EMPLOYMENT TRIBUNALS

Claimant:	**Mr B Sobnack**
Respondent:	**Loughborough University**
Heard at:	Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
	By cloud video platform
On:	8, 9, 10, 11 February 2021
Before:	Employment Judge Adkinson sitting alone
Appearances	
For the claimant:	Mr D Flood, Counsel
For the respondent:	Ms E Hodgetts, Counsel

This has been a remote which has been not objected to by the parties. The form of remote hearing was V: video whether partly (someone physically in a hearing centre) or fully (all remote). A face to face hearing was not held it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of about 320 pages, the contents of which I have recorded. The order made is described below.

JUDGMENT

After hearing the evidence and submissions of each party, the Tribunal concludes that:

1. The respondent employed the claimant in his role as warden of Harry French Halls of Residence;
2. The respondent unfairly dismissed the claimant;
3. The claimant's employment would have ended on 31 August 2021 and therefore any compensation must be limited to that date;
4. The claimant's conduct contributed to his dismissal. The basic award and compensatory award should therefore be reduced by 25%;
5. Neither re-engagement or re-instatement are appropriate in this case and so the Tribunal orders neither;
6. The respondent must pay to the claimant the following sums which take account of any reductions under the rule in **Polkey** or for the claimant's contributory conduct:
    - 6.1. a basic award of **£4,129.38**, and

6.2. a compensatory award of **£10,299.84**.

REASONS

Background

1. The Claimant, Mr Sobnack, is employed by the Respondent, Loughborough University ("the University"), as a university teacher in physics. There are no issues in this case that relate to that employment.

2. Between 1 December 2002 and 27 March 2020, Mr Sobnack was also the warden of Harry French Hall of Residence, one of the Halls of Residence at Loughborough University. He says that this was pursuant to a contract of employment (what I have called "the contract of wardenship") that was separate and distinct from that of his role as a university teacher and that he was unfairly dismissed from it. He seeks compensation and he also seeks his reinstatement or reengagement in the role of warden.

3. The Respondent does not dispute it is possible for him to have two contracts of employment with the University. However, they say that is role of warden was not that of an employer/employee relationship. They say even if they were wrong about that he was fairly dismissed for some other substantial reason. If remedy is appropriate, then they resist his reinstatement or reengagement. The University also raised issues about the calculation of losses and in particular the calculation of the cap on an award for unfair dismissal.

The hearing

4. Mr Sobnack was represented by Mr Flood, Counsel, and the University by Ms Hodgetts, Counsel. I am very grateful to the help that they provided to the Tribunal and the co-operation that they clearly had with each other beforehand to narrow the issues in the case.

5. I heard oral evidence from Mr Sobnack, Mr I Usen, a sub-warden from 2016 in Harry French Hall and also from Mrs D Vignali who was the Sales and Service Provider at Unite, who are the organisation who manage the hall on behalf of the University.

6. On the University's behalf I heard evidence from Dr M Alonso, who is Director of Student Services, the Associate Chief Operating Officer and who dismissed Mr Sobnack from his role as warden. In addition, I heard oral evidence from Professor R Thomson, the pro-Vice Chancellor of Teaching, who reviewed Dr Alonso's decision to terminate Mr Sobnack's role as warden.

7. I have taken into account each witnesses oral evidence. I have also taken into account the written evidence of Mr H Johnson. Originally, he was going to be a witness for Mr Sobnack but he decided not to call him or his statement as evidence. However, University instead tendered his statement as evidence. There was no objection to that happening and therefore I allowed it in.

8. At the close of the case, each party provided written submissions and also made oral closing submissions. I have taken those into account in the decision that I have reached.

9. With the agreement between the parties, I have dealt with both liability and where appropriate remedy.

10. The hearing itself proceeded by way of HMCTS's Cloud Video Platform on 8, 9, 10 and 11 February.

11. During the course of the hearing there were some minor technical difficulties but neither party suggested they had any impact on the fairness of the proceedings and for my own part I am not aware or was able to perceive any unfairness to either party caused by either the use of CVP or by the technical difficulties.

12. During the course of the hearing at the end of every hour we took a break of approximately five minutes in line with Health and Safety Executive guidelines on the use of computer monitors.

13. There was a bundle of approximately 255 pages and I have considered those documents to which I have been referred.

14. The Claimant prepared a remedy bundle of approximately 108 pages and again I have considered those to which I have been referred.

15. The University submitted a supplementary bundle of 9 pages. No objection was taken to that being put before me. I have considered those documents to which I have been referred.

16. In view of the number of issues in the case I decided to reserve my decision. This is that decision.

Issues

17. Counsel for both parties had cooperated and agreed between them a list of issues for me to resolve and I agree that that represented the issues that I have to engage in having now heard the evidence in the proceedings.

18. In summary the issues are as follows:

    18.1. Was the contract of wardenship a contract of employment?

    18.2. If yes,

        18.2.1. has the Respondent established a potentially fair reason for dismissal namely a breakdown in trust and confidence amounting to some other substantial reason?

        18.2.2. If yes, was the dismissal fair or unfair in accordance with the substantial equity and merits of the case taking into account all the circumstances and in particular the respondent's size and administrative resources?

    18.3. If I decide that the Claimant were unfairly dismissed the following further issues arise:

        18.3.1. Is it just to order the reinstatement of the Claimant?

18.3.2. If not, is it just to order his reengagement?

18.3.3. What compensatory award is the Claimant entitled to?

18.3.4. Should I make any reduction to the compensatory award under the principle set out in the rule in **Polkey**?

18.3.5. Was any dismissal caused or contributed to by the claimant's actions? If so by what proportion would it be just and equitable to reduce the amount of the basic or compensatory award?

18.3.6.

18.3.6.1. Does the ACAS Code of Practice on disciplinary procedures apply?

18.3.6.2. If yes has the Respondent failed to comply with it unreasonably and if so, should I increase the award on the grounds it is just and equitable to do so and if so by what amount?

18.3.7. For the purposes of the statutory cap on any compensatory award, does a week's pay include any fringe benefits?

19. The parties agree that, subject to any reductions and liability, the basic award would be £5,505.84.

20. There is also no argument that the Claimant has failed to mitigate his loss. That concession was, in my view, quite properly and sensibly made on the facts of this case.

Findings of fact

21. I make the following findings of fact on the balance of probabilities.

The witnesses

22. I begin by making some observations about what I made of the witnesses, because I have taken this into account when evaluating their evidence.

23. I begin with the University's witnesses. I am quite satisfied that both Dr Alonso and Professor Thomson did their best to tell me what they honestly believe to be the truth. My primary reason for this conclusion is that their evidence significantly undermined the University's case that the dismissal was fair and that he was not an employee and that they gave such evidence freely and without attempting to play it down. Their evidence also accorded with the documents available. They made appropriate concessions, in particular about relying on human resources ("HR") and in Dr Alonso's case, about how clearly and quickly he lost trust in Mr Sobnack.

24. I have a different view about Mr Sobnack and believe he was consciously trying to paint a favourable picture of matters rather than give straight answers to assist the Tribunal to work out what had happened.

25. The University sought to make a number of points to undermine his credibility. For me, the following things were significant to undermine his believability in my view.

25.1. The first is that after he started these Employment Tribunal proceedings, when he was no longer the warden of Harry French Hall, he decided to send an e-mail on 25 June 2020 making serious allegations about sub-wardens who had been involved in complaints against him. There was absolutely no point in sending that. He said it was to deal with allegations he had heard on "the grapevine". This makes no sense to me. He was not being investigated at the time; he was not being subjected to any sort of disciplinary proceedings; the Employment Tribunal proceedings were of course already presented at that point. In my view he could not provide any satisfactory explanation for suddenly, unexpectedly and without prompting sending this e-mail to the University with the allegations in it. The e-mail seems to do nothing other than trying to tarnish the names of potential complainants or witnesses. I consider that demonstrates the claimant was seeking to build a favourable scenario.

25.2. The second matter is that the e-mail was blind carbon copied to his two witnesses Mrs Vignali and Mr Usen. There was no reason to copy them in. He could not provide any satisfactory explanation for these unnecessary actions. He seemed to be trying to influence their evidence or making sure the stories were straight. I can see no other motive or explanation for copying them in.

25.3. The third matter is his retirement. There is correspondence that shows from 2019 that Mr Sobnack had already negotiated his phased retirement to conclude on 31 August 2021. After he presented his claim, he started to try to secure work beyond his due retirement date. There is no real explanation for this sudden change in view. It seems odd given he believed they had unfairly dismissed him. The only difference is now he was suing the University. Given his attempt to build a case by sending the above-mentioned e-mail, this too seems to me to be a manoeuvre to bolster his claim rather than a genuine and long-felt desire to continue working and being warden after the proposed retirement date.

25.4. The case revolves around his communication style. His explanation in cross-examination has been that English is not his first language. That was never advanced as a reason at the time. I could detect no difficulty in fluency in English nor in the cultural communications that accompany a language, by which I mean the manner in which one expresses oneself.

25.5. His credibility is also undermined by his own schedule of loss. In his claim he has also sought to try and claim things like the expenses of buying a new house that he says he was going to rent out but now had to move into. This not supported by the

> documentary evidence: it shows that he was applying for a residential mortgage that forbade letting out without the mortgagee's consent, rather than a buy-to-let mortgage. He has produced no evidence to show that the house was a lettable proposition or how much rent he would have received. Furthermore, none of the ancillary costs such as utility bills are supported by any evidence. In my opinion the mortgage offer shows he was not going to let out the house. He was therefore going to incur these costs in any event as one would in any home. Taking into account the lack of evidence, contradiction between his case and the mortgage offer, and his other attempts to paint a favourable picture (such as the e-mail I describe above) and letting witnesses know the story he will seek to advance, I do not believe that this is someone who simply made a mistake in setting out their schedule of loss: rather I believe he has put them in there simply because he is trying to recover more compensation than he knows he would be entitled to. It is a deliberate exaggeration.

26. I did not find Mrs Vignali a helpful witness. The manner in which she answered questions gave me the impression that she had a pre-determined story to tell. For me, the most significant factor was that she denied any contact with Mr Sobnack about this case. His e-mail in which he blind-copied her shows this is wrong. While it shows something about the way Mr Sobnack has chosen to present his case, I am not satisfied her evidence is of any real help on the issues I have to decide.

27. Mr Usen denied prior contact. However, he freely admitted Mr Sobnack's solicitors had contacted him and he had received the e-mail. His manner was clearer and straightforward. He made concessions where appropriate. I found him to be a credible witness. For all that however, I do not find his evidence really took the case any further forward one way or another.

About the respondent

28. The University is a large educational institute in Loughborough, Leicestershire. Whilst I have not been given details about its resources there has been no suggestion that the University lacks the resources to run a sophisticated HR department that one would expect of a large public sector institution.

About the claimant

29. Mr Sobnack is a university teacher in physics. He started that employment on 31 December 1999. He is due to retire from that role on 31 August 2021.

Wardens and sub-wardens

30. The University has a number of Halls of Residence in which students are accommodated primarily in their first year. Each Hall of Residence is headed by a person known as a warden. The person who acts as a warden must be a permanent member of the academic staff. It is not possible to be a warden in one's own right independently of employment as an academic member of staff.

31. Below the warden there are sub-wardens. These are graduate students studying at the University, for example, for a PhD.

32. In Harry French Hall there is one warden (who at material times was Mr Sobnack) and he has below him 3 sub-wardens to assist in discharge of his duties.

33. As part of their roles wardens and sub-wardens get their own accommodation. That is part of, but distinct from, the Halls of Residence itself.

34. Whilst wardens work for the University under the contract of wardenship, the sub-wardens are volunteers whose reward is better accommodation.

35. In order to discharge their duties wardens and sub-wardens need to live on site so that they can respond quickly to any developments or incidents, can be seen as part of the Hall of Residence community and can more effectively discharge their disciplinary, academic and pastoral duties that come with the role.

36. In cross-examination, Dr Alonso accepted that:

    36.1. Mr Sobnack was personally expected to perform the role of warden;

    36.2. He was not able to delegate the task to anyone else without the University's consent;

    36.3. He was not able to substitute anyone else into the role without the University's consent;

    36.4. He personally had to do the job;

    36.5. He had to do it at all times subject of course to any annual leave or rest breaks to which he might be entitled; and

    36.6. The University ultimately decided who would be the substitute if Mr Sobnack were absent for whatever reason.

Mr Sobnack's appointment as warden

37. Mr Sobnack was appointed as the warden of Harry French Hall on 1 December 2002. It was a role he loved. The role of warden is governed by the contract of wardenship. At the relevant time the warden's duties were set out in a detailed document dated from September 1999. There was some discussion about whether there is a more up to date version of these duties, but no one has suggested that they differ in any material respect. The warden's job description provides as follows:

    "5.1 – Roles and Responsibilities of wardens. wardens act as a resident tutor to each student in Hall over a continuous period of time. The Hall warden provides a service far beyond that of the normal carer. He/she is always on duty. He/she is always available to listen and be the "link" to the other services within the University. He/she is at hand when needed late at night or in the early hours of the morning. His/her concern and care for each student in Hall is paramount. His/her care includes:

    "• Offering support and guidance

"• Fostering community spirit

"• Responsibility for welfare, health and safety and discipline of students

"• Management of sub-wardens

"• Links with Loughborough University Mission Statements

"5.2 – Relationship of wardens with Assistant wardens and sub-wardens assists the warden and Assistant wardens (where applicable) with the day to day running of Hall life. Their areas of responsibility are determined by the warden and may include responsibility for organising particular aspects of Hall life. … The function of a sub-warden are varied and differ from one Hall to another. Central to these however are the concepts of welfare, discipline, liaison and socialising. The sub-warden provides a support system to the students under the egis of the warden.

"…

"5.4 – Conditions of Service the guidance sets out the periods for which a warden is appointed. This says nothing about whether the contract of wardenship is one of employment or not.

"5.5 – Operating Indicators the guidance gives a number of examples. I need only quote the headings, and these are:

"• To exercise pastoral responsibility and care for the students resident in Hall

"• To maintain good order within the Hall and where necessary to exercise disciplinary powers in accordance with the authority delegated by Counsel under the provisions of ordinance XVII

"• To exercise managerial responsibility for the performance of sub-wardens in the Hall

"• To encourage students resident in Hall to participate in Hall life through social and other events which develop the community spirit of the Hall

"• To play a part in the dissemination of information relating to the availability of a combination of returning students

"• In conjunction with the residential organisation of Student Accommodation Services to ensure on a day-to-day basis the Hall runs efficiently and effectively

"• To develop efficient and effective working relationships with colleagues working in a variety of sections and departments within the University (this is particularly so in relation to the residential organisation in Students Accommodation Services)."

38. The guidance goes on to provide appraisal guidelines for wardens although it seems to be common ground in this case that Mr Sobnack only had one appraisal.

39. Clause 5.7 requires the warden to occupy accommodation provided by the University as a rent-free service occupation (unless given a dispensation). On the termination of the appointment for any reason the warden has to

vacate and give up possession of the accommodation at the direction of the University in a clean condition and in an undamaged state.

40. Clause 5.8 deals with emoluments. It says the warden's accommodation is provided free of rent and utility charges (electricity, gas and water) and meals. However, this must be declared by the warden to his/her tax officer. He is also responsible for any council tax implications.

41. The things I have quoted tally very much with the job description that was given to Mr Sobnack.

42. In Mr Sobnack's letter offering an appointment on 14 November 2002 it says that:

"The appointment carries with it membership of Wardens Committee, it will run concurrently with your appointment as a lecturer which remains unchanged. You will be entitled to a warden's allowance currently valued at £6,274 per annum, in recognition of the number of students in Hall a further allowance of £972.00 per annum. All other conditions attaching to this offer are as set out in the enclosed sheet. You will receive a supplementary allowance of £500 per annum as compensation for the absence of dining rights in your Hall."

43. His appointment as warden was extended in 2009.

44. At its extension it seems Mr Sobnack was provided with a new document setting out the general conditions of service applying to all Hall wardens. There is no suggestion that these terms of service do not apply to Mr Sobnack's wardenship at all times material to this case.

45. So far as relevant, these general conditions of service read as follows (the numbering is how it appears in the contract):

"1 – termination of employment. If you were to terminate your employment with the University, you are required to give one term's notice in writing to the Director of Student Guidance and Welfare. Should the University wish to terminate your employment for any reason other than gross misconduct you will be entitled to one term's notice. Such notice on both sides is to be given before the first day of a term to expire on the last day of that term.

"…

"4 – Disciplinary procedure. In the event of a formal disciplinary action being considered necessary because of conduct or capability issues the normal sequence of events will be:

"(a) An oral warning normally given by the Director of Student Guidance and Welfare or under their nominee in the presence of the warden. You may be accompanied by a University Union representative or other colleague. A record of this warning will be placed on your personnel file, but it will be spent after twelve months subject to satisfactory conduct and performance. For further indiscipline or poor performance or for a serious offence the warden may be issued with a final warning in writing. The warden may be accompanied as above. A record of this warning will be placed on the individual's personnel file, but it will be spent after two years subject to satisfactory conduct and performance.

"(b) For further indiscipline the warden may be dismissed from their wardenship with the appropriate period of notice.

"(ii) In the event of gross misconduct it may not be practicable to follow the sequence given above and the University reserves the right to suspend the warden whilst investigating the matter and subsequently to dismiss the warden from his/her wardenship without notice. The warden has a right to be accompanied by University Union Representative or other colleague of his/her choice for the purpose of making a statement during the investigation.

"(iii) A warden wishing to appeal against any formal disciplinary action should notify the Director of Personnel Services within ten working days of the action being taken. The appeal will be considered by a pro Vice Chancellor whose decision is final.

46. Clause 6 confirms that the warden must remain an employee of Loughborough University and that they must reside in the accommodation provided in the Hall.

47. Clause 7 repeats the obligations to keep the council tax authority informed of his employment and residential status.

48. Clause 8 repeats the terms as to emoluments which are materially the same as above.

Dr Alonso's appointment and role

49. On 9 September 2013, the University appointed Dr Alonso as the Acting Director of Student Services. He was permanently appointed to this position in April 2014.

50. Dr Alonso is responsible overall for amongst other things the Halls of Residence. It is quite apparent that Mr Sobnack believes that Dr Alonso sought to standardise services across the Halls of Residence and to remove their individuality. Dr Alonso is described by Mr Sobnack as seeking to micromanage the Hall wardens.

51. I accept that this may well be Mr Sobnack's personal belief. However, I do not believe that it will assist me to determine if there is any truth behind it because it will not shed any light on what happened in the incidents relevant to this case. In any case I am not in a position to form any opinion on the matter with both a lack of evidence and expertise.

The first complaint – Mr M Henry

52. Mr M Henry was a sub-warden at Harry French Hall.

53. On 3 July 2018, Mr Henry made a complaint to Dr Alonso about Mr Sobnack's conduct as Hall warden. I have not seen a full copy of the complaint but I do have a copy of Dr Alonso's conclusions set out in a letter to Mr Henry dated 23 July 2018. It says so far as relevant:

"I am now in a position to respond to your complaint. I consider the substance of your complaint to be related to:

"(a) The fact that Dr Sobnack contacted you on 27 June to ascertain whether you had secured another sub-warden role.

"(b) His comment that you leaving Hall 'was the best thing to happen to the Hal'.

"I discussed both these aspects with Dr Sobnack.

"In respect of Dr Sobnack contacting you on 27 June, although I appreciate this was sensitive timing as you were at a Visa interview. I think the contact was borne out of a desire on Dr Sobnack's part to move forward with recruitment to the sub-warden position. Notably this can become time pressured over the summer period given leave commitments and the need to ensure new sub-wardens are in place to attend the new sub-warden training in September. Dr Sobnack says that he had not been officially notified (that is in writing) of your new role and did not wish to proceed on the course of action without direct confirmation. This is what precipitated his messages to you on 27 June. I do therefore think on balance that this contact was reasonable although I note that it was unfortunate timing and that the messages expressed a degree of urgency which you may have found surprising.

"In respect of the comment that you alleged that Dr Sobnack made during your phone call on 27 June Dr Sobnack admitted he had indeed said that you leaving the role of Harry French sub-warden would be 'the best thing to happen to the Hall'. I have explained to Dr Sobnack that I find this comment entirely unnecessary and unprofessional. He has expressed his regret at the comment. I have been very clear with him that I do not expect any repetition of such a lack of professionalism. I can only add my apologies to the regret expressed by Dr Sobnack and reassure you that I do not expect, nor will I tolerate similar such behaviour in future."

54. Dr Alonso spoke to Mr Sobnack about this matter on 23 July 2018 and afterwards sent him an e-mail confirming their discussion. In that e-mail Dr Alonso wrote as follows:

"As I noted when we met though I think you are perfectly within your rights to seek confirmation that Mr Henry was leaving the sub-warden role in order that you could start recruitment I think your subsequent comment to him was unnecessary and unprofessional. I would hope that I do not have to speak to you about such matters again."

55. In cross-examination Dr Alonso confirmed that this was no more than informal advice rather than as any form of disciplinary sanction. It certainly was not any form of oral or written warning under a disciplinary policy. Dr Alonso confirmed he had not in fact used the disciplinary policy in relation to Mr Henry's complaint.

The second complaint – Ms A Chang

56. Ms A Chang was another sub-warden. There is no suggestion of any link between her and Mr Henry. On 16 May 2019, Ms Chang made a complaint to Dr Alonso about Mr Sobnack in his role as warden. The complaint is quite detailed. It involved the following allegations:

56.1. On 14 March 2019 Mr Sobnack had said to Ms Chang that he was unhappy with her for trying to delay her start date at Harry French Hall in order to avoid carrying out her duties. Mr Sobnack

did not believe her when she tried to explain the circumstances of that delay.

56.2. On 4 April 2019 Mr Sobnack sent to Ms Chang an aggressive text messages saying amongst other things:

"why don't you listen?????? Stick to what has been decided!".

Ms Chang complained that this message was of an inappropriate, angry tone.

56.3. On 10 April 2019 Mr Sobnack had left an aggressive phone message for her.

56.4. On 29 April 2019 Mr Sobnack had sent a message to a WhatsApp group chat of which all sub-wardens were members directed to Ms Chang that said:

"I am really unhappy and extremely disappointed! [Mr Usen] and I waited for 25 minutes".

Ms Chang felt was inappropriate and humiliating tone for a message directed to her in a public forum to which her colleagues could read the message.

56.5. On 8 May 2019 there had been a series of text messages in which Ms Chang had told Mr Sobnack in a text that she had to attend a meeting connected with her studies.

Mr Sobnack replied, "do you have to stay for dinner????".

Ms Chang: "they have invited me to attend".

Mr Sobnack: "And you got the invitation today??".

Ms Chang: "got the agenda today"

Ms Chang complained that it was inappropriate in tone to use so many question marks.

57. Ms Chang also complained that Mr Sobnack called into question her integrity, interfered with her PhD activities and made demands that she attended meetings during her off-duty hours.

58. She attached to her complaint copies of the text messages.

59. In response to Ms Chang's complaint there was a formal investigation carried out by Ms McGinty, the Head of Legal Services. She prepared a confidential investigation report and as part of that investigation interviewed Ms Chang, a witness, who is described as a confidential witness, and Mr Sobnack to get his side of the story.

60. She produced a detailed report. So far as relevant she did not find Ms Chang's complaint was made out. She did note however the following:

"However the tone and manner of some of the communications from the Respondent which I have seen have been unhelpfully emotive. The Respondent acknowledged there is at least one message that was sent in 'haste' and would have been worded differently with the benefit of hindsight. Similarly there appears to me to be evidence of the complainant has,

perhaps with good motive, created situations which are frustrating or administratively difficult for the Respondent to manage. There is no malice in this, but there appears to be no recognition that this might have caused the Respondent difficulties or concerns."

61. Under the sub-heading "Overall Summary", Ms McGinty concluded:

"As investigating officer I have not been able to identify sufficient evidence to support an allegation of bullying and harassment by the Respondent, in particular with reference to the basis of the complaint:

"• His tone and demeanour towards her in public and private including inferences as to her personal integrity: The Respondent has reflected upon this and demonstrated some remorse in relation to at least one interaction. The suggestion that the Complainant's personal integrity has been challenged has not been substantiated;

"• interference with and challenge to her PhD activities: I have found no evidence in support of this aspect of the complaint;

"• by placing unreasonable expectations and demands on her in relation to her role as a sub-warden at Harry French: The Respondent has high expectations of the sub-wardens under his management. I have not seen any evidence which supports that these are unreasonable. What is apparent is a difference in approach, a difference in perception of certain interactions and what might be a "clash of personalities between the parties in a professional context or indeed a misalignment of understanding of the role and expectations of a sub-warden. I detect no malice in either part.

62. Her report was sent to Dr Alonso. On 26 June 2019 he wrote to Mr Sobnack saying:

"on the basis of the report I do not find evidence to substantiate Ms Chang's allegations and so will not be taking any formal action. I would however like to talk to you informally about some aspects of the findings and will ask [my assistant] to arrange a time for us to do so. "

63. That meeting took place on 1 July 2019 in the morning. After the meeting Dr Alonso wrote to Mr Sobnack summarising the outcome as follows:

"Dear Mr Sobnack

"Thank you for meeting with me this morning to discuss the outcome of the investigation. As discussed below are some brief notes of the meeting. Please let me know if I have missed something or not quite captured it correctly.

"I noted there were no substantive evidence of bullying and harassment found in the investigation

"I noted there was an issue with tone in one of your communications which you yourself had accepted. I ask you to reflect on this for future such instances and adopt a different tone.

"You asked to see a copy of the complaint and the investigation report. [He provided a link to the files]. Given the sensitivity I would you not to share these other than with Andrew. I have redacted some sections because

these contain sensitive information about the Complainant's personal circumstances.

"We discussed Ms Chang continuing in the role. You said that you did not feel that she would be a suitable candidate for the sub-warden role going forward. You also noted the other sub-wardens had found it difficult to work with her. I will meet with Ms Chang to discuss this and will then be back in touch. In the meantime please do not respond to any requests regarding the extension of her role.

"You noted that the investigation had taken some time and this has been stressful on you. I acknowledge this. In terms of the time taken I have not reviewed the exact timeline, but it is true to say that in such investigations setting up accompanied meetings of the relevant parties can stretch out the timelines.

"I hope we are now able to move forward productively

"Regards…"

64. In evidence Dr Alonso accepted that this advice was not given as an oral warning or as a formal written warning of any kind. It was not issued pursuant to a disciplinary policy. He agreed that, like that in relation to Mr Henry, it was no more than informal advice to Mr Sobnack about his style of communication.

65. This was the second occasion that Mr Sobnack had conceded that his communication style needed moderating. It was the second complaint about amongst other things his communication style and it is therefore the second time that Dr Alonso had had to remind him to moderate it.

66. There could be no doubt by now that Mr Sobnack was aware of the need both by his own recognition and on Dr Alonso's informal advice of his meet to moderate the tenor of his messages when communicating with sub-wardens.

67. As he accepted in cross-examination, the use of multiple exclamation or question marks could well change or influence how a recipient might perceive a text message, and might make an otherwise neutral text appear aggressive, intimidating or suggesting disbelief.

68. In cross-examination, he also accepted that his tone was not appropriate on at least on occasion.

69. I believe that it must also be an inevitable conclusion that, as warden, he knew that he had to be careful about how he communicated. He had for years managed sub-wardens who themselves may well be new to the University and embarking upon a very different and potentially stressful new academic stage. As a warden managing several sub-wardens, he would have to have known, and over the years have learnt, of the importance of the tone of his communications when working with subordinates and managing them. The job description itself implies this is important too.

70. Mr Sobnack did not suggest it was an accident he used multiple question marks in the texts. It must have been deliberate. He must have wanted to convey a particular sub-text because they have no other linguistic function.

As noted, he is fully fluent. I therefore infer and find as a fact that he must have understood when typing out text messages, the subtext that would be conveyed by the use of multiple punctuation marks and of the tone that they would convey.

71. There are other allegations and counter-allegations about Ms Chang. Further it is said that the message of 4 April 2019 was written by Mr Sobnack when he was in China, and Unite had contacted him there to complain that Ms Chang had ignored his instructions about collecting her keys. In the light of the admissions and outcome of the investigation, I see no relevance to the resolution of these issues and so put them to one side.

The third complaint – Ms S Doma

72. In October 2019, Ms S Doma, another new sub-warden, made a complaint to the University's HR Team about Mr Sobnack regarding his conduct in the role as warden. The HR Team passed this on to Dr Alonso.

73. On 25 October 2019, Dr Alonso met with Ms Doma.

74. Ms Doma told him that Mr Sobnack's behaviour and communication style was aggressive and confrontational. In particular she alleged he was trying to control her whereabouts even when she was not on duty.

75. Dr Alonso admitted that on hearing this that his first thought was Ms Doma's complaint had what he considered a striking similarity to the complaints from Mr Henry and Ms Chang.

76. As a result of the meeting, he formed the impression that she had given serious consideration about making a complaint.

77. He asked Ms Doma to put her complaint in writing. She e-mailed her complaint to him after the meeting. The complaint contained a number of allegations. She attached to it a number of documents to support her complaint.

78. Many of the allegations could superficially be described as one person's word against another. However, within the allegations were examples of text messages to which Mr Sobnack was a party and which he sent. One of the documents was the duties and responsibilities that Mr Sobnack had prepared which provided as follows so far as relevant:

    78.1. Any sub-warden had to let the warden know of their whereabouts when not on duty;

    78.2. They had to attend warden or sub-warden team meetings and disciplinary meetings and to attend Harry French committee meetings but only when they were on duty.

79. Ms Doma alleged it was improper that she should have to tell Mr Sobnack where she was when she was off duty.

80. Of the text messages, one relates to a student, X, who had attempted self-harm. Mr Sobnack was very insistent that Ms Doma tried to see X to check on their welfare regardless of whether or not Ms Doma was on duty. This was because he believed X had already built a link with Ms Doma, he was concerned about continuity and about earning X's trust. He was unhappy

that Ms Doma was not making sufficient effort to see X. His text message reads so far as relevant:

"You tried to see [X] only once yes yet again? It is a pastoral matter?"

81. Ms Doma also complained about the following:

81.1. Mr Sobnack requiring her to attend meetings or work during weekends when she was not on duty;

81.2. His threatening to make arrangements so that she could get calls around 04:00;

81.3. In response to one conversation about working on weekend, saying to her "This is bullshit. I will continue having meetings in weekends";

81.4. His referring to her and Mr Usen as "bloody foreigners"; and

81.5. In the conversations on top table, he had raised religious arguments which had opened with phrases like "Jesus was a gay man and that he had no children".

82. Ms Doma, who under the terms of her visa was forbidden to work more than 20 hours per week and had to keep a record of her worked hours, also alleged that he asked her to work in excess of 20 hours but not to record those extra hours in her time sheet.

83. Dr Alonso on receiving these considered them and felt that they were indicative of unprofessional behaviour by Mr Sobnack. He concluded that because these allegations were strikingly similar to those made by Mr Henry and Ms Chang and because of the number of allegations, he no longer could have any trust and confidence in Mr Sobnack discharging the role of warden effectively.

84. He did not reflect on the fact (in fact I am satisfied it never even occurred to him) that:

84.1. most of the allegations made by Mr Henry and Ms Chang were found not to be proven;

84.2. the allegations by Ms Doma were just that – allegations: there had not been so much as a beginning of an investigation to ascertain their veracity or accuracy;

84.3. Ms Doma herself might be at fault too;

84.4. The previous allegations had not resulted in any disciplinary process or sanction;

84.5. Mr Sobnack had been a warden for 2002 and there had been no complaints until Mr Henry's complaint;

84.6. The contract of wardenship prescribed a process for dealing with disciplinary matters.

85. Dr Alonso consulted HR on dismissing Mr Sobnack. The upshot was that they advised him he only needed to give one term's notice to terminate Mr Sobnack's appointment as warden. They appear not to have considered

that the contract of wardenship prescribed a process for disciplinary matters either.

86. Dr Alonso said that he reflected on the briskness of giving a term's notice. He felt that the complaints of Mr Henry and Ms Chang had shown two incidences of unprofessional behaviour which Mr Sobnack had accepted and that this one was a third example of unprofessional behaviour.

87. He explained in his evidence to me in chief that this was because:

"I could plainly see from the document which Ms Doma had provided to me that there were examples of further unprofessional behaviour which could not have been fabricated. These included the fact that Mr Sobnack had told Ms Doma that Ms Chang had been removed from her sub-warden post because she had filed a complaint against him and that the e-mail exchanged between Mr Sobnack and Ms Doma in which his tone was very brusque, 'you tried to see [X] only when yet again! It is a pastoral matter!'."

88. He said the complaint did not warrant an investigation because some of the complaint related to differing accounts of an issue where there would be no independent witness evidence. On balance I think he believed this because it is so flawed that I do not believe he would have made it up. Many allegations are one person's work against another. To decide not to investigate is not justified by the fact it would be difficult. In any case, if a decision were to be taken that investigation were too difficult, then the only reasonable course would be to give the benefit of the doubt resulting from the lack of investigation to the person about the complaint had been made.

89. It was suggested by Professor Thomson that the reason there was no investigation was in fact because Ms Doma did not want one. It also gives rise to the following 2 realistic options as Professor Thomson accepted: Either the complaint goes no further and the benefit of any doubt is given to the person about whom the complaint was made or, if the matter is too serious to ignore, the investigation proceeds despite the complainant's wishes. She did not suggest, quite properly, that one simply accepted the allegation as true and proceeded on that basis.

90. Dr Alonso said in any event that an investigation would not have changed the fact he had lost trust in Mr Sobnack carrying out his warden role. He said that by then he had completely lost trust in Mr Sobnack's ability to carry out his role as warden in a professional manner and concluded there was no other option than to terminate his appointment.

91. In the circumstances I am satisfied from the first that he was aware of the complaint, Dr Alonso decided that he was going to dismiss Mr Sobnack from his role of warden. It was a firm decision. He no longer trusted Mr Sobnack and was not open to the possibility that his decision might be an overreaction, was based on unproven allegations, or a complete misjudgement. His conclusion was essentially a knee jerk, gut reaction and simply decided he wanted him out at any cost. Flawed as his logic may be, I believe he genuinely believed that an investigation would serve no purpose whatsoever. There is no evidence of any ulterior motive to dismiss Mr Sobnack, and none was suggested. There is no other obvious reason to dismiss him either.

92. Having made his decision, he was going to sack Mr Sobnack, he contacted Mr R Taylor the Chief Operating Officer on 25 October 2019 at 17:00 to discuss the way forward.

93. At some point that evening, though it is not clear when, he met Mr Taylor and explained to him that there had been instances of Mr Sobnack using unprofessional language on 2 occasions he had given him warnings that such behaviour should not be repeated. It appears he did not mention to him that those warnings were not any form of warning under a disciplinary policy but were no more than informal advice. He told Mr Taylor that the 3rd allegation had had similar allegations to the previous 2, that he had now lost trust and confidence in Mr Sobnack carrying out the role of warden and that had no choice but to terminate his wardenship.

94. Mr Taylor raised no concerns whatsoever with that but suggested that Dr Alonso write to Professor C Lynton, the Provost, and Deputy Vice Chancellor, and to Professor R Allison, the Vice Chancellor. Dr Alonso did this on 28 October 2019 setting out his discussions with Mr Taylor. Professor Lynton replied by e-mail that day expressing that they had no concerns with Dr Alonso's proposed course of action. Professor Allison did not respond.

95. On 29 October 2019 Ms Doma submitted further details of complaint alleging that Mr Sobnack had said he was going to monitor her for a period of 4-6 weeks and that if her contract of being a sub-warden was not renewed within the first year, she would be barred from being a sub-warden in any other Hall in the future. This allegation was not investigated either.

96. Mr Alonso spoke to Ms Doma on 31 October 2019 and says that he was concerned with her mental wellbeing as she said that she felt she could not stay in Harry French Hall of Residence and that she reported that her sleep was affected.

97. He met again with her on 1 November 2019 and told her he was going to advise Dr Sobnack of the complaint he had received and would be dealing with the matter in that conversation. He did not tell her that he was going to terminate Mr Sobnack's appointment.

98. At about this time and unaware of the complaint, Mr Sobnack contacted the University's Student Services Operation Manager, Ms A Truby by e-mail. Mr Sobnack complained about Ms Doma's performance as a sub-warden and said he believed she was not up to the job. The University never did anything about this complaint, even though (as the University's witnesses conceded) it was a plausible scenario both parties were correct in their complaints and views about the other.

99. On 4 November 2019 Ms Doma made a further complaint that Mr Sobnack had yelled at her. On 6 November she complained that he had been trying to contact her. None of those complaints either were investigated by the University.

100. At this point I should explain that there were a lot of questions asked of the witnesses about the substance of the allegations that Ms Doma had made against Mr Sobnack. If the parties were expecting me to form a conclusion

about the accuracy of them then they are to be disappointed for the following reasons:

100.1. Whether her complaints were justified or not is not relevant to the issues I have to determine – this is not a breach of contract claim where I must decide what happened and if factually there had been a breach of a particular term of the contract;

100.2. I am not satisfied the role of an Employment Tribunal to try and fill in the gaps in an investigation that the employer was well placed to undertake but deliberately chose not to pursue. It is not the role of the Tribunal to provide a process to enable the employer to plug the gaps in their potentially inadequate response. These are unfair dismissal proceedings. Tribunals must not substitute themselves for the employer. That must cut both ways. Not only does it mean Tribunals should not determine what they would have done were they the employer, it also means they should not be undertaking the investigation and fact-finding exercise that the employer should be doing;

100.3. Moreover, there has been no investigation conducted by the University to try and establish what the facts would have been at that time. The University has not even sought to interview (yet alone actually interviewed) the potential witnesses to try and establish what happened. The University has made no effort to gather any evidence other than that which Ms Doma chose to disclose. There has not been any investigation of the complaints that Mr Sobnack made about Ms Doma, nor was that issue explored at the hearing. I have neither the expertise nor evidence to undertake that role;

100.4. I have not heard from Ms Doma;

100.5. So, even if I were wrong about the Tribunal's role or the relevance, I simply do not have enough information to be able to draw any conclusion whatsoever that Mr Sobnack on balance behaved as alleged either at all or in part, or that Ms Doma on balance behaved as alleged either in whole or in part. This is subject to one caveat. I do have some of the text messages because she provided copies.

100.6. It follows that if I am wrong about my role and if I therefore had to express a finding of fact on Ms Doma's complaint, I would have to say on balance her complaint relating to the text message is made out because I have seen it whereas the rest is not. There is not enough to show her bare allegations are correct.

Dismissal

101. Dr Alonso arranged a meeting with Mr Sobnack on 8 November 2020. That meeting was attended by Mr Sobnack who was accompanied by his trade union representative, Mr A Dicks. Dr Alonso was accompanied by Mr C Wheldon, Head of Enterprise, Network and Employer Engagement as an observer.

102. Mr Sobnack prepared a note of that meeting after it had taken place. The University did not prepare any note. Although Mr Sobnack did not send his note to Dr Alonso afterwards, yet alone invite him to consider its accuracy, there has been no real suggestion or demonstration that it is inaccurate in any material way.

103. The note records that the meeting opened with Dr Alonso saying that:

> "This was the third time in eighteen months that he has complaints against Mr Sobnack from sub-wardens and furthermore he once had to caution him for not keeping records of an incident."

104. The reference to not keeping records of an incident was something new and not alluded to anywhere else in the case.

105. The note continues ("I", "my", "me" etc. refers to Mr Sobnack)

> "To this I said that both the case of Mr Henry and Ms Chang and the University investigations found no substantial grounds on which to uphold the complaints. The only things found against me were that I was rude in my reply to Mr Henry... and that I misjudged the tone of my SMS to Ms Chang when communicating with her urgently with her from China."

> "Dr Alonso then asked whether I had told Ms Doma about Ms Chang and I replied that Ms Doma had asked me why Ms Chang left and I told her there had been complaints but without giving her any details. Dr Alonso commented that sometime back I was upset that Ms Chang had been talking about me and I contacted Dr Alonso who then told Ms Chang she was not to talk about me and yet here I had done the same thing that is talked about Ms Chang to Ms Doma.

> "Dr Alonso further said he had lost trust and confidence in my ability to perform as a warden, that he was the only warden he had received complaints about and that hence was terminating my contract as warden."

106. The notes go on to record that Mr Dicks raised several times queries about the fairness of the process that Dr Alonso was following and also queried that there was no proposal whatsoever to investigate Ms Doma's complaints. He also pointed out that while there had been a cluster of complaints none made previously against Mr Sobnack in his many years as warden.

107. The conversation then continued for some time going into some of Ms Doma's allegations. I see no benefit of going into them. It was not an investigation. Moreover, Dr Alonso had gone into this meeting with a closed mind. This is apparent from the fact that Dr Alonso had decided to dismiss Mr Sobnack on receipt of Ms Doma's complaint, all communications with HR, Mr Taylor, Profession Lynton and Professor Allison show he had made up his mind and the fact he opened the meeting by telling Mr Sobnack that he had been dismissed. I reject his evidence to me that he would have been prepared to change his mind. That is contrary to all other evidence. As far as he was concerned it was a formality: Mr Sobnack was no longer going to be a warden.

108. As a result of the meeting on 15 November 2019 Dr Alonso wrote to Mr Sobnack and gave him a term's notice. The notice was to commence on

5 January 2020 which meant his last day in the role would be 27 March 2020. He was to vacate the property by that date but because of the effect of the lockdown resulting from that year's Covid-19 pandemic, that was extended, and he was allowed to remain in situ until more or less the end of June 2020.

109. The letter of dismissal makes no reference to a right of appeal. This was done on the advice of a Mr P Cox-Stone who was a HR partner in the University.

Review

110. Mr Sobnack did request a review of the decision and that review was carried out by Professor R Thomson. Prior to that review a Ms L Brown, HR partner spoke to Mr Sobnack to gather some information for Professor Thomson's benefit as part of the review. As I noted above, Professor Thomson told me in evidence whilst it might have been preferable if Ms Doma's complaint had been investigated she noted in her review that at the wishes of the complainant it had not been investigated.

111. In evidence Professor Thomson noted that she had concluded that for someone in the position of warden, Mr Sobnack's behaviour in his interaction did not meet with the professional standards that would be expected of him. She also said:

"It was also front and centre of my mind that the University was entitled to terminate the wardenship by giving a term's notice and as that happened I could see no reasonable basis on which the decision should be overturned. I felt the decision was a reasonable one whether it had been on the basis of the first two complaints alone or all three complaints. Under section 1 of the General Conditions of Service applying to Hall wardens I believe the University was entitled to terminate the wardenship."

112. Professor Thomson fairly admitted in cross-examination that in relation to the agreement she was relying very much on the advice that she had been given by HR.

113. Professor Thomson therefore upheld Dr Alonso's decision to dismiss.

The claim

114. Mr Sobnack embarked upon early conciliation between 27 April and 12 May 2020. He presented his claim to the Tribunal on 11 June 2020.

The e-mail of 25 June 2020

115. On 25 June 2020 at 11:38 he sent to HR an e-mail that went into allegations about an event on 16 March 2020 that appeared to relate to a student who had been bleeding badly and who had required an ambulance and it appears to have been an act of self-harm. I have expressed my view on this email above. Again, I do not believe that resolution of the issues raised helps this case one way or another and, besides, with a paucity of information I am not able to decide that the allegations in it are, on balance, true.

Law

Employment status

116. As well as the cases below I have also considered the commentary in **IDS Employment Law Handbook Vol 3 Chapter 2** on employees and workers and **Harvey on Industrial Relations and Employment Law Div A** on employees and workers.

Statute and regulations

117. The **Employment Rights Act 1996 section 230** provides so far as relevant:

"(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

"(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

"…

"(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

"(5) In this Act "employment"—

"(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

"…

"and "employed" shall be construed accordingly.

"…"

Meaning of employee

118. There is no complete and unchanging list of criteria to determine if a contract is one of employment or one for services. Each case must be considered on its own facts: **Warner Holidays Ltd v Secretary of State for Social Services [1983] ICR 440 QB**.

119. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433 QBD**, McKenna J provided this guidance:

"A contract of service exists if these three conditions are fulfilled.

"(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.

"(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

"(iii) The other provisions of the contract are consistent with its being a contract of service."

120. The passage was approved in **Autoclenz Ltd v Belcher and others [2011] ICR 1157 UKSC**.

121. The obligation on one party to provide work and on the other to accept work are the irreducible minimum of mutual obligation necessary to create a contract of employment: **Carmichael and another v National Power plc [1999] ICR 1226 UKHL**.

122. When looking at the facts, a Tribunal should ask itself if the history of the relationship showed that it had been agreed there was an obligation on the claimant to do at least some work and a correlative obligation on the employer to pay for it: **Dakin v Brighton Marina Residential Management Co Ltd UKEAT/0380/12 EAT**.

123. The mere fact a putative employee can arrange their own hours, holidays and amounts of work does not prevent a contract from being one of employment: **Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612 CA**.

124. The ability of a putative employee to substitute someone to do the work they otherwise would do is a relevant factor. In **Pimlico Plumbers Ltd v Smith [2017] IRLR 323 CA** the Court of Appeal said that

"'[84] … In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance.

"Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally.

"Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional.

"Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance.

"Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance.

"Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

125. The Supreme Court, on appeal, did not comment on these observations. However, the Employment Appeal Tribunal has applied them in **Chatfield-Roberts v Phillips UKEAT/0049/18 EAT**.

Unfair dismissal – some other substantial reason

126. The **Employment Rights Act 1996 section 111** entitles a person who has been employed for a sufficient period to bring a claim for unfair dismissal

127. **Employment Rights Act 1996 section 98** provides (so far as relevant):

> "(1) In determining … 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.
>
> "…
>
> "(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.
>
> "…"

128. The employer bears the burden of proving on the balance of probabilities that the claimant was dismissed for some other substantial reason. The reason for dismissal means "a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee": **Abernethy v Mott, Hay and Anderson [1974] ICR 323 CA; W Devis and Sons Ltd v Atkins [1977] ICR 662 UKHL.** That is to be viewed from the basis of the facts known to the employer at the time of dismissal: **W Devis and Sons Ltd.** If the if the employer fails to persuade the tribunal that had a genuine belief, then the dismissal is unfair.

129. In assessing the reason for dismissal there is no requirement to prove the reason actually justified dismissal: that is a matter when considering fairness: **Gilham aors v Kent County Council (No 2) [1985] ICR 233 CA**. Therefore, while he Appeal Tribunal and Court of Appeal have emphasised the need to ensure that "some other substantial reason" is not used as a panacea or mantra to avoid a disciplinary process (**A v B [2010] ICR 849 EAT; and on appeal as Leach v OFCOM [2012] IRLR 893 CA**) they do not require me to decide at the first stage if the decision itself was reasonable. However, I do believe they require me to be alive to the possibility at all stages that an employer may have used a label to disguise its real reason.

130. When it comes to reasonableness the burden of proof is neutral. The tribunal should consider all the circumstances including the employer's size and administrative resources.

131. The way that an employee's personality manifests itself may result in a breakdown of trust and confidence. If this impacts on the employer's business, then it may amount to some other substantial reason and be a potentially fair reason for dismissal: **Perkins v St George's Healthcare NHS Trust [2005] IRLR 934 CA**. I see no reason why this would not apply to a style of communication.

132. In **Ezsias v North Glamorgan NHS Trust [2011] IRLR 550 EAT**, the Appeal Tribunal addressed the issue of whether creating a distinction between dismissal for a breakdown of trust and confidence, and dismissal for conduct contributing to that breakdown, could create an avenue by which employer could avoid being required to undertake normal conduct procedures. The Tribunal said:

"We understand that concern, but the fact is that the [employment] terms only apply when it is the employee's conduct or competence which is the real reason for why the action was taken against him. Although as a matter of history Mr Ezsias' conduct was blamed for the breakdown, the Tribunal's finding in the present case was that his contribution to that breakdown was not the reason for his dismissal. We do not suppose that those who were responsible for negotiating the [employment] terms had this in mind, but the fact is that the [employment] terms do not apply to cases where, even though the employee's conduct caused the breakdown of their relationship, the employee's role in the events which led up to that breakdown was not the reason why action was taken against him. We have no reason to think that employment tribunals will not be on the lookout, in cases of this kind, to see whether an employer is using the rubric of "some other substantial reason" as a pretext to conceal the real reason for the employee's dismissal."

133. When considering some other substantial reason, there is no reason why the principles that apply to misconduct set out in **British Home Stores Ltd v Burchell (Note) [1980] ICR 303 EAT** should not apply to some other substantial reason: **Perkin v St George's Healthcare NHS Trust [2006] ICR 617 CA at [65]**. The Tribunal believes this must be so where the dismissal and circumstances (if not misconduct) are akin to it.

134. The principles **Burchill** (as developed over the years) are, in summary:

134.1. Was there a reasonable basis for the respondent's belief?

134.2. Was that based upon a reasonable investigation?

134.3. Was the procedure that the employer followed within the "range of reasonable responses" open to the employer?

134.4. Was the decision to dismiss summarily within the "range of reasonable responses" open to the employer?

135. Tribunals can look at the facts behind the loss of confidence and whether on all the facts the dismissal was unfair under **section 98(4)**: **Governing Body of Tubbenden Primary School v Sylvester UKEAT/0527/11 EAT**.

136. The Tribunal is not entitled to substitute its own view for that of the employer.

Remedies for unfair dismissal

Reinstatement and re-engagement

137. The **Employment Rights Act 1996 section 116** provides

"(1) In exercising its discretion under **section 113** the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—

" (a) whether the complainant wishes to be reinstated,

" (b) whether it is practicable for the employer to comply with an order for reinstatement, and

" (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

"(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

"(3) In so doing the tribunal shall take into account—

" (a) any wish expressed by the complainant as to the nature of the order to be made,

" (b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and

" (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

"(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement. …"

138. The Tribunal is not limited to considering only these factors: **Port of London Authority v Payne aors [1994] ICR 444 CA**.

139. It is irrelevant that there might be a reduction under the rule in **Polkey**: **Manchester College v Hazel aor [2014] ICR 989 CA**.

140. In terms of practicability, at the first stage (whether deciding in principle to order reinstatement or re-engagement) I am concerned only with whether, provisionally, it appears practicable: **Payne**. I must assess practicability as at the date of my decision: **Rembiszewski v Atkins Ltd UKEAT/0402/11** and on the basis of what can be done **United Lincolnshire Hospitals NHS Foundation Trust v Farren [2017] ICR 513 EAT**.

141. While the relationship with colleagues is relevant, as is contributory fault, any adverse finding in relation to these is not a trump card to prevent reinstatement or re-engagement: **Lincolnshire County Council v Lupton**

[2016] IRLR 576 EAT; McGregor v Intercity East Coast Ltd [1998] SC 440 CSIH. Likewise, a genuine but unreasonable breakdown in trust and confidence is a factor but not a conclusive one: **British Airways v Valencia [2014] IRLR 683 EAT**.

142. When assessing practicability, I must be satisfied not only that the employer genuinely had a belief that trust and confidence had broken down but also that its belief in that respect was not irrational: **Farren; United Distillers & Vintners Ltd v Brown UKEAT/1471/99 EAT**.

Compensation

143. The Tribunal awards compensation by reference to a basic award and compensatory award.

144. The **Employment Tribunals Act 1996 section 119** sets out how to calculate the basic award.

145. The **Employment Rights Act 1996 section 123** empowers a Tribunal to award compensation that is "just and equitable" in the circumstances.

146. There are potential uplifts and reductions, the law of which is as follows.

Polkey: *Reduction to compensatory awards under the rule in* ***Polkey v AE Dayton Services Ltd [1988] AC 344 UKHL***

147. The rule in **Polkey** requires a Tribunal to consider the prospect that an employee might have been dismissed in any event.

148. The approach to the assessment is set out in **Software 2000 Ltd v Andrews [2007] IRLR 568 EAT**:

> "The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed."

149. Furthermore, in **Hill v Governing Body of Great Tey Primary School [2013] ICR 691 EAT**, the Tribunal said

> "[24] A 'Polkey deduction' has these particular features. "First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although [Counsel] at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption

that the employer would this time have acted fairly, though it did not do so beforehand."

150. The assessment may be that a dismissal would have occurred by a fixed date or that there was a percentage chance it may have happened at some point. There is nothing to suggest it could not be both in an appropriate case.

Contributory conduct

Observations about contributory fault and reductions to the basic and compensatory award.

151. What amounts to contributory fault is the same for both the basic and compensatory award: **Langston v Department for Business, Enterprise and Regulatory Reform UKEAT/0534/02 EAT**.

152. Before any reduction can be made, the Tribunal must be satisfied that the relevant conduct is "culpable and blameworthy": **Nelson v BBC (No2) [1980] ICR 110 CA**. It includes foolish or "bloody minded" conduct (as described in **Nelson**) as much as conduct that is properly described as tortious or misconduct warranting a disciplinary sanction.

153. In the case of both the basic award and the compensatory award, the focus is entirely on the employee's actual conduct and not that of other employees of the employer: **Parker Foundry Ltd v Slack [1992] ICR 302 CA; Williams v Amey Services Ltd UKEAT/0287/14 EAT; compensatory award see: Parker Foundry Ltd v Slack [1992] ICR 302, CA; Mullinger v Department for Work and Pensions [2007] EWCA Civ 1334, CA**. There is no requirement that the conduct has been established by an investigation.

154. It is not necessarily the case the employee should know the conduct is culpable or blameworthy. The Tribunal can also consider the employee ought to have known it was culpable or blameworthy: **Allen v Hammett [1982] ICR 227 EAT; Department for Work and Pensions v Coulson UKEAT/0572/12 EAT**.

155. While the Tribunal has a wide discretion in relation to reductions of the basis award, if the Tribunal is satisfied that the claimant's acts caused or contributed to the dismissal it must reduce the compensation by a just and equitable proportion: **Optikinetics Ltd v Whooley [1999] ICR 984 EAT**.

156. A failure to appeal is not relevant because it occurs after the dismissal and so cannot have contributed to it: **Hoover Ltd v Forde [1980] ICR 239 EAT**.

157. The basic award and compensatory award can be reduced by different amounts, but normally it should be the same amount: **G McFall and Co Ltd v Curran [1981] IRLR 455 NICA**. **University of Sunderland v Drossou 2017 ICR D23 EAT**

158. The EAT in **Hollier v Plysu Ltd [1983] IRLR 260 EAT** suggested that the contribution should be assessed broadly and should generally fall within the following categories: wholly to blame (100 per cent); largely to blame (75 per cent); employer and employee equally to blame (50 per cent); slightly to blame (25 per cent).

The basic award

159. The **Employment Rights Act 1996 section 122(2)** requires a tribunal to reduce the basic award where:

> "the tribunal considers that any conduct of the [claimant] before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent."

160. The approach I must take is as follows:

In **Steen v ASP Packaging Ltd 2014 ICR 56 EAT**, the Appeal Tribunal, summarising the correct approach under S.122(2), held that it is for the tribunal to:

160.1. identify the conduct which is said to give rise to possible contributory fault

160.2. decide whether that conduct is culpable or blameworthy, and

160.3. decide whether it is just and equitable to reduce the amount of the basic award to any extent.

161. The wording of the act is clear that, as for as the basic award is concerned, the conduct does not need to contribute to the dismissal before a reduction can be made.

Compensatory award

162. The **Employment Rights Act 1996 section 123(6)** compels the Tribunal to consider the issue of contributory fault in any case where it was possible that there was blameworthy conduct on the part of the employee relating to the unfair dismissal. This is so regardless of whether the issue was raised by the parties: **Swallow Security Services Ltd v Millicent UKEAT/0297/08 EAT**.

Unreasonable failures to follow the ACAS codes of practice

163. The only potentially relevant code of practice is The ACAS Code of Practice Number 1 ("COP1") says

> "1. This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.
>
> "Disciplinary situations include misconduct and/ or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.
>
> "Grievances are concerns, problems or complaints that employees raise with their employers. The Code does not apply to redundancy dismissals or the non-renewal of fixed-term contracts on their expiry.

164. In **Phoenix House v Stockman 2017 ICR 84 EAT**, the Tribunal confirmed COP1 does not apply to dismissals for "some other substantial reason"

because of a breakdown in the working relationship where the Tribunal observed:

"21. In my judgment, clear words in the code are required to give effect to that sanction, otherwise an employer may well be at risk of what is in reality a punitive element of a basic and compensatory award in circumstances in which he has not been clearly forewarned by Parliament and by ACAS that that would be the effect of failing to heed the code. The code does not in terms apply to dismissals for some other substantial reason. Certain of its provisions, such as for example investigation, may not be of full effect in any event in such a dismissal. What is required when a dismissal on that ground is in contemplation is that the employer should fairly consider whether or not the relationship has deteriorated to such an extent that the employee holding the position that she does cannot be re-incorporated into the workforce without unacceptable disruption. That is likely to involve, as here, a careful exploration by the decision maker, …, of the employee's state of mind and future intentions judged against the background of what has happened. Of course, it would be unfair, as it was found to be here to a marginal extent by the tribunal, to take into account matters that were not fully vented between decision maker and employee at the time that the decision was to be made. Ordinary common-sense fairness requires that. Clearly, elements of the code are capable of being, and should be, applied, for example giving the employee the opportunity to demonstrate that she can fit back into the workplace without undue disruption, but to go beyond that and impose a sanction because of a failure to comply with the letter of the ACAS code, in my judgment, is not what Parliament had in mind when it enacted **section 207A** and when the code was laid before it, as the 2009 and 2015 codes both were."

Order of adjustments

165. If there are any adjustments to be made to the awards, I must make them in a particular order. The approach I have taken is that set out in **IDS Employment Law Handbooks paragraph [7.214]** and the **Employment Tribunal Remedies Handbook 2020-2021** edition under "Adjustments and order of adjustments". Both these draw on the previously decided cases and in particular on the comments in **Digital Equipment Co Ltd v Clements (No.2) [1997] ICR 237 CA** and identify I should do the following (so far as relevant to this case):

165.1. Calculate the total losses suffered by the claimant;

165.2. Make any **Polkey** deduction;

165.3. Decrease or increase for accelerated or decelerated receipt of compensation in respect of future or past loss (**Bentwood Bros (Manchester) Ltd v Shepherd [2003] EWCA Civ 380**);

165.4. Apply any percentage reduction for any contributory conduct on the part of the employee;

165.5. Gross up the award if taxable (**Hardie Grant Limited v Aspden [2012] ICR D12 EAT**); and

165.6. Apply the statutory cap if relevant.

The statutory cap

166. The **Employment Rights Act 1996 section 124** provides so far as relevant

"(1) The amount of—

" (a) any compensation awarded to a person under section 117(1) and (2), or

" (b) a compensatory award to a person calculated in accordance with section 123,

"shall not exceed the amount specified in subsection (1ZA).

"(1ZA) The amount specified in this subsection is the lower of—

" (a) £86,444, and

" (b) 52 multiplied by a week's pay of the person concerned."

167. **Section 220** requires "a week's pay" to be calculated in the manner set out in **sections 221 to 229 inclusive**. These sections calculated a week's pay as a gross, not net amount: **Secretary of State for Employment v John Woodrow and Sons (Builders) Ltd [1983] ICR 582 EAT.** There is nothing in **section 124** or elsewhere to suggest a net figure should be used for a week's pay for calculating the statutory cap.

168. There was a debate before me about what was relevant to "a weeks' pay" for the purposes of **sub-section 124(1ZA)(b)**.

169. The claimant referred me to extracts for **Harveys on Industrial Relations and Employment Law Div H2C(2)(d) [858]** on the issue and suggested that it should include the benefits in kind, like the costs of accommodation. The claimant accepted that there are some authorities that show board and lodgings are not remuneration (cited in **Harvey** above). The claimant however pointed out that in some cases the value of any accommodation had to be added lest there would otherwise be a breach of national minimum wage legislation: **WA Armstrong and Sons v Borrill [2000] ICR 367**.

170. The respondent referred me to the history that underpins the legislation that eventually became **sections 220 to 229**. The respondent also referred to the rules of statutory interpretation found in In **Benion, Bailey and Norbury on Statutory Interpretation (8th ed)**.

171. I have considered both arguments and prefer the respondent's argument. A week's pay is the amount of money payable from the employer to the employee and does not include and value ascribed to free accommodation that comes with the employment. I will set out my reasons in brief as follows:

171.1. From the **Contracts of Employment Act 1963 schedule 2, Redundancy Payments Act 1965 schedule 1, Contracts of Employment Act 1972 schedule 2** (which repealed and re-enacted the **1963 Act**), **Trade Union and Labour Relations Act 1974**, **Employment Protection (Consolidation) Act 1978 schedule 14 paras 2 and 3** (which repealed and re-enacted predecessor legislation into one Act) and the **Employment Rights Act 1996** (which repealed and re-enacted the 1978 Act)

there is a theme of a week's pay being calculated by reference to a "rate of remuneration" to which the employee is entitled.

171.2. Where Parliament passes legislation with a form of words with previous legal history there is a presumption that it intended the words to be used in the sense given by the earlier history and this is a strong presumption where the acts are about the same subject matter: **London Corp v Cusack-Smith [1955] AC 337 361 UKHL, per Lord Reid; Barras v Aberdeen Steam Trawling and Fishing Co Ltd [1933] AC 402 UKHL(Sc)**.

171.3. There is a presumption that a consolidation act is not intended to change the law so words should be construed as in the predecessor legislation: **Halsbury's Laws of England vol 96(2018) para 734** and the cases cited there.

171.4. The word "remuneration" in the context of redundancy payments under the **Redundancy Payments Act 1965 schedule 1 para 5** (which defined a week's pay by reference to the "minimum remuneration" to which the employee would be entitled that week) has been interpreted in **S & U Stores Ltd v Wilkes [1974] ICR 645 NIRC** as follows:

"In our judgment the test for determining the "average weekly rate of remuneration" is as follows. (1) Any sum which is paid as a wage or salary without qualification is part of the employee's remuneration. (2) The value of any benefit in kind (e.g., free accommodation) or paid in cash by someone other than the employer (e.g., the Easter offering) is to be disregarded as not forming part of the remuneration. (3) Any sum which is agreed to be paid by way of reimbursement or on account of expenditure incurred by the employee has to be examined to see whether in broad terms the whole or any part of the sum represents a profit or surplus in the hands of the employee. To the extent that it does represent such a profit or surplus it is part of the employee's remuneration. This is not a matter which calls for an involved accountancy exercise. It is for the tribunal of fact to form a broad common-sense view of the realities of the situation as revealed by the evidence assessed in the light of their expert knowledge and experience."

171.5. The Employment Appeal Tribunal in **Best v St Austell China Clay Museum Ltd UKEAT/0924/03 EAT** applied **S & U Stores Ltd** and held that for the purposes of a "week's pay" held that:

"free accommodation is not pay".

171.6. In **University of Sunderland v Drossou [2017] ICR D23 EAT** the Employment Appeal Tribunal held that pension contributions could form part of a week's pay on the basis that they are clearly part of remuneration. As the respondent points out, the Tribunal did not refer to **Best** or to **S & U Stores** (it is not clear if the parties referred the Tribunal to those cases). As I read the cases there is no contradiction between the cases of **S & U Stores** or

Best on the one hand and **Drossou** on the other. I do not consider **Drossou** casts doubt on the validity of the respondent's position or the cases of **S & U Stores** or **Best**. My reasons are as follows:

171.6.1. Slade J in **Drossou** at [52] said:

"Benefits included in a compensatory award do not necessarily fall to be included in a week's pay"

171.6.2. **Drossou** was concerned with pension contributions being a remunerative element that were, the Tribunal concluded, clearly pure reward for doing the job. The payment was not qualified in any other way.

171.6.3. Things like free accommodation in which one has to live to do the job effectively are qualitatively distinct from physical payment of sums of money like pension contributions.

171.6.4. Therefore, the fact that a pension contribution is part of remuneration for the purposes of a week's pay does not undermine a conclusion in **Best** that free accommodation is not. It falls into the potential exemptions identified in **Drossou** at [52].

171.7. I do not believe **Borrill** assists (to be fair, the clamant more or less conceded this was the case). In **Borrill** it was necessary to ensure that the remuneration did not equate to less than the relevant agricultural national minimum wage laws that applied to that employment. Clearly where Parliament has passed clear legislation to address a particular problem, e.g., low pay, then other legislation should so far as possible not be interpreted so as to undermine that aim.

Conclusions

As a warden, was the Claimant an employee for the purposes of the Employment Rights Act 1996 section 230?

172. Yes: the contract of wardenship was a contract of employment. My reasons for this conclusion are as follows.

172.1. In clause 1 the University's contract of wardenship describes what would be terminated under that clause as "employment". The fact that the University has chosen specifically to describe what is being terminated as employment, objectively judged, would suggest that "employment" is the legal character of relationship the University believed the relationship would have. The fact that Mr Sobnack accepted those terms suggests it is the character he intended it would have too.

172.2. "Employment" is a specific word that is widely used to describe a common type of working relationship. It has been repeatedly used in the law for that specific type of legal relationship. I believe I can infer the choice to use a well-recognised term

repeatedly used by the courts and legislation shows that is what the parties intended. Had the University meant something other than employment and reminding myself of their resources and that they are a sophisticated employer, they could, and would, have said so.

172.3. Dr Alonso accepted:

172.3.1. Mr Sobnack was personally expected to perform the role of warden;

172.3.2. He was not able to delegate the task to anyone else without the University's consent;

172.3.3. He was not able to substitute anyone else into the role without the University's consent;

172.3.4. He personally had to do the job, and

172.3.5. He had to do it at all times subject of course to any annual leave or rest breaks to which he might be entitled;

172.3.6. The University ultimately decided who would be the substitute if Mr Sobnack were absent for whatever reason.

172.4. The work in being performed personally for a wage, and there is sufficient control that the University is, in old language, the master.

172.5. Overall, the role and obligations on each party are far more consistent with employment rather some other type of relationship. It is inherently implausible they would appoint a person as warden but not have them as an employee.

172.6. I have no evidence it is an "office" in any legal sense, but even it were there is nothing to show that employment in this role would be inconsistent with it also being an office.

172.7. There were never negotiations at various points to negotiate separate pay for separate work or services, like one may expect in a true self-employment relationship.

173. I do not believe that anything turns on the fact that he was already an employee of the University. No argument has been presented to me to suggest that one cannot have two contracts of employment with the same employer albeit in respect of different roles.

Fairness of dismissal

Has the Respondent established a potentially fair reason for dismissal, namely some other substantial reason being a breakdown in trust and confidence?

174. Yes. I am satisfied that upon receiving the third complaint from Ms Doma and considering its contents, Dr Alonso lost all trust and confidence in Mr Sobnack being able to discharge the duties as warden. He felt it was a similar complaint yet again to two previous complaints he had had to deal with. It is quite credible that Ms Doma's complaints, as set out above,

coupled with these previous complains would lead him to jump to the conclusion he no longer had any trust and confidence in Mr Sobnack. He had already twice had to give him informal advice about his manner of communication with the sub-wardens. Dr Alonso was a credible witness. I perceived his evidence on this as honest. In the circumstances it is inherently plausible he might react that way. I have no reason to doubt that what he told me was his genuine, honestly held belief.

Was the dismissal fair or unfair in accordance with the equity and substantial merits of the case?

175. No. The dismissal was not fair for the following reasons:

175.1. A reasonable employer would have acknowledged that although this was the third complaint of potentially similar matters, they would also have reflected on the fact that:

175.1.1. most of the allegations made by Mr Henry and Ms Chang were found not to be proven;

175.1.2. the allegations by Ms Doma were just that – allegations: there had not been so much as a beginning of an investigation to ascertain their veracity or accuracy;

175.1.3. Ms Doma herself might be at fault too;

175.1.4. The previous allegations had not resulted in any disciplinary process or sanction;

175.1.5. Mr Sobnack had been a warden for 2002 and there had been no complaints until Mr Henry's complaint;

175.1.6. The contract of wardenship prescribed a process for dealing with disciplinary matters.

175.2. No reasonable employer reflecting on those matters would have dismissed there and then. Instead, if they believed that they had lost trust and confidence in the employee, they would have started a process akin to a disciplinary process (as suggested in **Perkin**) (if not an actual disciplinary process). They would have realised the need to investigate and establish the facts. They would have also reflected on the fact that to dismiss without such a process would circumvent the contractual disciplinary process in the contract of employment: no reasonable employer would want to do that.

175.3. In this particular case the reasonable employer would have been faced with two possible routes forward given that apparently Ms Doma did not want there to be an investigation:

175.3.1. either it would have carried on regardless and investigated the matter and (if the investigation showed it were appropriate to do so) proceeded with either a disciplinary process or a quasi-disciplinary process; or

175.3.2. it would have halted the matter, given the benefit of all doubt to Mr Sobnack and confined itself to giving informal advice at most.

The reasonable employer would not have decided to proceed on the basis the allegations were substantially true without investigation.

175.4. No reasonable employer would have met with the employee and gone into that meeting with a closed mind and pre-determined outcome they were going to dismiss the employee. Reasonable employers do not decide the outcome of a meeting before it has taken place.

175.5. No reasonable employer would have failed to advise Mr Sobnack of his right to appeal or denied Mr Sobnack a right of appeal. The review that took place was no appeal. It was focused on Dr Alonso's decision alone, not the process that should have underpinned it such as the jump to a decision to dismiss without any investigation. Were the review an effective appeal, the reasonable employer would have realised that if Ms Doma did not want there to be an investigation it either had to go ahead without her consent and investigate anyway or drop the matter, as Professor Thomson conceded.

175.6. A reasonable employer would have reflected on the lack of previous disciplinary action for apparently similar matters. A reasonable employer would not have gone from there being no disciplinary procedures whatsoever but only informal advice being given to a conclusion that dismissal with notice was appropriate.

175.7. No reasonable employer would have gone from Ms Doma's complaint (which was mere allegations) to deciding on receipt of the complaint instantly that all trust and confidence had gone and the employment must end, especially in view of the lack of any previous disciplinary matters.

Remedy

Should I make any reduction to the compensatory award under the principle set out in the rule in Polkey?

176. I conclude that his compensatory losses should be limited up to 31 August 2021 because that is when he was due to retire. Suggestions he seeks to retire after this date are attempts to build up the value of his claim.

177. I do not believe any other reductions should be made under the rule in **Polkey** because it would require far too much speculation.

178. I have in mind the clear injunction that the Tribunal should be prepared to speculate as to what the University would have done had it behaved fairly. However, I have no information that enables me to sensibly speculate as to what the outcome of a fair procedure would have been for the following reasons:

178.1. No investigation of any kind was carried out into Ms Doma's complaints.

178.2. No interview was carried out with Mr Sobnack to get his version of events.

178.3. I cannot sensibly speculate what the investigation might have disclosed.

178.4. Ms Doma did not want her complaint to be investigated. I cannot speculate on whether the university would have respected that or felt it had to proceed.

178.5. Mr Sobnack's complaint that might cast doubt on Ms Doma was not investigated. I cannot speculate what that may have produced because I do not have any information to help.

179. The significant factors for me though are these:

179.1. The 2 previous complaints were for the most part dismissed. This suggests that the same would have happened to Ms Doma's complaint because of the striking similarity suggests the same outcome.

179.2. However even if that were wrong, if the University had investigated and embarked on a disciplinary or quasi-disciplinary process fairly, it would have noted that this was the first formal process. On the evidence I am not satisfied that that there would be any scenario in which it could have fairly concluded that the outcome for the first formal determination of misconduct (or quasi-misconduct) would have been dismissal on notice. It would have reflected on the long service, the contractual disciplinary policy, the lack of previous sanction and would imposed a sanction other than dismissal.

Was any dismissal caused or contributed to by Mr Sobnack's actions? And if so, is it just and equitable to reflect this in any award of compensation?

180. Yes. Mr Sobnack's text message to Ms Doma that read

"You tried to see [X] only once yes yet again? It is a pastoral matter?"

was brusque, blunt and unnecessarily aggressive in tone. The first question is clearly accusatory in tone. In context, it cannot sensibly be read as a genuine question. It makes no effort to engage. It has the same tenor of the messages that on each occasion resulted in Dr Alonso giving informal advice to Mr Sobnack. He had been advised to watch his tone in his text communications. He had ignored it.

181. That is culpable and blameworthy conduct that contributed to everything that happened. Therefore, I consider it is just and equitable to reduce his compensation to reflect this.

If so by what proportion would it be just and equitable to reduce the amount of the basic or compensatory award?

182. His conduct only partially contributed to the dismissal. It brought about some of the complaints. It was not what all the complaints were about. It

was not the main factor though to his dismissal. That instead was Dr Alonso's closed mind.

183. It seems to me that an appropriate reduction in this case is 25%.

184. I have applied my mind to whether or not there is a risk of double counting given the **Polkey** reduction. Since he was going to retire on 31 August 2021 in any event, it does not seem to me there is any overlap of double counting between the **Polkey** reduction and this one. I therefore make no adjustment to the 25% reduction.

185. I have considered if the basic and compensatory award should be adjusted separately. I can see no reason that they should be subject to separate adjustments.

Should I order reinstatement and reengagement?

186. I have concluded that I should not order either reinstatement or reengagement. My reasons are as follows:

186.1. While Mr Sobnack wishes to be reinstated or re-engaged, that is not a decisive factor.

186.2. Mr Sobnack contributed to his dismissal in his manner of communication. He had been told about it on 2 previous occasions. He did it again. There is no reason to believe he would alter his ways after a third warning if the other 2 informal warnings failed. It would therefore seem reasonable to believe it may re-occur. I do not consider that it is just to ignore his previous conduct and how that partly brought things about. I do not consider it proper to create the substantial risk that the issues will re-occur with the burden that will cause to the University to have to deal with it.

186.3. The break down in trust and confidence is genuine. I think that it would be impractical for there to be a working relationship going forward between him and Dr Alonso.

186.4. In any case Mr Sobnack was due to retire in August 2021. There are only 3 or 4 months until the summer recess in any event. Therefore, his reinstatement or re-engagement would be for a very short time in any event. I do not consider it practical to reinstate or reengage someone for such a short period of time into this role which requires and expects close relationships with the sub-wardens and students only for such a short period of time.

Did the ACAS Code of Practice apply?

187. The answer is no. The genuine reason for dismissal here was some other substantial reason even if that conclusion was unreasonable. Therefore, there is no uplift for a failure to follow the code of practice.

The statutory cap on compensatory award

188. Applying the law, a week's pay does not include the benefits as Mr Sobnack contends.

189. Free accommodation is clearly a benefit but living on site is clearly part of necessary arrangements to do the job. Here, Mr Sobnack did not have any real choice in the matter. That he may have welcomed the arrangement, benefitted from it or have been taxed on it is neither here nor there. The accommodation could be seen as a tool of the job from which he happens to derive consequential personal benefit. I see it as no different, for example, to an employee being given a computer for work purposes but through which they are allowed unlimited personal internet use. It is beneficial to the employee, but the computer is provided as a tool of the job to do the work for which they were employed. Using the words in **S & U Stores**, it is not "profit or surplus" to Mr Sobnack, but a tool of the job. If he lived off site then he would not be able to discharge his duties nearly as effectively (or at all even).

190. In calculating a week's pay, the Tribunal should use the gross weekly figure. Therefore, the statutory cap is:

52 weeks × £203.92 = £10,603.84.

Specific heads of loss

191. Mr Sobnack is only entitled to net weekly basic pay from the date of dismissal until 31 August 2021 when I am satisfied he would have ceased to be a warden because he would have retired. I am satisfied he would not have quit before that date given the nature of the role and that he clearly loved it.

192. I am satisfied that the sum of £300 reflects an appropriate loss of statutory rights.

193. I am not going to make any award for benefits for the loss such as gas, electricity and water. There is no evidence to support them. Besides, he was buying the house personally so they would have been incurred in any event.

194. As to the costs of acquiring new accommodation, I am not satisfied that these are recoverable. He would have to have moved out of the warden's accommodation at some point in the future and so therefore would have incurred the costs of conveyancing, the mortgage fees, stamp duty, removal costs and refurbishment costs in any event.

195. As to the costs of the mortgage I am not going to allow those. The mortgage that he was applying for was one of a residential mortgage for occupation of the property and not one for letting. He suggested that the plan was to change to a buy-to-let mortgage once the mortgagee had approved the mortgage. I saw no evidence to support that. Given I have doubts about his credibility and what he did actually apply for, I reject that suggestion. Therefore, I am not satisfied that these are costs that he would not have incurred but for his dismissal. This was a property he was going to buy as a residence for himself in any event. Even if I am wrong about that, the fact is that his claim is properly for the loss of rental income. He has provided no evidence whatsoever as to the rental income that he might have been able to recover and therefore they are not recoverable. I have no proof the property was lettable even.

196. In terms of future losses, I have already covered the issue of loss of earnings which takes until 31 August 2021. He would have retired after that date so would not incur any losses in any event.

197. Insofar as compensation is for future losses, I make no deduction for advanced receipt. The current interest rates and short period mean any such deduction would be negligible.

198. Grossing up will not apply because the award will be below £30,000.

Calculation of compensation

199. Therefore, Mr Sobnack is entitled to the following:

Basic award		
£203.92 × 27 (agreed relevant multiplier) =	£5,505.84	
Less 25% for contributory fault	-£1,376.46	**£4,129.38**
Compensatory award		
Loss of earnings from 27 March 2020 to 12 February 2021 (46 weeks 1 day)		
$46^{1}/_{7}$ × £179.45 =	£8,280.34	
Future loss of earning from 12 February 2021 to 31 August 2021 (28 weeks and 5 days) $28^{5}/_{7}$ × £179.45 =	£5,152.78	
This incorporates the limit to compensation for the purposes of the rule in **Polkey**. I have made no reduction for advanced receipt because the short period of time and low interest rates mean it would be de minimis.		
Loss of statutory rights	£300.00	£13,733.12
Less 25% for contributory fault	-£3,433.28	**£10,299.84**
The amount of the award is under £30,000 so grossing up does not apply.		
Statutory cap (so far as relevant) 52 weeks × £203.92 =	£10,603.84 >	£10,299.84

200. Because the proposed compensatory award is below the statutory cap, the claimant is entitled to the compensatory award in full as calculated.

201. I therefore award the claimant a basic award of **£4,129.38** and a compensatory award of **£10,299.84**.

Employment Judge Adkinson

Date: 9 March 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes

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.

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