EMPLOYMENT TRIBUNALS

Claimant: **Ms Yasu Shan**

Respondent: **Chichester College Group**

Heard at: **London South** **On:** **4-6 October 2017**

Before: **Employment Judge Nash**

Representation
Claimant: Mr Macphail, Counsel
Respondent: Mr Salter, Counsel

JUDGMENT

The Judgment of the Employment Tribunal is as follows: -

1. The Claimant was unfairly dismissed.

2. It is just and equitable to reduce the Claimants' compensation for unfair dismissal by 75%.

3. The Claimant was wrongfully dismissed.

REASONS

The Hearing

1. The claim form was presented on 5 September 2016 and the response was presented on 11 October 2016.

2. At the hearing, the Claimant's witnesses were herself and Ms Maria Lemos, a former colleague. She also relied on a statement by Mr Devlin Markew, a former student. The Claimant asked for permission for him to give evidence by way of a video link or on Skype. The Tribunal had informed the Claimant prior to the hearing that any such evidence must comply with the overriding objective in that the witness is clearly visible to the Tribunal, the parties and the public. However, the Claimant was not in the event able to comply and accordingly relied on Mr Markew's written evidence. The Tribunal followed its normal practice of attaching little

weight to the evidence of a witness who was not present, on oath or cross-examined.

3. The Respondent's witnesses were as follows: Mr David May, a Programme Area Manager, Mr Andrew Mann a Programme Area Manager and the Claimant's line manager, Ms Shirley Batchelor of HR, Ms Clare Wallace, Vice President Curriculum who made the decision to dismiss, and Ms Kim Morton Deputy CEO who heard the appeal.

4. The Tribunal had sight of an agreed bundle of 268 pages. References are to this bundle unless otherwise stated.

The Claims

5. There were two claims - for so-called ordinary unfair dismissal under Section 94 of the Employment Rights Act 1996, and for wrongful dismissal.

The Issues

6. With the parties the issues were agreed.

7. In respect of unfair dismissal the issues were as follows:

8. The first issue is the reason for dismissal. The Respondent relied on the potentially fair reason of misconduct or in the alternative some other substantial reason, being the same misconduct coupled with disregard for disciplinary policies.

9. The second issue is procedural unfairness. In a misconduct dismissal the Tribunal will have to consider, following the case of **BHS v Burchell**, whether the Respondent had a reasonable and genuine belief in the culpability of the Claimant based on a reasonable investigation.

10. The third issue was, if the dismissal was found to be procedurally unfair, should there be a so-called Polkey deduction; that is, had the Respondent followed correct procedure, could it and would it have dismissed fairly in any event?

11. The fourth issue was sanction – did dismissal come within a reasonable range of responses to any culpable conduct by the Claimant.

12. The fifth issue was contribution; if the Tribunal should find that the Claimant was unfairly dismissed to what if any extent had the Claimant contributed to her dismissal.

13. The sixth issue was whether there should be any adjustment to any award under the ACAS code.

14. In respect of wrongful dismissal there were two issues.

15. Firstly, did the Claimant commit the conduct relied upon as a fundamental breach by the Respondent? The Respondent relied on the conduct set out in the letter of termination.

16. The second issue was whether any such conduct amounted to gross misconduct that is a fundamental breach of the contract of employment permitting the employer to dismiss summarily.

The Facts

17. The Respondent is a Further Education College. It employs about 457 people including 71 at the Claimant's place of work. The Claimant started on 6 January 2014 as a 6th form lecturer in Biology, part-time.

Background

18. In October 2014 the Respondent's Ofsted inspection resulted in a "requires improvement" grading.

19. This fed into two policy changes. Firstly there had been long-standing concerns from staff and students about tutorials. Tutorials are non-specifically academic. They are distinct from "lessons" in subjects that lead to exams. They are contact time between staff and pupils dealing with generalised matters including pastoral care such as student satisfaction surveys, presentations on topics such as going to university and light-hearted quizzes for instance about rabbits at Easter. They also include one to one interviews between tutors and members of the tutor group.

20. The Claimant received - along with all staff - an email on 9 February 2014 enclosing a presentation from a meeting the previous day about a "rebooting" of the tutorial system, from page 106A. The documents concerning the presentation were somewhat difficult to read so their evidential value was limited. The Tribunal ascertained that the documents appeared to provide staff with some instructions as to how to carry out tutorials. The Claimant had not attended the meeting about the new tutorial structure.

21. There were further emails to all staff on 17 and 25 February asking them to look at tutorial materials on the intranet and enclosing a a five week tutorial overview. Then weekly tutorial plans were provided, of which the Tribunal did not have sight. The Claimant received all these documents

22. The second policy change was to the Staff Observation Policy. The Respondent had a long-term policy of observing staff and grading them. It notified staff including the Claimant on 14 March 2016 that the policy had been changed. The email referred the staff to the new observation policy on the intranet. Staff were also informed on 16 March that there would be a window of observation in the week starting on 21 March 2016 wherein each employee could be observed at least once, without any further warning.

23. There was a dispute between the parties as to whether the old policy had including observation of tutorials as well as academic lessons. The written policy did not state this in terms. The Tribunal found that the old policy was more easily interpreted as covering only lessons and not tutorials but it was not clear. The Claimant believed that the observation policy did not

apply to tutorials, as did Ms Lemos. Others including her line manager believed that it did.

24. The Tribunal found that the previous position was unclear but there was nevertheless a reasonable belief by the Claimant that the observation policy did not apply to tutorials. However, the new policy (from page 68) was unambiguous - tutorials could be observed.

25. Ms Wallace sent an email on an unrelated matter – leave policy - on 15 March 2016. In reply, the Claimant sent a lengthy and less than entirely courteous email on 16 March raising objections.

26. The Respondent then put a hard copy of the new observation policy in all staff pigeonholes. It was unclear whether the Claimant had a chance to see this before she was in fact observed in a tutorial, and hence if she was aware that her observation might be a tutorial rather than a lesson.

The Alleged Misconduct

27. On Monday 21 March the Claimant carried out a tutorial, which was chosen as her observed lesson for the observation window. Mr David May carried out the observation. There was a conflict between them as to what occurred.

28. It was not disputed that the Claimant arrived five minutes late for the tutorial at 12.30 as opposed to 12.25. It was also agreed that there were two surveys she was supposed to carry out in the tutorial. For one, the Claimant stated that there was only a single question. The second tutorial was not accessible on the system. After this, most students were released, as exams were approaching. Mr May stated that there was more than one question in one survey and the other survey was accessible. However, his evidence on this was unclear; he had not, it appeared from his evidence carried out an observation of another teacher doing these surveys. Accordingly, the Tribunal preferred the Claimant's evidence as to the surveys as it was clearer.

29. There was a further conflict as to the time the tutorial ended. Mr May said the tutorial was over at 12.39 and in effect lasted only nine minutes. The Claimant said she left at 12.55 after a one to one with a student. Accordingly the tutorial lasted 25 minutes. It was not in dispute that the tutorial was timetabled for one hour. The Claimant gave unchallenged evidence that she then carried out a one to one with a further student to take up the rest of the hour. It was also agreed that the Claimant did not complete the tutorial register at the time but did so shortly afterwards.

30. Mr May's evidence was that the Claimant was rude after the students left. Her manner, body language, and speech were rude and dismissive. She said words to the effect of, "write what you like" (in the observation report) and that she did not care what he wrote. The Claimant denied this.

31. Following the observation Mr May completed the Observation Report. Although the new observation policy no longer required him to award a grade, he said that the tutorial would have been graded as the lowest grade. Mr May's report stated that the Claimant did not cover various

matters, which were prescribed in the weekly tutorial plan. However, there was no clear evidence as to these, so it was not easy for the Tribunal to judge the significance or contents of the elements of the prescribed elements.

32. Mr May then complained to Ms Wallace; he was upset at the Claimant's behaviour. Ms Wallace together with HR decided that her behaviour could amount to gross misconduct and should be investigated.

The Investigation

33. On 23 March Ms Shirley Batchelor HR and Ms Angela Rindell, a member of the management team, were appointed as investigating officers. They interviewed Mr May who said the Claimant arrived late, that the tutorial lasted nine minutes after which the students left. She had told him that she did not care what he wrote up. The Claimant had also said that the Respondent should provide structure for the tutorial.

34. On 24 March Ms Wallace decided to suspend the Claimant. The Claimant was escorted around the building to the staff room to collect her personal belongings and then out of the building. This happened on the last day of term so staff and students were witnesses. The Tribunal found that the Claimant found the suspension distressing and humiliating but that, once the decision to suspend during the school day had been made, those carrying out the suspension sought to minimise this.

35. By way of a suspension letter given to her on that day, the Claimant was told that there were allegations against her in respect of a deliberate refusal to carry out duties or reasonable instructions or to comply with the Respondent's rules and, in addition, serious insubordination. However, no further details were provided. The suspension letter did not state that the Claimant was not permitted to contact students although this was clear from the suspension policy.

36. The Claimant emailed the Respondent on 24 March asking for details of the alleged misconduct. Ms Batchelor replied saying only that it was entirely to do with the observation. The Respondent then invited the Claimant to an investigation meeting during the Easter break on 30 March.

37. The Claimant sought to delay the investigation meeting until the summer term in order to obtain more information and allow her chosen companion to attend. Ms Batchelor stated that the meeting could not be postponed and offered to help her find an alternative companion. The Claimant refused this offer and said she would not attend the meeting. Ms Batchelor informed the Claimant on 30 March that it would go ahead in any event that day.

38. The investigation meeting proceeded in the Claimant's absence. The investigating officers, according to their report, decided that the Claimant was culpable of misconduct by being late, leaving early and not delivering the tutorial. This was exacerbated into gross misconduct by her behaviour and attitude to Mr May. The investigating officers carried out some further enquiries including checking the Claimant timetable and the time it would

take to arrive at her tutorial room from her previous location. They took the express decision not to involve the students.

39. On 31 March Ms Batchelor and Ms Rindell produce their investigation report (page 142). This was written in strong language. The report stated that the Claimant had shown a deliberate determination not to comply with the college's procedures her, "attitude was wholly defiant and challenging". She had shown "clear insubordination" and the matter was entirely conduct related. It stated that the Claimant had no intention of meeting the college's expectations it required of her as a lecturer.

The Disciplinary Process

40. On 31 March the Respondent invited the Claimant to a disciplinary hearing on 14 April by way of a letter stating that summary dismissal was a potential outcome. It asked her to provide a witness statement five days before the hearing. It did not provide the investigatory report.

41. The Claimant by way of a letter of 4 April criticised the process including the fact that she was unable to provide a witness statement as requested before seeing the investigatory report. At this stage the Claimant was not aware of the full allegations against her

42. The Claimant contended that on 5.4.16 the Respondent advertised her post. The Respondent denied this. The evidence, some inconclusive job adverts from agencies. The Tribunal found that the Respondent did not advertise her post but was making enquiries about how to cover her lessons.

43. On 8 April the Respondent sent an email to all staff saying that it was important that they did not let poor attendances in tutorials adversely affect the OFSTED rating.

44. On 9 April the Claimant responded to the allegations in writing. She said she let the students go after twenty-five minutes and then continued with other work including a confidential one to one with another student. She says management told her that tutorials would not be part of the observation process.

45. The evidence pack for the disciplinary meeting was provided to the Claimant on 11 April, two days before the meeting. It was only at this point that the Claimant became aware of the substance of the allegations against her. That day the Claimant informed the Respondent that she was unwell and accordingly might not be able to attend the disciplinary meeting.

46. On 12 April the Claimant provided her reply to the investigation report. She denied making the comments and gave her version of the timings and activities at the tutorial. We now know that the Claimant was signed off sick from 13 April, but the Respondent's case was it was unaware of this as the Claimant did not provide a sick note. The Claimant claimed that she delivered the sick note (a fit note) at the same time as her reply to the report. However, the Tribunal found the Claimant's evidence on this point unsatisfactory. She had not mentioned sick note during the disciplinary

process, the appeal, her ET1 or her witness statement. The Tribunal accordingly found that she did not provide the sick note.

47. The Tribunal had sight of considerable email correspondence in the bundle at this time showing that students, and parents, were very upset about losing their teacher at the start of the A level term with university places at stake. The emails were very positive about her performance as a teacher. It appears this correspondence started when a parent emailed the Claimant on her private email address on 12 April saying their child was distraught as she was told that the Claimant had gone for the rest of the year. The parent enquires about engaging the Claimant as a private tutor. The student believed the Claimant is suffering from a serious illness.

48. She replied to parents and students and asked them to give her private email address to others. There were references to students' concerns about the supply teacher. The emails state that the Respondent told students on different occasions that the Claimant was ill and they were very concerned. A parent wrote to the Respondent to complain about the loss of the Claimant in very strong terms.

49. The Respondent policy forbids the staff from providing their private email address to students. The Respondent's witnesses stated that policy also prohibits staff using students' private emails but were unable to point to this in any documents. The Claimant denied any such rule. The Tribunal found on the balance of probabilities that there was no such policy; this is likely to be a live issue in a school and such a rule would be likely to be clearly set out.

50. The Claimant telephoned the Respondent on the day of the hearing to say that she was unwell but did not request a postponement. The disciplinary hearing went ahead in her absence. The decision makers were Ms Wallace and Mr Simon Finch a member of the senior management team.

51. The disciplinary hearing considered whether to postpone on the grounds of the Claimant's illness. However, the disciplinary decision decided to continue as they found that the Claimant was well enough to deliver her papers to school, and her recent contact implied that she was prepared for them to proceed in her absence. (There was a phone call in which the Claimant reminded them that she wanted to rely on her witness statement.) Further, Ms Wallace was concerned that students were being "inveigled" by the Claimant.

52. The hearing considered new allegations against the Claimant. One of the disciplinary officers informed the decision makers that the Claimant had been emailing her students saying that she was under investigation for a disciplinary matter. The decision makers did not have sight of the emails in bundle but believed (correctly) that the Claimant been in touch with students during suspension and (incorrectly on the evidence in the bundle) that the Claimant had informed her students about the disciplinary.

53. The hearing was postponed to 15.4.16 for the investigating officers to investigate the Claimant's contact with students. The produced a second investigatory report on 14 April (page 172). This second report found that the Claimant was in breach of the safeguarding and other policies. They

did not tell the Claimant about the new allegations and made no attempt to take her representations. The Respondent did not have sight of the Claimant/student/parent emails in the bundle.

54. On 14 April the Claimant wrote to the parents offering private tuition and encouraged the students to complain to the Respondent about her removal.

55. The disciplinary hearing reconvened on 15 April and decided to terminate the Claimant for gross misconduct. This was confirmed by way of a letter stating that the reason for dismissal included breaches of the suspension and safeguarding policies. Ms Wallace stated that the key point for the decision makers was the non-delivery of the tutorial. They would have dismissed for gross misconduct without her actions during suspension.

The Appeal

56. The Claimant appealed against her dismissal by way of a letter of 19 April. It included complaints about additional allegations being used to justify dismissal without any details being provided.

57. The Respondent wrote to the Claimant on 20 April (page 188) stating that if contacted any student further to her dismissal, the DBS will be informed because of safeguarding issues. In evidence, the Respondent's witnesses accepted that they had not contacted the DBS. However, the letter on its face showed that the Respondent had concluded that the Claimant was a safeguarding risk to her former students. The Claimant was at this date no longer their employee. Ms Batchelor and not those making the decision to dismiss wrote this letter, but they were content with this letter and the appeal panel raised no issue.

58. On 22 April the Respondent invited the Claimant to an appeal hearing on 4 May. The Claimant could not attend so it was voluntarily rescheduled for 12 May. The Respondent sent the appeal pack to the Claimant on 9 May.

59. The Claimant informed the Respondent that she could not attend due to illness so the Respondent voluntarily postponed the appeal again. This time they informed the Claimant that the hearing would go ahead in her absence if she did not attend. The Claimant telephoned to say that she would not attend the appeal, which went ahead on 19 May in her absence. The Claimant did not request a postponement.

60. Ms Morton considered the appeal, which was by way of a review not a rehearing. She upheld the decision to dismiss for gross misconduct on the same grounds as the decision to dismiss.

The Applicable Law

61. The applicable law in respect of unfair dismissal is found at section 98 of the Employment Rights Act 1996 as follows:

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

(a)the reason (or, if more than one, the principal reason) for the dismissal, and
(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2)A reason falls within this subsection if it—
...
(b)relates to the conduct of the employee,

(4)Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b)shall be determined in accordance with equity and the substantial merits of the case.

62. The employment Tribunal has jurisdiction over claims for breach of contract existing on termination by virtue of the Employment Tribunals Extension of Jurisdiction of Order (England and Wales) 1994. The question for the Tribunal is whether there has been a fundamental breach of the employee's contract of employment by the employee.

Submissions

63. Both parties made oral submissions

Applying the Law to the Facts

Unfair Dismissal

64. The first issue for the Tribunal was the reason for dismissal. The Tribunal considered what was the genuine reason in the Respondent's mind when dismissing. The Tribunal found that misconduct was the reason the Respondent dismissed the Claimant. All witnesses gave evidence, which was convincing, as to their firm belief that the Claimant's actions amounted to misconduct. The language of the investigation report left little room for doubt; the Respondent was genuinely of the view that she was wilfully committing misconduct. After the dismissal, the Respondent in the person of Ms Batchelor, and there was no reason to believe that she was not supported by management, wrote to the Claimant in effect stating that any further contact between her and the students would constitute a safeguarding risk which would need to be reported to the DBS.

65. The Tribunal then identified the misconduct in the Respondent's mind. The Tribunal considered if it was just the conduct on 21 March or, in addition, the conduct during the suspension. However, the Respondent gave unequivocal evidence that the actions during suspension were not a reason for dismissal; it would have dismissed for misconduct in any event. The Tribunal accepted this evidence.

66. The Tribunal considered the Claimant's case that the reason for termination was that she was victimised for challenging the Respondent on its leave policy. The Tribunal did not accept this explanation. The Investigation Report was written using strong language and suggested a strong sense of grievance. The suspension in the view of the Tribunal seemed ill thought out – it was unclear why the Claimant needed, several days after the Tutorial, to be removed from the building where it was inevitable there would be witnesses on the last day of term; the matter might have been left till the end of the working day with less disruption for all. These suggest that the Respondent felt strongly about the Claimant's conduct. The Tribunal cannot find that it did so because of one email.

67. Accordingly, the Tribunal considered whether the misconduct dismissal was procedurally unfair. In misconduct dismissals the Tribunal must follow the case of **British Home Stores v Burchell** [1978] IRLR 379 with the caveat that the burden of proof is now neutral. It must consider whether the Respondent dismissed the Claimant holding a reasonable and genuine belief in her culpability following a reasonable investigation. The Tribunal may not substitute its view for that of the employer as to what is a reasonable investigation. The question is whether the Respondent's investigation came within a range available to a reasonable employer in the circumstances.

68. The Tribunal firstly considered if there was a reasonable investigation. The Tribunal did not need to consider the failure to inform the Claimant of the email allegations prior to dismissal, because it had found that this did not impact on the Respondent's decision to dismiss.

69. The Tribunal found that the decision to go ahead with the investigation meeting (in effect because the Respondent would not delay for a chosen companion) did not take the investigation outside the reasonable range; particularly where a college is potentially looking at starting an exam term without a teacher.

70. The Tribunal had concerns about the investigation. Contrary to its procedure, the Respondent did not tell the Claimant as soon as practicable, but started the investigation first. It had a power but not requirement to suspend under its policy and chose to suspend where there was no suggestion of risk to the students or staff.

71. The investigating officers accepted the (inevitably) subjective opinion of Mr May as to the Claimant's attitude without, seemingly any caution, when they had not heard the Claimant's side of the story. The investigation report was termed in charged language. The use of the term "insubordination" regarding the failure by the Claimant over leave requests indicated a willingness to see the Claimant as difficult.

72. With-holding the investigation report, which clearly would cause a reaction from the Claimant, until 2 days before the hearing was unnecessary and put the Claimant at a disadvantage. In the event, this was avoided by accepting a second statement from the Claimant and the Claimant accepted that there would have been no material difference if she had

seen the report earlier. In the opinion of the Tribunal, it is hard to see what benefit there can be to good industrial relations for an employer to refuse to provide anything other than the barest outline of the allegations against an employee more than two days before a hearing that will consider gross misconduct. This is something that the Respondent might wish to reconsider in future processes, to seek to mitigate the stress and ill feeling inevitable in such matters.

73. Nevertheless, the Tribunal may not substitute its view of what constitutes a fair procedure for that of the employer. These shortcomings were not sufficient to take the investigation outside a reasonable range.

74. For the avoidance of doubt, the Tribunal considered if the investigation was outside the reasonable range because the Respondent continued with the dismissal hearing in the Claimant's absence. The Claimant said that she was ill, she had not provided a fit note (contrary to the sickness procedure) and had not asked for a postponement. This did not take the investigation outside of the reasonable range. Although the employer was unaware at the time, the Claimant was actively arranging – on the day of the hearing – the taking on of paying pupils, and arranging logistics which is hard to reconcile with her being so incapacitated she could not effectively attend the hearing.

75. The Tribunal had already found that the Respondent held a genuine belief in the Claimant's culpability. Accordingly, it went on to consider if this belief was reasonable.

76. The Tribunal found it within the reasonable range to find the Claimant was very discourteous to Mr May. He gave consistent evidence as to her conduct during the tutorial. The Respondent, however, did not rely on this as sufficient for dismissal. The key reason for dismissal, according to Ms Wallace, was the failure to deliver the tutorial. Accordingly, the question for the Tribunal is - was it within the reasonable range to find her culpable of misconduct for failing to deliver the tutorial. Or to put it another way, was it within the reasonable range to view her failure to deliver the tutorial as misconduct?

77. A failure to carry out duties might at first sight be viewed as poor performance. However, the Respondent viewed this failure as gross misconduct because it believed that her failure was wilful. Was this belief within the reasonable range?

78. The Tribunal noted that the Claimant was notably little concerned with the observation process. The Tribunal had found that the Respondent had, in effect, changed or clarified the observation policy to include tutorials very shortly before the observation. The Tribunal had found that the Claimant, and other staff, had a reasonable belief that tutorials were not to be observed. Observation, particularly in an Ofsted context is likely to be much discussed and the Tribunal found that the Respondent should (and may well have been) aware that there had previously been at least confusion over whether tutorials were included for observation.

79. For the avoidance of doubt, the Tribunal did not accept the Claimant's case that the introduction of the new policy was linked to her in any way. It

was part of the Ofsted preparations which were likely to be the over riding concern of the college. Further, the new policy differed from the old in ways that did not relate to what lessons were subject to observation.

80. The Claimant knew about the weekly tutorial instructions and received the plan for the material week. However, her evidence was that she did not always follow the plans, as they were not always suitable for her class. The Claimant told the Respondent in clear and detailed terms that the surveys on 21 March were problematic. There was no evidence that the Respondent had checked the viability of these surveys; Mr May's evidence was unclear. The five weekly overview did make reference to a very light hearted survey about rabbits (for Easter) and it is hard to see how failing to surveys such as this can be reasonably viewed as evidence of misconduct.

81. The Tribunal was aware that it could be a nice distinction whether an employee's actions amount to poor performance or misconduct. The Tribunal reminded itself that it may not substitute its view of whether it was reasonable to view actions as misconduct or performance, i.e. whether the material actions fall on the misconduct side of the line; it may only consider if the Respondent's decision to view the actions as misconduct come within a range of reasonable beliefs. The Tribunal found that the crux was whether it came within a range of beliefs available to a reasonable employer in the circumstances that the Claimant's actions were wilful.

82. The Tribunal reminded itself that it was considering primarily the failure to deliver the lesson. The Tribunal found that there was nothing to suggest that the Claimant had been told that failure to deliver a particular tutorial would be seen as misconduct. The emails encouraged staff to adhere to the new tutorial plans and approach but no more. The Claimant did not attend the "reboot" meeting and the Respondent was, or should have been, aware of this. Further, there was evidence that shortly before this "reboot" in February 2016, there was not a proper structure for tutorials. (Students had raised complaints at student councils and the Claimant herself complained to Mr May on 21 March.) Finally, the plan for the 21 March tutorial was not before the Tribunal so there was no evidence to establish that the Claimant was wilful in failing to deliver it.

83. Accordingly the Tribunal found that it was not within the range of reasonable beliefs to find that the Claimant was culpable of misconduct. Therefore, the Claimant was unfairly dismissed.

84. The next issue was whether the Tribunal should make a so-called Polkey deduction. That is, had the Respondent followed a fair procedure would it and could it have dismissed fairly?

85. The Tribunal followed the guidance of Elias P (as he then was) in **Software 2000 v Andrews 2007** ICR 825. If an employer contends that the employee would have ceased to have been employed in any event had fair procedures been followed, the Tribunal must have regard to the evidence. There may be circumstances where there is insufficient evidence for the Tribunal to sensibly reconstruct what might have been. However, a Tribunal must have regard to the evidence and the mere fact

that there is an element of speculation involved is not a reason to refuse to have regard to the evidence.

86. A fair procedure would have resulted in the Respondent not dealing with the Claimant's action as predominantly misconduct but as a performance issue, perhaps with a lesser misconduct issue in respect of her conduct towards Mr May. Further, in a fair performance procedure, she would have been clearly informed about the case against her. In those circumstances, how would the procedure have worked? Would the Claimant have attended the meetings? The Tribunal found she would not; she did not say in reply to Tribunal being accused of gross misconduct in particular that caused her to suffer stress. Further, it was reasonable of the Respondent to have pressed on with the procedure during the Easter break – in the interests of students.

87. The most likely result is that the Respondent would have concluded that her performance fell well short of what was required in the tutorial, particularly in light of the behaviour to Mr May. The fact that the Respondent was so influenced by its view that the Claimant's conduct was wilful, makes it likely that the Claimant would not have been dismissed for a performance issue; the most likely result was a final written warning. A further reason against a performance dismissal is that it would have been in the interests of students to retain the Claimant; especially as the performance issue was not related to exam subjects but to tutorials. Accordingly, the Respondent would not have dismissed the Claimant had it followed a fair procedure.

88. The final issue was whether the Claimant had contributed to her dismissal and if so, to what extent. The Tribunal found that, she was responsible for blameworthy conduct. She had failed to deliver the tutorial plan. Her behaviour to Mr May was unprofessional and discourteous. The breaching of the suspension and possibly the safeguarding policy did not cause the dismissal but did contribute. The Tribunal accepted that the Claimant's motivation was to help students who were put in a difficult and worrying situation. Nevertheless, it was a clear breach of the suspension procedure, which stated in terms that employees on suspension must not contact directly or indirectly students.

89. Due to the seriousness of the Claimant's contributory conduct, the Tribunal judged it just and equitable to reduce both the basic and contributory awards by 75%.

90. The Tribunal did not find that there was a failure to comply with the ACAS Code of conduct and accordingly there is no corresponding adjustment to the award.

Wrongful Dismissal

91. The question is whether the Claimant committed a fundamental breach of her contract of employment permitting the Respondent to dismiss her summarily. The burden of proof is on the Respondent and the standard is the balance of probabilities.

92. A fundamental breach is one that goes to the root of the contract. According to Lord Steyn in **Malik v BCCI** HL 12.6.97, in respect of a fundamental breach by an employer, 'the employer shall not: without reasonable and proper cause, conduct itself in a manner ... likely to destroy or serious damage the relationship of confidence and trust between employer and employee."

93. Considering first the contractual grounds for summary dismissal, the grounds relied upon as gross misconduct are as listed as potential gross misconduct.

94. This Respondent did not rely on **Boston Deep See Fishing and Ice Co v Ansell** (1888) 39 ChD 339 and argue that it did not know its employee was in breach at the time of termination but relied on a breach which they discovered post-termination. The Respondent relied on the grounds set out in the letter of dismissal, that is what it knew when it made the decision to dismiss.

95. Accordingly, the Tribunal considered what had happened during the tutorial on 21 March. On the balance of probabilities, the Tribunal found that the Claimant did say words to effect of, "I don't care what you write…write what you like". There was no suggestion of previous ill feeling between Mr May and the Claimant, and he reported these comments promptly to management when they would be fresh in his mind. However, the Tribunal did not find that this was gross misconduct; it was poor performance, and arguably misconduct.

96. The Tribunal found that the Claimant did not deliver the planned tutorial, as the Claimant did not deny this. However, as the tutorial plan was not before the Tribunal there was insufficient evidence for the Tribunal to find that the failure to deliver this tutorial was gross misconduct. It was not in dispute that the Claimant was five minutes late. The Claimant did not deny that she left the tutorial early. Again, while these matters might very well be poor performance, they are not sufficient for the Respondent to discharge the burden on it of proving a fundamental breach.

97. The Tribunal finally considered the Claimant's actions whilst on suspension. This had on the Respondent's case, not been the reason for dismissal. Nevertheless, for the avoidance of doubt, the Tribunal asked itself if the Claimant's actions referred to in the letter of dismissal could amount to a fundamental breach. The Respondent's knowledge when it wrote the letter of dismissal was limited to Ms Riddell's email at p170; this stated that the Claimant had contacted her class and told them that she was under investigation for a disciplinary.

98. The true situation, we now know from the emails, was that the Claimant had not told her students about the disciplinary. However, she was in contact with the students in breach of the suspension policy. Further, giving students her personal email was in breach of policy. The Tribunal did not find that her using the students' personal emails was in breach of policy.

99. The Tribunal did not consider that this amounted to a fundamental breach on the Claimant's part. The Tribunal found on the balance of probabilities, that it was the students' parents who made contact first, due to their children's distress. The Tribunal accepted that the Claimant's motivation was the students' best interests. The emails showed that it was disruptive and distressing for the students to lose their teacher in their A level term.

100. The finding that this was not a fundamental breach was bolstered by the fact that the Respondent, once it found out what the Claimant had done (including setting up lessons and planning to charge students) did not seek to argue that this constituted gross misconduct. This corroborates its case that what it considered to the operating fundamental breach was the Claimant's actions on 21 March.

101. Accordingly, the Claimant was not in fundamental breach when she was dismissed. Therefore, the Respondent breached her contract by dismissing her summarily. She was wrongfully dismissed.

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Employment Judge Nash
Date: 15 October 17

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.