking system only allowed a teacher to select absent or present.

99. In oral evidence during supplemental questions, Mr Smithers explained the focus of his investigation changed. He said the allegation the Claimant had falsified registers was not accurate as the Claimant had taught the lesson, just at an earlier time so he decided to drop that allegation but then he discovered the issue with the coaching sessions being run as drop in sessions.

100. The minutes of the investigation meeting with the Claimant were sent to the Claimant. The Claimant corrected these minutes, making it clear that Mr Alloyte had actually visited him in the classroom during coaching sessions (rather than phoned him) and explaining the use of "S" for study leave in the registers. In oral evidence, Mr Smithers state he had no reason to doubt that the Claimant had returned these corrected minutes to HR, but HR had never provided the corrected minutes to Mr Smithers. This oversight on the part of the Respondent's HR department meant Mr Smithers's investigation had not included considering the use of "S" in registers or interviewing Mr Alloyte.

101. During her oral evidence Ms Leaves confirmed at Havering Sixth Form, teachers had used "S" or "D" on the electronic registers – she had routinely used a "D" for directed study to indicate a student was working independently in the college (rather than physically being in the classroom with the teacher). With the new electronic registers it was only possible to select "present" "absent" or "late".

The invitation to disciplinary hearing

102. By letter of 18th November 2020 Ms Blackburn wrote to the Claimant, inviting him to attend a disciplinary hearing that would be considering the allegation

"that you have falsified register marks, specifically those relating to coaching sessions on a Friday morning. It is alleged that these sessions were cancelled without the permission of a college senior manager. Further, it is alleged that you left work early on at least two occasions without permission from your line manager when you were expected to be teaching meaning that students did not receive their allocated teaching hours. It is alleged that your alleged actions fail to meet our expectations of proper conduct by a college employee and breach the trust and confidence which goes to the heart of any employment relationship".

103. The tribunal note the allegations of misconduct have changed and are now :

103.1 Allegation 1 – cancelling Friday morning coaching sessions;
103.2 Allegation 4 – falsifying registers for Friday morning coaching sessions;
103.3 Allegation 5 – leaving work early without permission; and
103.4 Allegation 6 – not providing students with their allocated teaching hours.

104. In her letter, Ms Blackburn confirmed

"We recognise that your current state of ill health is directly linked to the ongoing process and therefore we consider it to be reasonable to conclude the process as soon as we can, whilst making adjustments for your current condition. If you feel unable to attend the meeting in person or online we can allow for your trade union representative to attend on your behalf. We can also accept written statements for consideration by the hearing chair. [tribunal emphasis]"

The Claimant's solicitor's written submissions

105. By letter of 27th November 2020, the Claimant's solicitors wrote a comprehensive 7 page letter to Ms Blackburn, setting out their concerns about the Claimant's suspension and the proposed disciplinary hearing and setting out extensive submissions as to whether the Claimant had committed acts of misconduct. This included

105.1 surprise that the Claimant had been questioned about moving forward lessons when *"staff had received an email from Mr John Crossley some weeks earlier stating that breaks in between classes could be worked through during these unprecedented times. In addition, I have been informed that it is common practice at the sixth form to work through lunch breaks and that teachers do not have to obtain their line managers permission to do this*";

105.2 "*I do not regard the issue concerning late completion of the registers to be an act of gross misconduct at all. [The Claimant] completed the registers when he was able to and indeed completed them correctly. He has not therefore falsified registers as has been suggested"*.

105.3 *"Please could you also clarify why Ms Leaves made the complaint as [the Claimant] has been told two different stories. During the investigation meeting with [the Claimant], he was told that Ms Leaves held a focus meeting with [the Claimant]'s Level 3 Sport Foundation Group class and that during this meeting the students stated that [the Claimant] had cancelled the lessons on 9th and 16th October 2020. [The Claimant] was told that this was the reason for the investigation. However, this position differs to what is stated within the investigation report."*

105.4 *"[The Claimant] has not falsified register marks relating to the coaching sessions. As he explained to Mr Smithers during the investigation meeting, a parent had complained about their child having to come in for an hour coaching session during the midst of a global pandemic. This is a perfectly valid complaint due to the fact that [the Claimant] was simply required to be available to answer questions and support students during the coaching session, to which he did, and therefore it was not necessary for students to be physically present in a classroom for [the Claimant] to do this. Indeed he informed the three students from his coaching session that he was available to answer any questions they had or provide support and assistance with their UCAS applications during the scheduled coaching session, either via email or in the designated classroom. Therefore, he did not cancel the sessions as alleged. Indeed some students did drop into the classroom to speak to [the Claimant] during the sessions. In any event, I have been informed that the students were keen to work on their UCAS applications and given that the coaching sessions weren't taking place in a computer room, it was reasonable to allow the students to complete their applications in another room on site. As you are aware, [the Claimant] made sure that all students were on site before they were marked in as being present for the session. [The Claimant] has already explained that it was fair to mark the students as present for the coaching sessions if they were on site as the alternative would have been to mark them as absent, which would have affected their attendance records. [The Claimant] noted that previously it had been widely accepted for a teacher to mark students with an "S" on the register where they were taking study leave so that it didn't affect their attendance record. Indeed during [the Claimant]'s career at the College it has been common practice for teachers to mark students as present during coaching sessions if they were working independently on site, provided the students contacted the teacher to inform them they were working independently and present on site. It seems pedantic to ask the students to sit in the room with [the Claimant] for over an hour when they did not require any advice or support. Indeed this would have been a waste of their valuable time which could have been spent working on more pressing matters such as their UCAS applications for example. [The Claimant] has only ever had his students' educational needs at heart."*

105.5 *"It has been alleged that [the Claimant] marked all students as present for the coaching sessions. However, as you will see from the register, Ms [C] was not marked in for the first two weeks as she did not attend these coaching sessions. [The Claimant] therefore contacted Ms [C] to find out why she had not attended the session, not the other way around, as has been alleged."*

105.6 *"I note from the meeting minutes on 11th November 2020 that Mr Smithers said that "there is evidence that suggests MB has cancelled sessions with the students, telling them to go away and work independently." However, [the Claimant] was not provided with this "evidence" at the investigation meeting. The fact that the evidence was not provided to [the Claimant] demonstrates that the entire disciplinary process is unfair and a sham as he should have been provided with the said evidence before or at the investigation meeting to allow him the opportunity to comment on or challenge the evidence there and then."*

105.7 *During the investigation meeting with [the Claimant], Mr Smithers asked [the Claimant] who else he thought Mr Smithers should contact when investigating the allegations. [The Claimant] suggested that Mr Smithers contact his colleague Mr Allotey to clarify if he went to Room O106 during the Friday's coaching session to discuss a student called [Mr R]. However, Mr Smithers choose to ignore this request. Furthermore, this was omitted from the original meeting minutes sent to [the Claimant] which he had to amend.*

105.8 *when Mr Mcgeoghegan visited [the Claimant]'s staffroom on 25th September 2020, [the Claimant] was either in room O106 teaching his students via Microsoft Teams or working from home having obtained Ms Leaves permission to do so to ensure that he could utilise Microsoft Teams from his house. At that time all students and most members of staff were working from home. I am therefore concerned as to why the investigation report implies that Ms Leaves was not aware of [the Claimant]'s whereabouts. I am also concerned that Ms Leaves decided to listen to idle rumours and gossip regarding [the Claimant]".*

106. The Claimant's solicitors written submissions were not shared with the dismissing officer or the appeal officer.

The Law

Relevant law - discrimination

107. The provisions of the Equality Act 2010 ("EqA") apply to these claims. EqA protects employees from discrimination based on a number of "protected characteristics". These include disability (see Section 6 EqA).

"Disability"

108. Section 6 of the Equality Act 2010 provides a person has a disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

109. Schedule 1 to the same Act explains that an impairment is "long-term" if it has lasted or is likely to last for at least 12 months or the rest of the life of the person affected.

110. The Guidance On Matters To Be Taken Into Account In Determining Questions Relating To The Definition Of Disability (2011), was issued following the Equality Act 2010. This explains in detail, the intended meaning of "substantial adverse effect". A substantial adverse effect is one that is more than a minor or trivial effect.

111. The 2011 guidance also provides helpful guidance on determining whether the impairment affected the claimant's ability to carry out normal day-to-day activities.

Disability Discrimination

112. As Baroness Hale explained in *Archibald v Fife Council* [2004] UKHL32, disability discrimination is different from other types of discrimination, as the difficulties faced by disabled employees are different from those experienced by people subjected to other forms of discrimination,

"…[the Disability Discrimination Act 1995] is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminate against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment."

113. This element of more favourable treatment is reflected in the two types of protection that are unique to disability: Section 20-21 EqA (failure to make reasonable adjustments) which requires an employer to take action in certain circumstances and Section 15 EqA (discrimination arising from disability) which is focussed upon making allowances for disability.

Failure to make reasonable adjustments

114. Disability discrimination can take the form of a failure to comply with the duty to make reasonable adjustments (see Sections 20, 21(2), 25(2)(d) and 39(5) EqA).

115. Section 20 EqA imposes, in three circumstances, a duty on an employer to make reasonable adjustments. They include, at Section 20(3) EqA, circumstances where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in comparison with those who are not disabled. The duty then requires an employer to take such steps as it is reasonable to have to take to avoid the disadvantage (Section 20(3) EqA).

116. As Mr Pickett has identified, whilst a PCP can be widely construed, it does not include all acts of unfairness - see *Ishola v Transport for London* [2020] EWCA Civ 112

"*In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP."*

117. For something to be a "practice" there must be an element of repetition (see *Nottingham City Transport v Harvey* UKEAT/0032/12/JOJ).

118. In relation to "substantial disadvantage" section 212(1) EqA defines "substantial" as "more than minor or trivial"; it is a low threshold. However, this exercise requires the Tribunal to identify the nature and extent of the claimant's substantial disadvantage in meeting the PCP, because of their disability (see *Chief Constable of West Midlands Police v Garner* EAT 0174/11).

119. The Claimant bears the burden of proving each PCP put him at a substantial disadvantage in comparison with non-disabled colleagues (see *Project Management Institute v Latif* [2007] IRLR 519).

120. When assessing whether there is a substantial disadvantage, the Tribunal must compare the position of the disabled person with persons who are not disabled. This is a general comparative exercise and does not require the individual, like-for-like comparison applied in direct and indirect discrimination claims (see *Smith v. Churchill's Stairlifts plc* [2006] IRLR 41 CA and *Fareham College Corporation v. Walters* [2009] IRLR 991 EAT). The House of Lords confirmed in *Archibald v Fife Council* [2004] UKHL 32 that an employer is no longer under a duty to make reasonable adjustments when the disabled person is no longer at a substantial disadvantage in comparison with persons who are not disabled.

121. There are supplementary provisions in Schedule 8 EqA. Paragraph 20 of that Schedule provides that the duty to make reasonable adjustments only arises where an employer knows (or ought reasonably to know) of both the disabled person's disability and that they were likely to be at that disadvantage.

122. Once the duty has arisen, the Tribunal must consider whether the respondent has complied with it by taking such steps as it was reasonable to have to take to avoid the disadvantage. The Equality and Human Rights Commission Code of Practice on Employment (2011) ("the EHRC Code of Practice") sets out a list of possible adjustments that might be taken by employers in paragraph 6.33. In many cases, the question of compliance with the duty will turn on whether a particular adjustment was (or, if not made, would have been) "reasonable". This is an objective test to be determined by the Tribunal and can be highly fact sensitive. It is a rare example of Tribunals being permitted to substitute our own views for those of the employer where we consider, in effect, that it ought to have reached a different decision. Lord Hope explained in *Archibald v Fife Council* [2004] IRLR 651, that sometimes the performance of this duty might require the employer to

treat a disabled person, who is in this position, more favourably to remove the disadvantage attributable to the disability.

123. It is important to assess whether a proposed adjustment would have avoided the disadvantage – in lay terms, whether it would have worked. The EHRC Code of Practice sets out some of the factors that may be taken into account when determining whether an adjustment was reasonable at paragraph 6.28. They include: whether the steps would be effective; the practicability of the steps; the financial and other costs of making the adjustment; the extent to which it would disrupt the employer's activities; the extent of the employer's financial or other resources; the availability to the employer of financial and other assistance to help make the adjustment (such as advice through Access to Work) and the type and size of the employer.

124. In *Leeds Teaching Hospital NHS Trust v Foster* [2011] UKEAT/0552/10/JOJ Keith J confirmed that it was not necessary for the Tribunal to find there was a "real prospect" of the adjustment removing the particular disadvantage; it was sufficient for the tribunal to find that there would have been "a prospect" of that.

Discrimination arising from disability

125. S15 Equality Act 2010 ("EqA") provides,

(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

126. The first point to note is, if the employer can show they did not know, and could not reasonably have been expected to know that the claimant had a disability the s15 claim will fail.

127. Para 5.14 of EHRC Code of Practice explains

"employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'."

128. The next point to note in a s15 claim is that the tribunal does not need to compare the claimant's treatment to that of a comparator, real or hypothetical. The claimant must prove "unfavourable treatment", i.e. that they have been put at a disadvantage, and that this was because of something arising in consequence of the claimant's disability. The EHRC Code of Practice explains that arising in consequence includes anything which is the result, effect or outcome of the person's disability.

129. The claimant has to demonstrate unfavourable treatment: it is not enough to show they have been differently treated.

130. In Pnaiser v NHS England and anor [2016] IRLR 170 EAT, Mrs Justice Simler summarised the proper approach to determining s15 claims at paragraph 31,

"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises.

(d) The Tribunal must determine whether the reason/cause (or, if more than one) a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act,…the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

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

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear that the knowledge required is of the disability only and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

The burden of proof in discrimination claims

131. S136 Equality Act 2010 establishes a "shifting burden of proof" in a discrimination claim. If the Claimant establishes facts, from which the Tribunal could properly conclude, in the absence of an adequate explanation, that there has been discrimination, the Tribunal is to find that discrimination has occurred, unless the employer is able to prove that it did not. (see *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 332 and *Igen Ltd & others v Wong & others* [2005] IRLR 258).

132. In *Madarassy v Nomura International plc* [2007] IRLR 246, the Court of Appeal warned against allowing the burden to pass to the employer where all that has been shown is a difference in treatment between the Claimant and a comparator. For the burden to shift there needs to be evidence that the reason for the difference in treatment was discriminatory. It is also well established that treatment that is merely unreasonable does not, of itself, give rise to an inference that the treatment is discriminatory.

133. It is also established law that if the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then it is not improper for a Tribunal to find that even if the burden of proof has shifted, the employer has given a fully adequate explanation of why

they behaved as they did and it had nothing to do with a protected characteristic (see *Laing v Manchester City Council* 2006 ICR 1519).

134. Having reminded ourselves of the authorities on the burden of proof, our principle guide must be the straightforward language of S136 EqA itself.

Relevant Law - Unfair dismissal

135. The Respondent bears the burden of proving, on a balance of probabilities, that the Claimant was dismissed for one of the potentially fair reasons set out in Section 98(2) of the Employment Rights Act 1996 (ERA). The Respondent states that the Claimant was dismissed by reason of his misconduct; see Section 98(2)(b) ERA. If the Respondent establishes that it did have a genuine belief in the Claimant's misconduct, and that it did dismiss him for that potentially fair reason, we must go on to consider the general reasonableness of that dismissal under Section 98(4) ERA.

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

137. In considering the question of reasonableness, we have had regard to the decisions in *British Home Stores Ltd v. Burchell* [1980] ICR 303 EAT; *Iceland Frozen Foods Ltd v. Jones* [1993] ICR 17 EAT; the joined appeals of *Foley v. Post Office and Midland Bank plc v. Madden* [2000] IRLR 82 CA; and *Sainsbury's Supermarkets Limited v. Hitt* [2003] IRLR 23 CA. In short:

    137.1 When considering Section 98(4) ERA, we should focus our enquiry on whether there was a reasonable basis for the Respondent's belief and test the reasonableness of its investigation.

    137.2 However, we should not put ourselves in the position of the Respondent and test the reasonableness of its actions by reference to what we would have done in the same or similar circumstances. This is of particular importance in a case such as this where the Claimant is seeking, in effect, to "clear his name".

    137.3 In particular, it is not for us to weigh up the evidence that was before the Respondent at the time of its decision to dismiss (or indeed the evidence that was before us at the Hearing) and substitute our conclusions as if we were conducting the process ourselves. Employers have at their disposal a band of reasonable responses to the alleged misconduct of employees and it is instead our function to determine whether, in the circumstances, this Respondent's decision to dismiss this Claimant fell within that band. (see for instance Turner v East Midlands Trains Ltd [2012] EWCA Civ 1470, [2013] IRLR 107)

137.4 The band of reasonable responses applies not only to the decision to dismiss but also to the procedure by which that decision is reached – was the procedure adopted within the reasonable band of options that were available to the employer? (see *Whitbread v Hall* [2001] EWCA Civ 268).

137.5 It is sufficient that the employer genuinely believed on reasonable grounds that the employee was guilty of misconduct. The employer does not have to prove the offence or inadequacy — *Alidair Ltd v Taylor 1978 ICR 445, CA*. Furthermore, an honest belief held on reasonable grounds will be enough, even if it is wrong.

137.6 The fact that the employee did not in fact commit the misconduct is irrelevant. The relevant question is simply whether the employer had reasonably concluded that he did at the time of dismissal (see *Devis (W) & Sons Ltd v Atkins* [1977] AC 931).

138. Following the ACAS Code of Practice on Discipline and Grievance Procedures ('the Acas Code') is an important factor in determining whether the disciplinary procedure adopted was fair (*see Lock v Cardiff Railway Co Ltd* [1998] IRLR 358).

139. The ACAS Code provides

"Inform the employee of the problem

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

Decide on appropriate action

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

140. The Acas guide, Discipline and grievances at work ("the Acas guide") that accompanies the ACAS Code, provides

"Investigating cases

When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against. [Tribunal emphasis]

141. In deciding whether disciplinary action is appropriate and, if so, what form it should take, the Acas guide suggests that employers consider:

    141.1 whether the rules of the organisation indicate what the likely penalty will be as a result of the particular misconduct

    141.2 whether standards of other employees are acceptable, and whether this employee is being unfairly singled out

    141.3 the employee's disciplinary record (including current warnings), general work record, work experience, position and length of service

    141.4 any special circumstances which might make it appropriate to adjust the severity of the penalty

    141.5 whether the proposed penalty is reasonable in all the circumstances; and

    141.6 whether any training, additional support or adjustments to the work are necessary

142. Fairness does not mean that similar offences will always call for the same disciplinary action. Each case should be looked at in the context of its particular circumstances, which may include health, justifiable ignorance of the rule or standard involved, or inconsistent treatment in the past.

143. We note the Acas guide is non-statutory and non-binding and just provides guidelines – employers are not required to follow this guidance to the letter.

144. In Strouthos v London Underground Ltd 2004 IRLR 636, the Court of Appeal explained it is important that the employee knows the full allegations against him, that disciplinary charges should be precisely framed, evidence should be limited to those particulars and the employee should know the evidence the employer is relying on.

Relevant law – wrongful dismissal

145. In a wrongful dismissal claim, the Tribunal has to ask whether the Claimant was guilty of conduct that was so serious it amounted to a repudiatory breach of the contract of employment, entitling the employer to terminate the contract without notice. We must be satisfied that there was an actual repudiation of the contract by the Claimant.

146. It is generally accepted that the Claimant must commit an act which fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract) — *Wilson v Racher 1974 ICR 428, CA*.

147. In Briscoe v Lubrizol Ltd 2002 IRLR 607, the Court of Appeal confirmed the Claimant's conduct *'must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment' and confirmed* the Claimant's

conduct should be viewed objectively – it is possible for an employee to repudiate the contract even without an intention to do so.

Conclusions

148. Turning to the List of Issues, the Tribunal's conclusions were as follows:

Disability

Question 1: Was the Claimant disabled within the meaning of section 6 Equality Act 2010?

149. The Tribunal (and the Respondent) accept the Claimant has a disability by reason of his prostatectomy.

150. However, the disability discrimination claims in this case are not presented as being related to the Claimant's prostatectomy. Rather the s15 and failure to make reasonable adjustments claims are all based on the consequences / substantial disadvantages the Claimant asserts he experienced as a consequence of his anxiety and depression.

151. The key question is whether the Claimant has a disability by reason of his anxiety and depression.

152. The Tribunal accepted the Claimant had a mental impairment (namely anxiety and depression) at the material time (ie from November 2020 onwards)

153. We also accepted that anxiety and depression did have a substantial adverse effect on the Claimant's ability to carry out his normal day to day activities in the period November 2020 to January 2021, in that the Claimant had difficulty sleeping and experienced heart palpitations. We note the Claimant was also prescribed antidepressant tablets at that point in time.

154. We noted the occasions on which the Claimant has been unable to work (as set out in paragraph 66 of this judgment) and the reasons for this. In February 2020 the Claimant was prescribed Zopiclone 3.75mg to treat his sleeping difficulties; this coincided with a 6 week absence from work which was precipated by a family member suddenly becoming acutely unwell.

155. Having considered all the medical evidence (and the Claimant's impact statement) we cannot say that at the relevant time (November 2020 to January 2021) the Claimant's anxiety and depression had a long term substantial adverse effect on his ability to carry out normal day to day activities, as it had not lasted at least 12 months and it was not likely to last at least 12 months. We found the impairment the Claimant experienced in February 2020 was in response to his family circumstances rather than being an ongoing underlying health condition. There was no evidence suggesting,

155.1 the Claimant had, prior to 2020, experienced anxiety and depression that had a substantial adverse effect on his ability to carry out normal day to day activities; or

155.2 continued to experience an impairment that was having the requisite substantial adverse effect in Summer and Autumn 2020 (prior to November 2020).

156. We have noted the Claimant was prescribed Zopiclone on one occasion in February 2020 and antidepressants in November 2020. When we consider the impact of any impairment without this medication, we are satisfied there was no impairment having a long term substantial adverse effect on the Claimant's ability to carry out normal day to day activities.

The Disability Discrimination Claims (Discrimination Arising from Disability & Failure to make reasonable adjustments) (Questions 4 to 11 in the List of Issues)

157. As and we have found the Claimant's anxiety and depression did not amount to a disability (and the disability discrimination claims are all based on the consequences / substantial disadvantages the Claimant experienced as a consequence of his anxiety and depression) the Claimant has not succeeded with his disability discrimination claims.

Unfair Dismissal

Question 13 What was the reason or principal reason for dismissal? / Question 14a Did the Respondent hold a genuine belief in the Claimant's misconduct?

158. The Respondent says the reason was conduct and in closing submissions specifies:

158.1 Altering the timetable for sports lessons on 9th Oct and 16th Oct without permission

158.2 Irrespective of the time these sports lessons took place, not teaching them for the full duration of 2 x 70 minutes each and leaving the site early as a result

158.3 Cancelling coaching sessions scheduled for 9 Oct and 16 Oct and instead converting these to informal optional drop in sessions

158.4 Falsifying the register related to these coaching sessions to show attendance which had not actually taken place

159. Did the Respondent hold a genuine belief the Claimant had committed these acts and they amounted to misconduct? This was a finely balanced and difficult decision for the Tribunal. There did appear to be a desire to find acts of gross misconduct (on the part of the Claimant's line manager and Ms Blackburn) and the allegations and investigation veered off on a different path (rather than ending), when Mr Smithers established the Claimant hadn't cancelled the afternoon class as had originally been alleged, suggesting the Respondent was creating a case to fit the

outcome it desired rather than looking at evidence and allegations completely impartially. However, when we looked at the information in front of the dismissing officer and the appeal officer, we accepted (just) that they both genuinely believed the Claimant had committed these acts and that these acts amounted to misconduct. We accepted that the dismissing officer and appeal officer were not party to a sham process to facilitate the Claimant's dismissal; nor were they motivated by his sickness record or his decision not to pursue voluntary redundancy.

160. Having concluded the reason for dismissal was misconduct (one of the potentially fair reasons for dismissal set out in s98(2) Employment Rights Act 1996 S98(4) of that acts requires us to consider did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. We remind ourselves that the burden of prove is neutral.

161. As part of our analysis under this general reasonableness test, we went on to consider whether at the time the belief was formed the Respondent had reasonable grounds for that belief and carried out a reasonable investigation; whether the Respondent otherwise acted in a procedurally fair manner; and whether dismissal was within the range of reasonable responses.

Question 14b Did the Respondent hold a genuine belief in the Claimant's misconduct ***based on reasonable grounds****?*

162. Essentially both the dismissing officer and appeal officer formed a belief in misconduct based on the CCTV footage / photograph of a white car leaving at 1.00pm and 1.02pm on 9th and 16th October 2020. They accepted this proved the Claimant had altered the timetable for sports lessons and had not taught 70 minute lessons.

163. They accepted electronic registers as evidence the Claimant had falsely stated students had attended coaching sessions and the Claimant had accepted he was delivering coaching sessions as drop in sessions.

164. The Tribunal accepts these are reasonable grounds to form a belief in the Claimant's misconduct as these are just within the range of evidence that a reasonable employer might accept as being reasonable to form such a belief.

165. Did the Respondent fail to carry out a preliminary investigation before suspending the Claimant? We note the Respondent had barely started its investigation when it suspended the Claimant – the suspension occurred before registers had been checked and before interviews had been undertaken.

Question 14c: Did the Respondent hold a genuine belief in the Claimant's misconduct **following a reasonable investigation**?

166. We reminded ourselves that we must not substitute our view as to what was a reasonable investigation – instead we must ask whether this investigation fell within

the range of investigations that a reasonable employer might regard as being reasonable. Here we found it did not. The Respondent's dismissing officer and appeal officer adopted a blinkered approach, looking for evidence that supported a finding of gross misconduct and ignoring facts and lines of enquiry that didn't support that finding, which is completely contrary to the ACAS guide. We found that both Mr Smithers and Mr Araniyasundaran failed to be impartial and failed to approach their task with an open mind. We noted that Mr Smithers's investigation report omitted crucial evidence that supported the Claimant, such as Ms Leaves's admission that she had on previous occasions given the Claimant permission to move the Friday afternoon lesson forward. We noted that Mr Araniyasundaran chose not to make further enquiries that might lead to evidence that would support the Claimant. We note that none of these failings were corrected upon appeal, as Mr McDonald did not adequately consider any of the grounds of appeal. This meant the investigation was not within the range of investigations that a reasonable employer could regard as being reasonable in all the circumstances.

167. Further and in the alternative the investigation fell beyond the range of reasonable investigations, as the Respondent had not undertaken any enquiries into the customs and practice at the sixth form college. If it was established custom and practice to

167.1 start the final lesson of the day during the lunch break to engineer an early finish;

167.2 take registers after the event;

167.3 work through scheduled breaks without needed management approval;

167.4 record learners as present in a lesson when they were working elsewhere independently;

167.5 ask students to email their teachers if they were present on site and accept that email correspondence as evidence of attendance; and/or

167.6 hold sessions as drop in sessions especially if the session was based in a non-computer room,

no reasonable employer could regard the conduct that the dismissing officer and appeal officer had in mind as being sufficient grounds for a finding of gross misconduct.

Question 15. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with those facts?

168. On the facts that the dismissing officer and appeal officer had in mind (ie following a flawed investigation, so without the full picture), we were satisfied that the decision to dismiss was just within the range of reasonable responses, albeit it was on the harsher end of the range of responses given the Claimant's lengthy service and the extreme conditions he was working in during September and October 2020.

Question 16 Did the Respondent adopt a fair procedure?

169. For the reasons set out in paragraphs 166 and 167 we found the Respondent did not adopt a procedure that a reasonable employer could regard as being fair.

170. Further and in the alternative, the Claimant was not provided with key documents such as the minutes of the meeting with Ms Leaves (in which she admitted having previously given permission to bring forward the lessons) or the minutes of the meeting with his Friday afternoon sports students who unanimously supported his account that lessons had finished at 1.30pm (not 1.00pm as the dismissing officer concluded), which denied him access to evidence that supported his case.

171. Further and in the alternative, having indicated that in light to the Claimant's ongoing health condition, written submissions could be accepted, it was unfair in all the circumstances for HR officers to not share the Claimant's solicitor's detailed written submissions with the dismissing officer.

172. Further and in the alternative, the appeal officer did not give any real consideration to the Claimant's grounds of appeal, which meant he was denied a fair opportunity to appeal the decision. This is particularly unfair given the Claimant's longstanding service, unblemished disciplinary record and demonstrated little care for an employee that was unwell with stress.

173. We are satisfied that the Respondents' decision to dismiss (and uphold that decision), and the standards by which those decisions were reached, fell beyond the band of responses open to a reasonable employer of a similar size and with similar administrative resources.

<u>If a fair procedure had been adopted, would the Claimant have been fairly dismissed in any event / what was the possibility of such a fair dismissal and when might it have taken place?</u>

174. The Tribunal are satisfied that if a fair procedure had been adopted and the dismissing officer or appeal officer had fairly considered the custom and practice at the college and the mitigating evidence, there was no chance that the Claimant would have been dismissed. At most he may have received a warning, but he was most likely to receive training on revised practices.

<u>If the dismissal was unfair, should the Claimant's compensation be reduced on the basis of his conduct and or contribution?</u>

175. Having found that, with a fair procedure, the Claimant would, at most, have received a warning, the tribunal do not accept his conduct was such that it would be appropriate to reduce his compensation.

Notice Pay

176. It is agreed that the Respondent dismissed the Claimant without notice. The Tribunal found the Claimant's conduct was not of a nature that could be said to amount to a repudiatory breach of the employment contract.

177. Parties agree that if the Claimant was entitled to notice it was 12 weeks' notice.

Employment Judge Howden-Evans
Dated: 27th October 2023