EMPLOYMENT TRIBUNAL

Claimant: Mrs. Samia Abed

Respondent: Capital City College Group

Hearing: Final Merits Hearing

Heard at: London Central ET (via video/CVP)

On: 13-16 June 2022 (ET deliberation day - 2 September 2022)

Before: Employment Judge Tinnion, Ms. Carpenter, Ms. Keating

Appearances: For Claimant: Mr. Kohanzad, Counsel
For Respondent: Ms. Venkata, Counsel

JUDGMENT

1. The Claimant was dismissed for the fair reason of conduct. The Claimant's claim of unfair dismissal under ss.94-98 of the Employment Rights Act 1996 is well founded, but on procedural grounds only.

2. There is a 100% chance the Claimant would have been fairly dismissed for the conduct for which she was dismissed had the Respondent followed a fair disciplinary and dismissal procedure.

3. The Claimant was 100% culpable for causing her own dismissal.

4. The Claimant's breach of contract claim (wrongful dismissal/notice pay) is not well founded and is dismissed.

5. The Claimant's claims of harassment related to race under ss.26 and 40(1)(a) of the Equality Act 2010 are not well founded and are dismissed.

6. The Claimant's direct race discrimination claims under ss.13(1) and 39(2)(c)-(d) of the Equality Act 2010 are not well founded and are dismissed.

7. The Tribunal's judgment and reasons are unanimous. Unless the parties confirm by 4pm on 25 November 2022 that there is no need for a remedy hearing in respect of the Claimant's unfair dismissal claim, a remedy hearing shall be listed on a date to be determined.

REASONS

Claims

1. By her ET1 and Statement of Case [1-21], Claimant Mrs. Samia Abed presented claims against Respondent Capital City College Group (**CCCG**), her former employer, for (i) unfair dismissal under ss.94-98 of the Employment Rights Act 1996 (**ERA 1996**) (ii) breach of contract (wrongful dismissal/notice pay) (iii) direct race discrimination under ss.13 and 39(2)(c)-(d) of the Equality Act 2010 (**EqA 2010**) (iv) harassment related to race under ss.26 and 40(1)(a) of EqA 2010.

2. In its ET3 [30-37] and Grounds of Resistance [46-52], the Respondent denied the claims. In brief, the Respondent alleged the Claimant had been fairly dismissed for gross misconduct, denied her race had any bearing on her dismissal, denied she had been treated less favourably or been harassed because of race, and denied certain historic allegations of discrimination. The Respondent also disputed the Tribunal's jurisdiction over certain claims.

Preliminary Hearing for Case Management

3. At a Preliminary Hearing for Case Management on 7 October 2021, the Claimant withdrew her claims against two other respondents she had named, leaving CCCG as the sole respondent. The Tribunal listed the claim for a liability-only hearing, clarified the issues to be determined, and made case management directions.

Final merits hearing

4. The final merits hearing (via CVP) was held on 13-16 June 2022 (**Final Hearing**). Both parties were represented by counsel. A bundle of c.750 pages was produced, to which additional documents were added during and after the hearing. References in square brackets refer to the relevant page of that bundle. The parties agreed a basic chronology and cast list.

5. The Tribunal heard evidence from the following witnesses: (i) Mrs. Abed (ii) Ms. Colleen Marshall (iii) Mr. Chris Humphreys (iv) Ms. Amanda Cowley. The Tribunal was satisfied all four witnesses sought to assist the Tribunal by giving their honest best recollection of events, including the Claimant, even though she at times struggled to answer basic questions directly. The Claimant is not a native English speaker but has taught students in English for the Respondent for over half a decade – the Tribunal was satisfied she can speak (and write) English well, and was not materially disadvantaged by the fact English is not her first language.

6. There was insufficient time at the Final Hearing for counsel to make closing submissions, and certain outstanding disclosure issues had to be addressed after the hearing (eg, disclosure of Claimant's diary and memory stick). The Tribunal made a Case Management Order on 16 June 2022 and a further Case Management Order on 28 July 2022. The parties' counsel made written closing submissions. On 2 September 2022 (first date available after the Tribunal had to release 5 August 2022 for reply submissions), the ET met in private (via CVP) for deliberations, which it concluded that day.

Findings of fact

7. The Tribunal makes the following findings of fact, including any findings of fact contained in the other sections of this document, on the civil balance of probabilities.

8. CCCG is a group of Further Education providers formed by the merger of various other FE colleges in 2016 and 2017. CCCG offers academic and vocational courses including A-Levels, BTECs, Foundation degrees and Higher Education courses. The Claimant has Israeli citizenship. She describes herself as of Palestinian and/or Middle Eastern ethnicity.

9. On 18 August 2014, the Claimant joined a predecessor of the Respondent [94-96]. Her job title was Curriculum Manager – Health and Social Care and Workforce Development. On 31 July 2014, the Claimant signed a Contract of Employment for Management Spine Staff which stated that if she was appointed to an academic management post, her duties would include (a) management and supervision of other members of staff, responsibility for the delivery of a service, quality management (clause 2.2(a)) (b) management of learning programmes and curriculum development, educational guidance, counselling (clause 2.2(b) (c) such other duties are might be reasonably be requested by senior management (clause 2.2.(c)). Clause 2.4 required the Claimant to "*maintain the highest professional standards and to comply with, promote and implement the policies of [her employer*]." [98-99]. Clause 16 noted that the Claimant's employer expected reasonable standards of performance and conduct from its employees, and stated details of its Disciplinary Procedure would be supplied to her [102].

10. The Claimant's Curriculum Manager job description [118-124] noted one of the purposes of her job was to "*ensure that the College's quality assurance processes are implemented, monitored and evaluated to assess impact and appropriately developed*" [119]. Under the heading 'Expectations of the Post Holder' [121], it noted the Claimant was to "*adhere to all other College policies and procedures and to explain them clearly and accurately to staff*", and to "*accept full line management responsibility including accountability for the quality of work undertaken by staff; provide support and professional leadership to staff; [and] to foster high standards of customer care*". Under the heading 'Knowledge and Understanding' [123], it noted the Claimant was required to have "*an understanding of quality standards required by major funding/regulatory bodies*". Under the heading 'Skills and Abilities' [123], it noted the Claimant was required to be able (1) to provide effective curriculum leadership … (3) to lead a team of staff and provide effective management … (4) to performance manage staff and hold staff to account.

11. Following a college merger in 2016, the Claimant's employment contract transferred to the legal entity now known as CCCG. In 2019, the Claimant began teaching on the Pearson course described below.

12. On 11 November 2019, CCCG appointed an individual referred to by the parties in these ET proceedings as 'E1' to an Hourly Paid Lecturer (**HPL**) post on a fixed-term contract.

13. Having been promoted, in academic year 2019/2020 the Claimant's post and job title was Curriculum Leader. Her duties as Curriculum Leader included leading teaching, learning and assessment. The Claimant conducted some teaching herself. As a Curriculum Leader, the Claimant had line management responsibilities for lecturers who were responsible for teaching students and marking/assessing their work.

Internal verification

14. CCCG provides qualifications from numerous awarding bodies, including Pearson. One of the Pearson qualifications CCCG offers, which fell within the Claimant's curriculum area, was a BTEC Level 4 Higher National Certificate in Health Care Practice (**HNC/HCP**), a specialist work-related programme of study intended for students wishing to develop careers in health and social care [289]. The qualification, allows students to work directly with members of the public in a healthcare or social care setting, so the importance of ensuring only students who have passed all required units before gaining the qualification is obvious.

15. The HNC/HCP consists of a number of units (around 14). Taking and passing Unit 2 (demonstrating professional principles and values in health and social care – 30 credits, largest weighted unit) and Unit 3 (supporting the individual journey through health and social care – 15 units) (**Units 2 and 3**) is mandatory – students must take and pass them in order to obtain the qualification. Units 2 and 3 are (and were) internally assessed/graded – ie, the decision whether a student has done work adequate to pass is made by a CCCG staff member, not Pearson. Because of this, quality assurance is necessary in order to ensure that CCCG's internal assessment/grading is fit for purpose, ie, students whose work is good enough pass, students whose work is not good enough do not pass, each student gets the right grades for their work, and students' grading is consistent across the cohort.

16. The quality assurance process for Units 2 and 3 involves two types of "verification": internal verification, responsibility for which rests on a designated 'Lead Internal Verifier'; and external verification, conducted by Pearson. In June 2018, Pearson issued written guidance for the internal verification process for certain of its qualifications (**Pearson IV Guide**) [197-210], which the Claimant accepted in her oral evidence included the HNC/HCP. Page 10 of the Pearson IV Guide stated that sampling from assessors (ie, those assessing student work) must cover the following as a minimum (a) every assessor (b) every unit (c) work from every assignment (d) every assessment site [206]. Page 12 of the Pearson IV Guide [208] outlined the process Pearson required internal verifiers to follow when making assessment decisions: the broad task was for the internal verifier to review the assessor's judgments against the learning aim, unit content, assessment criteria and assessment guidance as published in the qualification specification. This task included (amongst others) (1) checking student work against the assessment criteria to judge whether it had been assessed accurately (2) checking the assessment criteria (3) checking coverage of the unit content in conjunction with the assessment guidance to see if the assessor had taken this into account (4) checking feedback from the assessor to the student was accurate and linked to the assessment criteria. So far as the timing of internal verification is concerned, the Pearson IV Guide stated that student work must have been formally assessed for internal verification of

assessment decisions to take place.

17. In January 2021, Pearson issued guidance for 'internal assessment' for the 2020/21 academic year [225-256]. In August 2021, Pearson updated internal verification guidance for the 2021/2022 academic year. There is no suggestion that in the 2019/2020 academic year – the key period so far as the Claimant's dismissal is concerned - the Pearson IV Guide for 2018/19 was not relevant or applicable to the process of internally verifying the assessments of student work in Units 2 and 3. If there is any doubt on that issue, the Tribunal finds it was relevant and applicable. At the Tribunal hearing, a question was raised as to whether the Claimant ever received Pearson's guidance on internal verification. However, on 28 May 2019 the Claimant emailed herself [748] a copy of Pearson's internal verification guidance for the 2016/2017 academic year [749-761]. It was not put to any of the Respondent's witnesses that there was any material difference between that guidance and the Pearson IV Guide in effect in 2019/2020.

18. In the 2019/2020 academic year, the Claimant was CCCG's Lead Internal Verifier for the HNC/HCP. It was her responsibility to ensure the internal verification process outlined in Pearson's internal verification guidance was followed for the assessment of student work for all units of that qualifications, including Units 2 and 3.

19. In the 2019/2020 academic year, the Claimant was E1's line manager. Amongst other duties, E1 was responsible for teaching, assessment, and grading the work students did in Units 2 and 3 of the HNC/HCP.

Sickness absence incident: January 2020

20. In December 2019 and early January 2020, the Claimant spent part of her Christmas leave period in Israel/Palestine. On 16 December 2019 she had requested permission to take a few days additional leave (which she says she was entitled to in lieu), but her request was turned down because her intended return date would fall after the start of term on 6 January 2020. In the event, the Claimant left the UK for Israel on 24 December 2019 (as planned) [332], booked her return flight to the UK for 4 January 2020 (allowing her to get back in time for the start of term) [332], fell ill during her visit, and was unable to return to the UK until 7 January 2020 (the day after term started) [333].

21. On 6 January 2020, the Claimant notified her line manager Ms. El-Khadiri via email [321] that she had been poorly with a bad cold, had been unable to fly back to the UK as scheduled, and had booked her return flight on 7th January. By email on 8 January 2020 [331], the Claimant forwarded a copy of her sick note to Ms. El-Khadiri as well as copies of her original flight itineraries [332] clearly showing that she had been booked to fly back to the UK on 4 January 2020 (ie, before term started).

22. The Claimant's line manager Ms. El-Khadiri asked the Claimant for proof, in response to which the Claimant submitted a sick note from a local Palestinian doctor [335]. Ms. El-Khadiri queried the Claimant's sick note, the Claimant says because it was produced in Palestine. The Claimant raised this incident with her trade union representative, Ms. Pippa Dowswell, who prepared a draft email to Ms. Colleen Marshall mentioning it, a copy of which Ms. Dowswell forwarded to the Claimant for

approval on 16 January 2020 at 08:33 via email [335-336]. At 08:56, the Claimant replied that Ms. Dowswell's draft email to Ms. Marshall was fine. There was no evidence before the Tribunal that anything material subsequently happened about this particular incident.

Events which led to investigation

23. Prior to the 2019/2020 academic year, there were no concerns about the Claimant's competence or conduct as an internal verifier. See 30 July 2019 report by CPCAB (another awarding body) [257-262] (no concerns about assessment course or course administration, Claimant responsible for internal verification process, robust evidence of internal verification and internal moderation), and Pearson 4 September 2019 report [266-272] (no criticisms of Claimant).

24. The events which led to the Claimant being investigated and subsequently dismissed for misconduct are summarised below. Although she denies being solely or even primarily responsible for those events, the Tribunal notes at the outset its finding that something clearly went badly wrong in the assessment and grading of the HNC/HCP qualifications, in particular Units 2 and 3, at the end of the 2019/2020 academic year.

25. In the 2019/2020 academic year, one of E1's teaching responsibilities was teaching and assessing student coursework on Units 2, 3, 4 and 13 of the HNC/HCP. As Curriculum Leader and Lead Internal Verifier for the HNC/HCP, as well as E1's line manager, the Claimant's responsibilities included ensuring that (a) E1's students had finished their academic work for Units 2 and 3 on time (ie, before the Academic Board met to assess/determine final course grades) (b) E1 had graded students' final work of Units 2 and 3 and forwarded those final grades to her (c) she had internally verified E1's final grades for Units 2 and 3 before submitting those final grades to the Academic Board for approval (c) the Academic Board was put on notice if there were any issues or problems with the Units 2 and 3 final grades submitted for its approval.

26. By email on 18 May 2022 [747], E1 forwarded to the Claimant his predicted grades for Units 2, 3, 4 and 13. The Claimant acknowledged receipt later that day [747].

27. On 3 June 2020, Annabel Pearcy (CCCG PM – Higher Education and Professionals Programme) attended a virtual meeting with Ms. El-Khadiri and the Claimant to discuss teaching and assessment on the HNC/HCP, after which she sent them an email summarising the meeting [536-537] which noted that (i) teaching was continuing as normal in line with the delivery plan to the end of June (ii) final assessment submission dates were 20 June 2020 on both programmes (iii) work must be marked and internally verified in time for the assessment board (ie, the Academic Board where grades were to be finalised) (iv) some students were working ahead of the delivery plan, so it might be possible – provided it was fair to all students – to bring submission dates forward (iii) Bev Devlin (Pearson's External Examiner on the HNC/HCP wanted sample work assessments across all HNC/HCP units (3 assessments per unit, a total of 42 pieces) (iv) the Claimant was Lead Internal Verifier so she was to check the internal verification process against the marking of assignments, then sign off on same (v) the 'certification window' (ie, the Academic Board meeting to finalise grades) was the first week in July 2020, with a later window

in mid-August 2020 for any students with extensions in place).

28. By email on 5 June 2020, [450], E1 notified the Claimant of new submission dates for Unit 2 (30 June 2020) and Unit 3 (6 July 2020).

29. By reply email on 5 June 2020 [450], the Claimant acknowledged receipt of the new submission dates and asked E1 to add them to 'Turn It In'.

30. By email on 16 June 2020 [418], the Claimant informed Ms. El-Khadiri that Pearson's external moderator would not attend the Academic Board meeting (to confirm/finalises grades on the HNC/HCP) but requested the Board's minutes when it took place. She added "*Perhaps we could get this arranged after the 30th of June when all teaching are completed*."

31. By email on 25 June 2020 [415], the Claimant informed team members that she had received the external moderation report from Pearson, noted it was a good report, and thanked her team.

32. By email on 29 June 2020 [772], E1 reminded his students that the submission date (ie, deadline) for Unit 2 was 30 June 2020, and the submission date for Unit 3 was 6 July 2020. The Claimant was cc-ed on this email.

33. By email on 29 June 2020 at 15:13 [421], E1 forwarded to the Claimant student grades for the HNC/HCP, including grades for Units 2 and 3: "*Please find attached the Grades. Please read them carefully and let me know your comments*." The grades E1 forwarded for Units 2 and 3 [360] were not final grades following formal assessments of coursework but only predicted grades. His email did not say that, and the Claimant did not ask to check. In cross-examination, Mr. Humphreys rejected the Claimant's suggestion that this cover email suggests the grades E1 forwarded were actual grades. The Tribunal agrees with Mr. Humphreys – E1's email is unclear. Mr. Humphreys also rejected – rightly in the Tribunal's view - the suggestion that by not putting an asterisk on the grades forwarded E1 impliedly indicated they were final. Mr. Humphreys and Ms. Marshall both said – and the Tribunal accepts and finds – that whatever she subjectively knew/did not know, the Claimant *ought* to have known the grades E1 forwarded to her were predicted grades, as the Claimant herself had asked for the 'handover' dates for the grades to be extended to 6 July on 'Turn It In'. Mr. Humphrey stated – and the Tribunal finds – that the students concerned were not ahead of schedule. Mr. Humphreys stated it was the Claimant's responsibility to check she had final grades from E1 – the Tribunal agrees.

34. On about 29 June 2020, the Claimant forwarded the Unit and 3 grades she had received from E1 to CCCG's Academic Board – the body responsible for finalising HNC/HCP grades and determining whether students were entitled to the qualification She says she did so on the mistaken belief they were final, not predicted, grades.

35. By email on 30 June 2020 (at 17:44), Ms. El-Khadiri asked the Claimant:

> "*Has all the work that you were waiting for now been received marked and iv'd? (which was the reason we discontinued the assessment board meeting yesterday). The assessment board for tomorrow is at short notice so will not take*

place, staff that should attend will be the internal verifiers for the units being considered, you cannot verify all units as you deliver some of them? The module leaders/IVs should be presenting the grades for their units. Can you please confirm students that are at risk for these quals. Can I please have a response to the above so I can plan the assessment board."

36. By reply email on 30 June 2020 (at 18:58), the Claimant replied:

> "*The external moderator has asked if the board took place and I believe that she needs to send them off soon. If you think that the following people [not named] should attend then this is fine, but please check before going ahead. Please read the documents from Pearson on assessment and board panel. I'm ready and only Unit 17 from [E4] should be received tomorrow*."

37. By this email, the Tribunal finds that the Claimant represented to Ms. El-Khadiri that (1) all necessary final marking (ie, grading) of Units 2 and 3 had been done (2) all necessary internal verification of Units 2 and 3 marking had been done. Both representations were incorrect: (1) on 30 June 2020 E1 had not completed the final marking of Units 2 and 3 (2) on 30 June 2020 the grading of Units 2 and 3 had not been internally verified. Ms. El-Khadiri relied on these representations when she permitted the Academic Board meeting to finalise students grades on 3 July 2020.

38. Following various email exchanges with his students and the Claimant [769-772], by email on 1 July 2020 E1 stated as follows to the Claimant (under the subject line heading: "*HNC Unit 2 and Unit 3*"):

> "*Hi Samia – I am a bit confused here, Forget whom? What place are talking about. I told them they will be on with conditional offer, as long as they complete successfully all the Units I taught them. Please explain to me what a hell HND Degree is? I have never heard of it. Why I offer her a place before she pass all her Units I taught her and the rest of the group. You asked me to predict. But I will assess and mark them as specification guide me for the rest of July? Any different instruction? Please let me know*." [768-769]

39. By email on 2 July 2020, the Claimant replied to E1 (under the same heading):

> "*Hi [E1] – Usually all internal students internal progress to a second year course. This is not a Degree as such but equivalent. We can withdraw students within 6 weeks of the course if the tutor feels the students are no suitable. HNC is a second year of HNC. HNC, HND = is a 2 year course, its a vocational course that led to HE. Hope this clarifies the matter above. If [student name] not suitable then we wont offer her a place. King regards*" [768]

40. In closing submissions, the Respondent submitted this email exchange showed the Claimant was on notice that the Unit 2 and 3 grades E1 forwarded to her on 29 June were predicted grades, not final grades. The Claimant submitted it was a breach of natural justice for the Respondent to make this submission without having put that email exchange to her for comment. The Tribunal rejects both submissions. It is not in dispute this email exchange occurred, so it is appropriate to make a finding to that effect. However, the Tribunal does not accept E1's email was clear and

unambiguous either – in its view, there is a slight 'stream of consciousness' aspect to it where E1 jumps from subject to subject. What is clear, however, is that the Claimant did receive E1's email and did not ask E1 to clarify what he meant when he said "*You asked me to predict. But I will assess and mark them as specification guide me for the rest of July?".*

3 July 2020: Academic Board meets to finalise HNC/HCP student grades

41. On 3 July 2020, the Academic Board panel met (remotely) to finalise the HNC/HCP grades and confirm students' entitlement (and potentially lack of entitlement) to the qualification – see minutes at [377-382]. The Claimant was in attendance [377], along with her line manager Ms. El-Khadiri (who chaired the meeting), Ms. A Pearcey (Interim HE Performance and Quality Project Manager), and Mr. D Dangana (Interim Director of Group Quality & Compliance, Performance and Quality).

42. At the outset of the meeting, Ms. El-Khadiri explained the purpose of the meeting, was to consider under Pearson's regulations the grades of 17 students. Ms. El-Khadiri noted the Board had received no applications for extenuating circumstances. The Claimant confirmed no adapted assessments were necessary, and the original assessment plans remained in place for the HNC/HCP (all students met the Covid-19 adjusted workplace requirement of 70% per programme) [377]. The Claimant presented and confirmed the individual grades for 7 students on the HNC/HNP, including their grades on Units 2 and 3 [379]. At the end of the meeting, Ms. El-Khadiri confirmed the Board had received all units and confirmed individual grades, and stated that in the week commencing 6th July the 3 July 2020 Academic Board minutes and the Pearson grade template were to be returned to the external examiner for review and authorisation of certificates. The meeting ended after Ms. El Khadiri, the Claimant and Mr. Dangana thanked the team and everyone for delivering the programmes during exceptionally difficult (Covid-19) circumstances.

43. It is not in dispute that at the 3 July 2020 Academic Board virtual meeting, the Claimant did not tell attendees that the grades for the students in Units 2 and 3 were predicted grades, not final grades, did not tell attendees that the assessments and grading of Units 2 and 3 had not been internally verified, and did not tell attendees that there was any reason why the Units 2 and 3 grades should not be confirmed and finalised at that meeting. Had she done so, the Tribunal finds that it is certain that the Unit 2 and 3 grades would not have been finalised at this meeting, and further steps would have been taken to address and remedy each of these matters. Had the Claimant sought to internally verify the grades E1 had given for Unit 3, for example, the Claimant would have found out no Unit 3 coursework existed.

44. Although she was the Lead Internal Verifier for the HNC/HCP qualification at the time, it is not in dispute - and if it is the Tribunal finds as a fact – that on or before 3 July 2020 (1) the Claimant took no steps to check the Unit 2 and 3 grades E1 had forwarded to her were final grades following formal assessment, not predicted grades (2) the Claimant took no steps to internally verify the assessment grades for Units 2 and 3 against either the Pearson IV Guide or any other formal or informal criteria. Had she done so, the Tribunal finds it likely that (1) she would have discovered the Unit 2 and 3 grades E1 forwarded to her were predicted grades, not final grades (2) the Claimant would not have permitted the Academic Board to

finalise those grades (and the HNC/HCP qualifications resting on them) on 3 July

45. Appendix 10 to the investigation report [472-473] and the students' own declarations [476-487] confirming the work they had submitted was their own show the following students submitting their final work on Unit 3 to E1 after the 3 July 2020 Academic Board meeting on or around the following dates:

    a. student S7 – 5 or 6 July 2020 [472] [487]
    b. student S3 – 6 July 2020 [472-473] [481]
    c. student S6 – 6 July 2020 [472] [477]
    d. student S2 – 6 July 2020 [483]
    e. student S1 – 6 July 2020 [485]
    f. student S4 – 11 or 12 July 2020 [472] [478]

46. On 18 July 2022 – after the end of the 2019/20 final term – E1 emailed the Claimant letting her know he had completed assessing, marking and finalising the student papers for Units 2 and 3 and requesting payment for same:

> "… *I am writing to let you know that I have completed in assessing, marking and finalising paper works for Unit 2 – A6161637 and Unit 3 – F6161638. Seven students had submitted their work for assessment. The agreed final submission dates for these core modules were 30/06/2020 and 06/07/2020 respectively … Due to the unprecedented Covid-19 incident, I had to work extra time to complete the assessment formalities of Unit 2 and 3 beyond my hourly paid contract time. It took to me to read, assess and complete paper works for a total of 42 hours for 7 students and 2 core modules which is an average of three hours per student/per unit. Please let me know whether I had to complete my request as per the recent guidelines sent to hourly paid lecturers, or do you want to advise payroll as you did before without me completing my working hours? Please let me know*." [383]

47. The Claimant did not reply to this email. Had she read it at the time, she would have been put on notice that E1's assessment and grading work for Units 2 and 3 had (or might have) continued beyond the 3 July 2020 Academic Board meeting.

48. Receiving no reply (the Claimant claims she did not see this email until September 2020 [589]), by email on 14 September 2020 E1 raised the matter again, this time with CCCG Payroll employee Ms. E Oldham:

> "… *This is an outstanding payment request as per my email sent to my then line manager Samia Abed on July 18, 2020. The hours were for completing two Units in assessing, marking and completing paper works. The deadline for submitting the works of Unit 2 (A6161637) by students was 30th of June and for Unit 3 (F6161638) was 6th of July 2020. These submission dates have been agreed between the students, me and the Curriculum Leader Samia Abed. I have assessed the works of 7 students who submitted the works for the two core units. The dates for assessment for Unit 2 was after the deadline which was 30/06/2020 and my works on Unit 3 was after its agreed deadline 06/07/2020. I have submitted my request for payment on July 18, 2020*." [386]

49. By email on 14 September 2020 (cc-ing the Claimant and Ms. El-Khadiri) [31], Ms. Oldham replied that nothing had been received to pay these additional hours, and stated that the Claimant would need to submit a timesheet for these hours to be paid. On 15 September 2022, the Claimant replied that those additional hours were not agreed her by, and she would leave this to "Sal" to make a decision [31]. The Claimant's reply did not address the fact that E1's assessment and grading work on Unit 2 had continued past a 30 June 2022 deadline and E1's assessment and grading work on Unit 3 had continued past a 6 July 2020 deadline.

50. By email on 15 September 2020 [414], Ms. El-Khadiri replied that she had had no contact or arrangement with E1, and had not given him any HPL hours which was arranged or agreed by the Claimant as his line manager.

51. By email on 25 September 2020 [419], E1 gave the Claimant and Ms. El-Khadiri notice of his resignation from the Respondent, stating he was taking up employment elsewhere, and repeated his request for payment for 42 hours work to be settled.

Investigation

52. In late September 2020, Mr. D. Dangana (Group Director of Quality) called Mr. C. Humphreys (Head of Quality at City and Islington College, part of CCCG) and told him that assessment and grading on the HNC/HCP might have taken place after the Academic Board meeting held on 3 July 2020 to finalise student grades. Mr. Dangana tasked Mr. Humphreys to conduct an investigation.

53. By email on 25 September 2020, Mr. Dangana notified the Claimant (and others):

> "*I have been alerted to the fact that a potential mal-practice or mal-administration took place on the HNC/D in Health. Apparently, student support and assessments was still going on after the grades were submitted to the Academic Board which took place on the 3rd July 2020. I have been presented with evidence that student work was submitted on the 5th of July, two days after the Academic Board meeting and a member of staff has also asked to be paid for work done on the programme after the academic board meeting. I have asked Chris Humphreys to look into this and write a report based on the following:*
> *-Did teaching and assessment continue after the Academic Board?*
> *-If teaching and assessment carried on, why did it carry on?*
> *-Was any student work assessed after the academic board had considered and approved the grades?*
> *-If any assessments took place after the academic board, who authorised it and were any extenuating circumstances presented at the academic board; if not why not*?"

54. The email attached CCCG's 'Assessment Malpractice and Maladministration Policy' [148-152] approved on 9 July 2020. The policy defines malpractice as 'those acts which undermine the integrity and validity of assessment, the certification of qualifications, and/or damage the authority, reputation or credibility of the College or Group" [149]. The policy says malpractice may best be described as cheating. A non-exhaustive list of instances of staff malpractices [152] includes "*failure to follow Awarding Organisation policies and procedures for administering the internal or*

external assessment processes" [152].

55. Mr. Humphreys understood his investigatory brief to be purely factual. He decided he needed to speak to the following staff members, and organised meetings with them via email [389, 390]:

    a. Claimant – Curriculum Leader and Lead Internal Verifier for the HNC/HCP, the course that 'E1' had requested further payment relating to;
    b. E1 – had submitted request for additional payment that had alerted CCCG to possibility that teaching on HNC/HCP had continued after the Academic Board meeting on 3 July 202 to finalise grades;
    c. Ms. Saloua El-Khadiri – Claimant's line manager, chair of Academic Board meeting on 3 July 2020 where HNC/HCP final grades were confirmed.

56. On 28 September 2020, Mr. Humphreys interviewed Ms. El-Khadiri [533]. She stated (i) the assessment process for the HNC/HCP (ii) E1 had submitted a notice of resignation (ii) the 'hand-in' dates on the delivery plan had been amended (iii) as per normal practice, the External Verifier was not present at the Academic Board meeting on 3 July 2020 () (iv) no extenuating circumstances had been presented at that meeting. Ms. El-Khadiri shared numerous relevant documents [533].

57. On 29 September 2020, Mr. Humphreys interviewed the Claimant [534]. The Claimant stated (i) teaching and assessment had not continued after grades were submitted at the Academic Board meeting on 3 July 2020 (ii) E1 had forwarded final grades on 29 June 2020 (iii) E1 was not happy about not being re-employed for this stage for 2020/2021 (iv) the External Verification sample had not included Units 2 and 3. The Claimant shared numerous relevant documents [534].

58. On 2 October 2020, Mr. Humphreys interviewed E1 [535], who stated that (i) on 18 May 2020 predicted grades had been requested, which were provided by 31 May 2020 (based on Unit 4 performance) (ii) assessments of Units 2 and 3 were ongoing after the Academic Board meeting on 3 July 2020 (iii) a request had been made on behalf of students for changes to the 'hand-in' dates for three assessments including Units 2 and 3 (iv) the Claimant had attended a meeting with students to confirm the new hand-in dates (v) E1 had emails of student submissions after 3 July 2020. E1 shared numerous relevant documents [535].

59. By email on 6 October 2020 [425], Mr. Dangana updated the Claimant:

> "*I had a chat with Chris yesterday and I have established that some students work was assessed after the HE Academic Board. This means that the grades were submitted (for the learners and units concerned) to Pearson after the HE Academic Board were inaccurate. I have asked Chris to make arrangements for the work to be moderated and we would need to contact Pearson to explain the situation. <u>It is important that students do not suffer as a result of this process and so our priority is to ensure that the Awarding Organisation [Pearson] does not withhold the learners certificates and or sanction us by stopping us from delivering the qualification</u>. I will be liaising with Colleen [Marshall] and Saloua about the approach we take to resolve the issue and ensure that the students and the Centre are not adversely affected* …" (emphasis added).

60. The Tribunal finds that the concerns Mr. Dangana raised in this email – the possibility students might not be awarded their HNC/HCP certificates, and the possibility Pearson might deny CCCG permission to continue to offer its HNC/HCP certificate – were genuine, legitimate, and serious.

61. By a written notification dated 4 November 2020 [427-432] , CCCG (Rosie Francis) notified Pearson of suspected malpractice/maladministration involving centre staff. The notification stated the members of staff involved were the Claimant and E1, the date of the incident was on 3 July 2020, and described the incident as follows:

> "*The nature of the suspected malpractice is regarding a member of staff assessing and grading work after the Academic Board Meeting had taken place on the 03/07/2020. This was discovered after a member of staff requested payment for work carried out on assessing student work after the grades were submitted to the Academic Board Meeting. The grades provided to the exam board were predicted grades based on the performance of students in Unit 4 and not on the evidence of work provided by students in Units 2 and 3. Assessment and grading of student work continued after the Academic Board Meeting and resulted in 4 out of the 14 assessment decision grades being different from those submitted to the Academic Board on 03/07/2020*." [428]

62. Under the heading "*Could the candidates have been unfairly advantaged or disadvantaged by the suspected malpractice/maladministration*?", the notification stated: "*Yes. As 4 out of the 14 grades submitted are different to those submitted by the Academic Board Meeting. These students may be have been [sic] unfairly advantaged or disadvantaged*." [429].

63. By a report [444-446] with 13 appendices dated 21 January 2021, Mr. Humphreys summarised the outcome of his investigation. Summarising:

    a. the investigation was instigated to ascertain whether assessment and grading took place on the [HNC/HCP] following the Assessment Board meeting on 3 July 2020 (where final grades were submitted) in response to a member of staff requesting payment for work carried out assessing student work after grades were submitted to the Assessment Board of 3 July 2020 relating to Units 2 and 3 [444];
    b. no internal verification took place for Units 2 and 3 prior to the Academic Board meeting on 3 July 2020 [445];
    c. the grades on the HNC/HCP Assessment Board template were submitted as final verified grades at the Academic Board meeting on 3 July 2020 [445];
    d. no extenuating circumstances were requested at the Academic Board meeting on 3 July 2020 for students S1-S7 [445];
    e. assessment and grading of student work continued after the Academic Board meeting on 3 July 2020 [445];
    f. of the 14 grades submitted to the Academic Board meeting on 3 July 2020 for Units 2 and 3, the final grading was different to the grading submitted to the Board in 4 occasions (1 grade was a lower boundary, 3 grades were a boundary higher) [446];
    g. final grades for the work assessed after the Academic Board meeting on 3 July 2020 were not submitted either to the Claimant or to Pearson [446];

h. student work was handed in and marked after the Academic Board meeting on 3 July 2020 where final grades were submitted [446];
i. grades for incomplete work which were submitted to the Academic Board meeting on 3 July 2020 were not subject to any internal verification process [446];
j. there was a potential breach of the Respondent's Malpractice and Maladministration policy [446];
k. there was a potential breach of Pearson's guidelines [446];
l. a disciplinary hearing should be instigated.

Disciplinary / dismissal process

64. By letter dated 22 January 2021 [538], CCCG required the Claimant to attend a disciplinary hearing on 29 January 2022 (via MS Teams) to consider the following two allegations: "*Malpractice and Maladministration – Putting the college into disrepute*." No detail of the Claimant's conduct relied upon to substantiate these two allegations was provided. The letter warned her that the allegations (if substantiated) might constitute gross misconduct which might lead to summary dismissal. The letter informed the Claimant (i) of her right to be accompanied (ii) of her right to have the disciplinary hearing rescheduled on one occasion (iii) who the panel members would be (Chair Colleen Marshall, Vice-Principal, HR support Kishan Narayan, Mr. C. Humphreys to present management case) (iv) of her right to submit a written statement and provide evidence (v) of her right to contact any witnesses who she intended to call. The Claimant was to be sent a link to an e-folder containing Mr. Humphrey's Investigation Report and the evidence collected during the investigation.

65. The Claimant initially had difficulties accessing the e-folder, as a result of which the disciplinary hearing was rescheduled to 5 February 2021. The Claimant was sent a letter [542-543] repeating the previous letter's terms confirming the new date.

66. On 5 February 2021, the disciplinary hearing was held [544-554]. In attendance were Ms. Colleen Marshall (Chair), Mr. Peter Phillips (Disciplinary Panel member), Ms. Kishan Narayan (HR), Mr. Humphreys (Investigating Officer), the Claimant, and Ms. Feima Sannoh (the Claimant's trade union representative). At the outset, Ms. Marshall explained the structure of the hearing. The Claimant confirmed she had now received all the documents. Mr. Humphreys presented the management case [544-545], concluding that it was clear student work had been submitted after the Academic Board meeting which had not been subject to any internal verification and which had the potential of putting the college into disrepute. Ms. Sannoh asked Mr. Humphreys, which he answered. The Claimant confirmed her role was Curriculum Leader and she was the Lead Internal Verifier [546]. The Claimant was given the opportunity to ask questions. She read out a lengthy prepared statement [546-548] in which she stated (amongst other matters) that she had not been aware E1 had been marking papers in July 2020, and stated (in terms) that the grades she had received from E1 were final as far as she had been concerned [547]. She stated she had not breached the policy [548].

67. When put to her that Units 2 and 3 had not been internally verified, the Claimant accepted not all units had been internally verified, and stated that not all assignments needed to be internally verified [548]. Ms. Marshall put to the Claimant that she had

submitted grades knowing they had not been internally verified [548]. The Claimant replied this did not disqualify the grading [548]. When put to her that 100% of the assignments and units needed to be assessed, the Claimant replied "*It could be for other qualifications*". Ms. Marshall replied "*This is a Pearson qualification, we are fully aware of the units and sampling of student work, unless you as lead IV has marked. There is no evidence to work being IV'd*." The Claimant stated (in terms) that she accepted she had said the grades submitted were final, but disputed (in terms) that the fact that the deadline had been extended beyond the Academic Board meeting on 3 July 2020 that she must have known that the Unit 2 and 3 grades submitted were not final.

68. Towards the end of the meeting, Mr. Humphreys summarised the management case [551]. For the Claimant, Ms. Sannoh stated (i) the Claimant accepted samples of Units 2 and 3 had not been internally verified (ii) on 29 June 2020 E1 sent an email attaching the grades, which the Claimant submitted as final verified grades (iii) the Claimant had no knowledge that E1 was still assessing and marking, which came as a complete shock to her [551]. At the end of the meeting, Ms. Marshall stated that she found the Claimant blameworthy, and adjourned the disciplinary hearing until 8 March 2020 so the Claimant could make her plea in mitigation [552].

69. On 8 March 2020, the disciplinary hearing reconvened. In mitigation, the Claimant read out a prepared statement (earlier drafts are at [556] and [570-572]) in which she stated (in terms) (i) following the Academic Board meeting, an HPL [E1] had carried out assessment and grading on the HNC/HCP without her knowledge or authorisation (ii) the Claimant did not know assessments were still taking place (iii) the Claimant should have known assessments were still taking place, and accepted "*full responsibility*" (iv) as Lead "*internal mod*" [ie, Internal Verifier], the Claimant accepted she should have been more vigilant (v) the Claimant accepted attending the 3 July 2020 Academic Board meeting without having internally verified the work (vi) the Claimant will adhere to the policy in future (vii) the Claimant relied upon another staff member's confirmations (viii) the Claimant accepted she should have internally moderated (ie, verified) the work (ix) in future the Claimant will ensure that all units will be internally verified before the Academic Board panel (x) the Claimant suffered stress and anxiety during the first Covid lockdown (when she lost family members), although she accepted that this did not justify her actions (xi) the Claimant accepted submitting final grades that were not internally modified, and accepted responsibility for this as Lead Internal Verifier (xii) the Claimant work and record were good, this had been a one-off incident (xiii) the Claimant enjoyed her job, established good relations, and wanted to continue to remain working professionally with staff and students [551-552]. After an adjournment, Ms. Marshall expressed her condolences for the Claimant's bereavements [553]. Following a further adjournment, Ms. Marshall stated the College found the Claimant blameworthy, and the panel needed to discuss the case at length.

70. In the Tribunal's judgment, the Claimant thereby admitted (at a minimum) the following misconduct at the reconvened disciplinary hearing:

    a. not knowing assessments on Units 2 and 3 were still ongoing on 3 July 2020;
    b. failing to internally verify student work on Units 2 and 3;

c. submitting Units 2 and 3 grades which had not been internally verified.

71. Following a third adjournment, Ms. Marshall told the Claimant that (i) one outcome of Pearson's investigation is that students might have their degree certificates recalled or invalidated (ii) the relevant units had not been internally verified (iii) Ms. Marshall needed to outline the impact on the College, reputational damage and the financial impact of possible disbarment (ie, Pearson withdrawing the HNC/HCP from CCNG) (iv) the college found the Claimant blameworthy (v) the college had lost trust as employer (v) having reviewed the evidence and mitigation heard today, summary dismissal was the appropriate sanction.

72. By letter dated 15 February 2021 [583-586], Ms. Marshall formally notified the Claimant of the outcome of the disciplinary hearing. After summarising the hearing, and then the Claimant's points in mitigation, Ms. Marshall explained that the College had found the Claimant blameworthy of malpractice in relation to the Pearson HNC/HCP qualification based on the following factual evidence:

- the Claimant had confirmed that final grades were submitted to the Academic Board and authorised/verified without any evidence of student work or internal verification
- the Claimant sent an email extending the deadline beyond the date of the Academic Board where final grades were confirmed and authorised, and there was no evidence to suggest that this extension had been retracted
- the Claimant had authorised changes of the delivery plan
- there was zero evidence Unit 2 had been internally verified, and the Claimant admitted not internally moderating the student work
- there was zero evidence Unit 3 had been internally verified, and the Claimant had admitted not internally moderating the student work
- there was no need for the extension
- the Claimant did not challenge E1's request for payment, which was submitted for work completed after the Academic Board

73. Having explained the reasons for finding her blameworthy, Ms. Marshall highlighted the following factors that were considered in determining the appropriate sanction:

- student outcomes and progression
- ethical issue of students not actually being qualified, licenced to practice
- Claimant's behaviour had led to a loss of trust between employer and employee
- public confidence in the College and the integrity of the qualifications it offered
- reputational damage caused to the College, colleagues and the department
- financial impact of potential disbarment from the subject or qualification delivery in the future

74. Ms. Marshall's letter concluded the College found the Claimant guilty of malpractice and maladministration, the Claimant had put the College into disrepute, there had been a fundamental breach of trust between the Claimant and the College, and the sanction of summary dismissal was the most appropriate action. The letter ended by reminding the Claimant of her right of appeal and how to exercise it [586]. The Tribunal makes a finding of fact that the reasons Ms. Marshall stated in her dismissal

letter were the Respondent's true reasons for deciding to dismiss the Claimant.

75. On 18 February 2020, a colleague of the Claimant commented that the decision to dismiss was "*overly harsh*" [587]. Absent from the letter was any suggestion that the Claimant's conduct was free of blame.

Appeal

76. On 22 February 2021 [cf 619], the Claimant lodged an appeal against her dismissal [589-593], supported by twelve documents [595-605] listed at [594]. Summarising, the Claimant appealed against dismissal on grounds including the following: (i) the Claimant had been asked to attend the disciplinary hearing while ill (vomiting due to stress), however the hearing was continued with no consideration given (ii) Ms. Marshall acted emotionally, and when the Claimant tried to explain matters Ms. Marshall tried to stop her (iii) only the Claimant was held responsible, not the Academic Board panel chair or the Quality Nominee (iv) the Claimant's fragile mental health and loss of 3 family members due to Covid had not been considered (v) the Claimant's clean disciplinary record had not been considered (vi) while the Claimant agreed to take responsibility for not internally moderating Units 2 and 3, the rules did not say that the Claimant had to moderate 100% of assignments (vii) the Claimant was not aware of E1's actions over the summer – E1 had not sent her his new grades (viii) the Claimant had received E1's grades on 29 June 2020 which were duly submitted to the Academic Board on 3 July 2020 (ix) the decision to dismiss the Claimant was extremely harsh (x) neither the College nor her line manager had made the Claimant aware of the malpractice policy (xi) the Claimant could not internally moderate Units 2 and 3 due to late submissions compared to other units (xii) none of the Claimant's mitigation points/evidence were considered.

77. In her appeal letter, therefore, the Claimant (i) continued to accept Units 2 and 3 had not been internally verified (ii) accepted responsibility for that omission [590]. The Claimant made no suggestion in her appeal letter than she had been treated less favourably or unfavourably because of her race, ethnicity or national origin.

78. By letter dated 26 March 2021 [619], the Claimant was invited to attend an appeal hearing on 13 April 2021. She was informed of her right to be accompanied, who the appeal panel member would be, and what evidence would be relied upon.

79. On 13 April 2021, the Claimant's appeal hearing was held remotely via Zoom [623-627]. In attendance were Gary Hunter (Chair, CCCG Deputy Executive Principal), Amanda Cowley (HR), Ms. Marshall (Disciplinary Hearing manager/chair), the Claimant, and Ms. Sannoh (union representative). Ms. Sannoh submitted 8 points in support of the appeal [624], including an allegation that (i) the Claimant had been treated inconsistently, and unfairly, in comparison another employee who had been involved in a safeguarding incident and received a first written warning (ii) the Claimant had been previously treated unfairly in relation to not being able to attend work for 1 or 2 days (the incident referred to at paras. 20-21) above. The Claimant accepted that as Lead Internal Verifier, she should have done 100% internal verification, but also stated that nothing in the policy stated she needed to do 100% internal moderation. Ms. Marshall replied that in terms of the allegation – final grades having been submitted without evidence of internal verification – Pearson's policy

required all units to be verified [625]. Ms. Sannoh ended by submitting the decision to dismiss the Claimant was disproportionate and not reasonable, and the sanction should not exceed a written warning. At the end of the appeal hearing Mr. Hunter did not give an outcome, instead stating he was going to consider the Claimant's 8 points and take time to go through the information.

80. By letter dated 19 April 2021, Mr. Hunter notified the Claimant that her appeal was unsuccessful. Mr. Hunter addressed the Claimant's grounds of appeal:

    a. Ground #1 (decision to dismiss was unreasonable, unfair, disproportionate) and Ground #4 (failure to consider factors/mitigation, including length of service, circumstances of Covid lockdown, loss of family members) – although this may have been an isolated incident, College was entitled to take into consideration the severity and potential impact of the Claimant's actions; the Claimant's plea of mitigation was carefully taken into consideration before the sanction of dismissal was decided;

    b. Ground #2 (no previous disciplinary sanctions raised against Claimant) – the College treats each disciplinary process separately, and the allegations in this case were treated and found to be gross misconduct, and Claimant was made aware that dismissal was a potential consequence if allegations were substantiated;

    c. Ground #3 (incomplete disciplinary investigation, should have been investigation into E1 and his responsibility in this case) – E1 was spoken to during the investigation; there is no further information that would have been useful in relation to the index incident; as Lead Internal Verifier for the HNC/HCP course, it was the Claimant's failure to verify the student work ahead of the Academic Board meeting on 3 July 2020 which led to the situation;

    d. Ground #5 (failure to consider detrimental impact on Claimant, including health) – Claimant accepted having not notified the College or her line manager of her health concerns at the time of the incident; Ms. Marshall (as chair of disciplinary hearing) did consider Claimant's health mitigation appropriately, and a number of adjournments were made for the Claimant during the disciplinary hearing on 5 February and 8 February 2020;

    e. Ground #6 (disproportionate sanction) – while the Claimant did show remorse during the disciplinary hearing, the panel do not believe that the Claimant understood the severity of her actions on the reputation of the College, and more importantly the impact her conduct might have had on students and the wider community

    f. Ground #7 (inconsistent treatment of staff, referring to a 2012 disciplinary outcome, separate incident 2 years earlier) – the 2012 incident related to exam invigilation, was not conduct comparable to the Claimant's conduct for which she was dismissed, impact of what this individual did in 2012 would have significantly smaller impact on College than Claimant's case; regarding more recent incident, this involved safeguarding, neither the Claimant nor the

appeal panel know the full details of this incident, not sensible to make assumptions about what happened or compare that incident to Claimant's;

g. Ground #8 (unfair treatment prior to disciplinary hearing, relating to a separate investigation in November 2020) – the College has a duty to investigate concerns fully to gather facts and make informed decisions; because Claimant was Curriculum leader of the relevant area at the time of the November 2020 incident, it was necessary to interview the Claimant and obtain her input as the manager.

Pearson investigation

81. Following CCCG's notification of the incident to Pearson on 4 November 2020 (the allegation being that assessment and grading of student work had taken place after the Academic Board meeting on 3 July 2020, and had resulted in 4 out of 14 assessment decision grades being different to those submitted to the Academic Board), Pearson convened its own malpractice committee to consider the evidence in respect of alleged malpractice relating to Units 2 and 3 of the HNC/HCP, which the committee considered on 21 September 2021 [670]. Pearson notified the Claimant, E1 and CCCG separately in relation to its committee's findings.

82. By letter dated 27 September 2021 [670-673], Ms. T. Quadri (Pearson's Investigation Teams Administrator) notified the Claimant that the Malpractice Committee's determination was that, on the balance of probability, the Claimant's actions could be described as malpractice and amount to 'deception' as defined by JCQ. Regarding sanctions, the Malpractice Committee concluded that "*The actions of Samia Abed did undermine the integrity of the award and amounted to malpractice. This was a serious breach of trust. It merits the high level of sanction, suspension from administration of Pearson awards for the current academic year ending 31st July 2022. By which time she must be able to demonstrate understanding of current regulations as evidenced by a monitored training programme*." Pearson disbarred the Claimant from all Pearson qualifications from 21 September 2021.

83. By letter dated 27 September 2021 [674-676], Ms. Quadri notified E1 that the Malpractice Committee had concluded that the Claimant (as Curriculum Leader) had not appropriately briefed E1 regarding the requirements for submitting student grades, and that in these circumstances, E1 had not committed malpractice and would not be subject to sanctions.

84. By letter dated 27 September 2021 [677-681], Ms. Quadri notified CCCG of the Malpractice Committee's findings that the Claimant, but not E1, were guilty of malpractice. The committee had not been shown evidence that CCG gave all employed staff training in the current regulations for grade assessment and submission, and requested an action plan "addressing evidence of all staff training on the proper conduct and procedures relating to maintenance of the integrity of public examinations and assessments" by 25 October 2021.

Relevant law: unfair dismissal

85. Section 98(4) of the Employment Rights Act 1996 provides (in relevant part):

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

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

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

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

(b) relates to the conduct of the employee ...

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

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

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

86. The fairness of the dismissal must be judged based on the facts and circumstances before the employer at the time of dismissal. A dismissal will be unfair if, and only, *considered as a whole* the dismissal fell outside the band of reasonable responses open to the employer at the time – the Tribunal must not focus solely on the substantive or procedural fairness of the dismissal. The issue of whether the Tribunal itself would have dismissed the employee for the conduct at the time is irrelevant.

87. When considering whether a dismissal for misconduct was fair, the Tribunal should consider (a) whether the respondent genuinely believed the employee was guilty of the misconduct (b) whether the respondent had in its mind reasonable grounds for that belief at the time (c) whether at the time the respondent had formed its belief in the employee's guilt, it had carried out as much investigation into the matter as was reasonable in all the circumstances. The test "*all the way through*" is reasonableness - the employee is not required to be "*sure*", nor is there any requirement that an employee's guilt be proven "*beyond reasonable doubt*". British Home Stores v Birchell [1980] ICR 303. The range of reasonable responses test applies to the question of whether the investigation into the misconduct was reasonable in all the circumstances. Sainsbury's Supermarkets Ltd. v Hitt [2002] EWCA 1588, para. 31.

88. In determining whether dismissal was fair, the Tribunal is entitled to take into account the ACAS Guide to Discipline and Grievances At Work.

Relevant law: direct race discrimination (s.13 Equality Act 2010)

89. Section 4 of EqA 2010 defines race as a protected characteristic. Section 9(1) of EqA 2010 provides that race includes (a) colour (b) nationality (c) ethnic or national origin. In this case, the Claimant relied upon nationality (Israeli) and/or ethnical or national origin (Palestinian, Middle Eastern). The Claimant did not rely on colour.

90. Section 13(1) of EqA 2010 provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Relevant law: harassment (s.26 Equality Act 2010)

91. Section 26(1) of EqA 2010 provides that (1) a person (A) harasses another (B) if (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

92. Section 26(4) of EqA 2010 provides that in deciding whether conduct has the effect referred to in s.26(1)(b), each of the following must be taken into account (a) B's perception (b) the other circumstances of the case (c) whether it is reasonable for the conduct to have that effect.

Burden of proof (Equality Act 2010 claims)

93. Section 136(2) of EqA 2010 provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred. Under s.136(3) of EqA 2010, however, s.136(2) does not apply if A shows that A did not contravene the provision. The initial burden of proof rests on the claimant to establish primary facts from which the Tribunal could decide, in the absence of any other explanation, that a contravention had occurred. Only once the claimant had discharged this initial burden does the burden of proof shift to the employer to prove the treatment was "in no reason whatsoever" because of the protected characteristic. Igen v Wong [2005] ICR 931.

Issues

94. The issues the Tribunal had to determine at the final merits hearing were recorded in the note of the 7 October 2021 PHCM [57-59, paras. 32(1)-(7). At the final merits hearing, which was to determine liability only, the Tribunal notified the parties that it would be determining (a) the standard *Burchell* issues (ii) *Polkey* and contributory fault. The Claimant's counsel identified claims which were withdrawn. The appendix hereto sets out the issues the Tribunal determined at the hearing.

Discussion / Conclusions

Unfair dismissal (ss.94-98 Employment Rights Act 1996)

95. Issues 2 and 3. The Tribunal is satisfied the reason for the Claimant's dismissal was conduct, no other reason, specifically the following acts and omissions on her part:

    a. the Claimant's failure as Curriculum Leader and lead internal verifier on the HNC/HCP to discharge her responsibility to internally verify the grades for Unit 2 by assessing student work;

    b. the Claimant's failure as Curriculum Leader and lead internal verifier on the HNC/HCP to discharge her responsibility to internally verify the grades for Unit 3 by assessing student work;

    c. the Claimant's submission of Unit 2 and 3 grades to the Academic Board as 'final' without prior internal verification where there was no evidence of student work;

    d. the Claimant's confirmation that final grades for Units 2 and 3 were submitted to the Academic Board and authorised/verified when the grades submitted for students S1-S7 on those Units had not been internally verified by 3 July 2020 and were predicted grades, not final grades;

    e. the Claimant's extension of the deadline for submission of the final grades for Units 2 and 3 beyond the date of the 3 July 2020 Academic Board where final grades for all units of the HNC/HCP were confirmed and authorised;

    f. the Claimant's failure to challenge E1's post-3 July 2020 demand for payment for work on Units 2 and 3 done after the Academic Board meeting on 3 July (other than to note she had not personally authorised that work).

96. The Tribunal concluded conduct was genuinely the reason for the Claimant's dismissal on the following grounds:

97. First, notwithstanding a degree of prevarication, the Claimant and her representative ultimately accepted (in terms) that the Claimant was guilty of at least some of this misconduct (albeit not gross misconduct) (a) at her disciplinary hearing ("*I should have internally moderated the work. In future I will ensure that all units will be IV-ed before the board panel*") [553] (b) in her grounds of appeal ("*I have agreed to take responsibility for not internally moderating unit 2 and 3 … I believe the decision [to dismiss] has been extremely harsh*") [590-591] (c) at the appeal hearing ("*It is accepted SA has ultimate responsibility* [624] …*My IV did not impact dramatically on the grades. I am not withholding responsibility. As an IV, I should have done 100%* [625] … *"I am not changing m[y] admittance … On reflection, and after recovery, I have started to think properly. I should have read through properly. I took full blame for someone who made an error* [626] …*With regard to the possible outcomes, they are very serious, I do not underestimate them, they are potential outcomes. Finally, we would still submit the decision to dismiss [SA] was not reasonable and was disproportionate. College has acted unfairly. The sanction should not exceed a*

written warning" [626]).

98. Second, the overwhelming weight of the substantial documentary evidence in this case (referred to in the 'Findings of Fact' above) establishes a clear causal, chronological link between (a) the Claimant's conduct relating to Units 2 and 3 in the period June - July 2020 (b) the discovery that E1's assessment/grading of Units 2 and 3 had continued after the 3 July 2020 Academic Board meeting (c) Mr. Humphreys' investigation and conclusions regarding same (d) the Respondent's decision to initiate a disciplinary process (e) the decision to dismiss the Claimant. At the final merits hearing, the Tribunal was not referred to a single document which caused it to question or have any doubt about the direct causal link between the Claimant's conduct in the period June – July 2020 and her subsequent dismissal.

99. Third, given the Claimant's acceptance of misconduct and the aforementioned documentary evidence, there was a proper evidential basis before the Respondent's decision-makers to reasonably and genuinely conclude that the Claimant was guilty of misconduct, and that is what they did.

100. Fourth, the Tribunal heard the oral evidence of the Respondent's key decision-maker regarding dismissal: Ms. Marshall. Having heard her evidence tested under cross-examination, the Tribunal was satisfied it was genuinely the Claimant's conduct - no other reason or cause - which led her to act as she did at the time, reach the conclusions she formed at the time, and to dismiss the Claimant for gross misconduct.

101. Fifth, the Tribunal is satisfied that Ms. Marshall's decision to dismiss the Claimant because of the conduct above was not because of, or in any way directly or indirectly related to, the Claimant's race or ethnic/national origin. It is telling that the Claimant did not specifically allege she was being treated less favourably or unfavourably because of her race or ethnic/national origin during the dismissal process (including her appeal) - had the Claimant genuinely believed this was the case, she (or her union representative) would have said so. The Tribunal was not referred to any contemporaneous or historic evidence which, in the Tribunal's judgment, either (a) called into question the good faith of Mr. Humphreys, Ms. Marshall or Mr. Hunter when investigating the Claimant's conduct relating to Units 2 and 3 and the holding of a disciplinary hearing and later appeal hearing based on the outcome of that investigation, or (b) raised the possibility that one of them might (consciously or unconsciously) be racially biased against the Claimant. The Tribunal was not referred to any documentary evidence which, on even the most generous reading, suggested the Claimant's race or ethnic/national origin was (or might be) even remotely relevant to her being investigated and dismissed for the misconduct at issue. The Tribunal is satisfied the Claimant's conduct for which she was dismissed was serious misconduct which the Respondent would have treated the same way – an investigation, followed by a disciplinary hearing, leading very likely to dismissal absent compelling mitigating circumstances not present in the Claimant's case - no matter what race or ethnic/national origin an employee in the Claimant's position as Curriculum Leader and Lead Internal Verifier had. The Claimant has failed to prove facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent contravened s.13 or s.26 of the Equality Act 2010 in relation to her dismissal. If that is incorrect, and she did, the Tribunal is satisfied the

Respondent has shown it did not contravene either provision.

102. Issue 4. The Tribunal is satisfied Ms. Marshall and Mr. Hunter's belief that the Claimant was guilty of misconduct was based on reasonable grounds. Put bluntly, Ms. Marshall and Mr. Hunter were entitled to reach that conclusion based on the following true facts established at the time: (1) prior to the Academic Board meeting on 3 July 2020 the Claimant did forward Unit 2 and 3 predicted grades to the Academic Board which had not been internally verified and were no more than predicted grades, and at the Academic Board meeting on 3 July 2020 the Claimant allowed the Academic Board to finalise students grades and qualifications for the HNC/HCP knowing Unit 2 and 3 grades had not been internally verified (2) the Claimant did fail to internally verify the Unit 2 and 3 grades prior to the 3 July 2020 Academic Board meeting (3) the Claimant did fail to provide a proper response when E1 demanded additional payment for post 3 July 2020 assessment/grading work – the response she provided at the time (that she had not authorised this work) overlooked the much more significant issue at play that E1 was still continuing to assess/grade Unit 2 and 3 work after 3 July 2020. So far as extending the deadline for submission of final grades for Unit 2 to 30 June 2020 and Unit 3 to 6 July 2020 is concerned, the Claimant's witness statement said these extensions were requested by students because they were having problems completing their work placements due to Covid, but at the Tribunal hearing, however, the Claimant alleged (for what appears to have been the first time) that the extensions were made in order to give students the chance to achieve better grades so they could study at London Metropolitan University – there was little evidence the Claimant gave this explanation to Ms. Marshall or Mr. Hunter at the time of her disciplinary process.

103. Issue 5. The Tribunal is satisfied Mr. Humphreys' investigation was reasonable and thorough so far as it went (Mr. Humphrey's findings of fact and conclusions in his report were clearly evidence-based and, in the Tribunal's judgment, reasonable findings/conclusions to reach based on that evidence). The chief criticism the Tribunal makes of Mr. Humphreys' investigation (who for the avoidance of doubt clearly acted in good faith at all times) was the failure to investigate one of the matters which (a) he was specifically asked to investigate, which (b) was also relevant to the investigation he was undertaking and the possible outcome of any future disciplinary hearing, which was why what happened, happened (see para. 54 above for Mr. Dangana's instructions regarding the scope of the investigation). Mr. Humphreys determined his role was one of fact-finding, which the Tribunal considers reasonable. However, the reason (or reasons) why the Claimant and E1 acted as they did at the time is also a matter which Mr. Humphreys could – and in the Tribunal's view should – have made findings of fact about as well. The Tribunal accepts that making findings of fact about why the Claimant and E1 acted as they did would likely have been a more difficult exercise than simply finding out the facts of what happened. However, in the Tribunal's judgment, that was not a good reason for Mr. Humphreys not to engage in the 'why' fact-finding exercise at all. It would have been open to Mr. Humphreys to make findings of fact about why the Claimant and E1 acted as they did (a) on the balance of probabilities (b) acknowledging any findings of fact he made on this issue might be in dispute (c) making it clear in his report that any findings of fact he made on the issue would ultimately be for the decision-maker at any disciplinary hearing to determine (who could accept or reject those findings after hearing from the Claimant). In the Tribunal's judgment, Mr. Humphreys acted outwith

the band of reasonable responses open to him at the time as the investigating officer by not investigating (either adequately or at all) and making findings of fact about why the Claimant and E1 acted as they did at the time.

104. Issue 6. Subject to one important caveat, the Tribunal is satisfied the Respondent followed a fair, reasonable disciplinary and dismissal procedure: (1) the Respondent conducted its investigation without unreasonably delay, and interviewed the Claimant, E1 and Ms. El-Khadiri (2) the investigation was conducted by Mr. Humphreys, who was not responsible for the conduct of the disciplinary hearing or the decision made at that hearing, responsibility for which rested on Ms. Marshall (3) the Claimant was informed in writing that there was a disciplinary case to answer, was provided with the details of the disciplinary hearing, was informed of her right to be accompanied (which she exercised), and was informed that one outcome might be her dismissal (4) the disciplinary hearing was held without unreasonable delay (5) the disciplinary hearing itself was conducted fairly and reasonably, with the Claimant and her union representative given the opportunity (which they both exercised) to say what they wanted to say, and to ask questions (6) the Claimant was given the right, and adequate time, to provide any grounds of mitigation, which she exercised (7) the Claimant was informed of the outcome in writing, in detail, and informed of her right of appeal, which she duly exercised (8) the appeal hearing was conducted fairly and reasonably, with the Claimant again being given the opportunity to state her case in support of her appeal (9) the Claimant was told in writing, in detail, why her appeal had been unsuccessful.

105. The caveat is the Respondent's failure to put the Claimant on reasonable notice, in advance of her disciplinary hearing, of what she was factually alleged to have done (or failed to do) which was said to be wrong. The letter inviting the Claimant to that hearing informed her that the "*question of disciplinary action against you … will be considered with regard to the following allegations – Malpractice and Maladministration – Putting the College into disrepute. These allegations constitute, if substantiated, as gross misconduct*." In the Tribunal's judgment, these words did not put the Claimant on adequate notice of what the Respondent was alleging she had factually done (or not done, in breach of her duties) which the Respondent was alleging might be a breach of its Malpractice/Maladministration policy or which might have put CCCG into disrepute. The Tribunal accepts the Claimant was provided with a link to Mr. Humphreys' investigation report and the documentary evidence he relied upon in support of his findings of fact and conclusions, but having reviewed those documents, the Tribunal cannot discern – and more importantly, the Claimant could not discern at the time – precisely what she was personally alleged to have done (or not done) which was said to be wrong. In the Tribunal's judgment, the Claimant only received clear notice of what she was alleged to have done wrong in her dismissal letter [583-586]. In the Tribunal's judgment, that was too late in the process to be fair or reasonable to her, and this defect was not cured at the appeal stage, by which point in time the Claimant had of course already been summarily dismissed.

106. Issue 7. The Tribunal is satisfied that the disciplinary sanction the Respondent applied – the Claimant's dismissal – fell within the range of reasonable sanctions open to the Respondent at the time based on the findings of misconduct made.

107. First, as noted at the outset, it is abundantly clear that something went seriously wrong with the assessment, marking, internal verification, and final grading approval of student grades in Units 2 and 3 in the June – July 2020 period.

108. Second, the Claimant was Curriculum Leader, Lead Internal Verifier for the HNC/HCP, and E1's line manager. It was her responsibility (a) to ensure E1 had completed assessment of student work on Units 2 and 3 and she had final (not merely predicted) grades from E1 for those units (b) once she had E1's final grades, to internally verify those grades before submitting them to the Academic Board for approval (c) to ensure the Academic Board on 3 July 2020 only considered and approved Unit 2 and 3 final grades which had been internally verified, not predicted grades which had not been internally verified. The Claimant failed to discharge those responsibilities. She was an experienced member of staff who ought to have been able to do so.

109. Third, once what happened came to light, the actual consequences of the Claimant's failure to discharge her responsibilities were serious: the regrading of 4 of the 14 grades for Units 2 and 3 which the Academic Board had certified on 3 July 2020. The fact it was only 4 was mere happenstance – it could have been more.

110. Fourth, the *potential* consequences on students of the Claimant's failure to discharge her responsibilities were serious: some students might have been deemed to have passed the HNC/HCP when they had not, while others might have been deemed not to have passed when they had in fact passed. Thankfully, the Tribunal was not informed that any students lost the HNC/HCP qualification which they thought they had obtained as a result of the aforementioned regrading.

111. Fifth, the *potential* financial and reputational consequences on the Respondent of the Claimant's failure to discharge her responsibilities were serious – it is not in dispute that based on what happened, Pearson would have acted within its rights had it chosen to withdraw its permission for the Respondent to continue to offer the HNC/HCP qualification to its students. The Respondent was fortunate Pearson chose not to do so, Pearson instead deciding to suspend the Claimant from the course for 12 months.

112. Sixth, the Tribunal is satisfied that the Claimant's conduct fell within the definition of 'Malpractice' set out in the Respondent's 'Assessment Malpractice and Maladministration Policy' [148-152] approved on 9 July 2020: "*Malpractice consists of those acts which undermine the integrity and validity of assessment, the certification of qualifications; and/or damage the authority, reputation or credibility of the College or Group*." [149]. One of the policy's examples of malpractice by staff is "*failure to follow Awarding Organisation policies and procedures for administrating the internal or external assessment processes*" [152]. In this case, it is clear that the Claimant failed to comply with the Pearson IV Guide (eg, by failing to internally verify Units 2 and 3). The Tribunal is also satisfied that, in context, the Claimant's conduct fell within the category of serious dereliction of professional duty/gross negligence, a recognised type of gross misconduct.

113. The Tribunal is required to make a judgment about the fairness of the Claimant's dismissal as a whole, not focus solely on whether one particular aspect of the

process or the decision to dismiss was fair or unfair. Considering the matters above, the Tribunal's conclusion is that the Claimant's dismissal was unfair and outwith the band of reasonable responses open to the Respondent at the time because of (1) the Respondent's failure to conduct a reasonable investigation which made findings of fact not just about what happened but also why events transpired as they did (2) the Respondent's failure to put the Claimant on reasonable notice before her disciplinary hearing of what the Respondent was alleging the Claimant had (as a matter of fact) done (or not done, in breach of her duties) which the Respondent was alleging might be a breach of the Malpractice/Maladministration policy or might have put the College into disrepute. In the Tribunal's judgment, a longstanding employee invited to attend a disciplinary hearing the outcome of which might be their dismissal is entitled to receive reasonable advance notice of what it is alleged as a matter of fact they have personally done (or not done, in breach of duty) which might result in their dismissal. Doing so "*sets the goalposts*" for everyone, and provides both employer and employee with a clear marker as to what factual matters the disciplinary hearing is likely to focus on. There may be cases where such notice is not required, but the Tribunal is satisfied this case was not one of them, the Tribunal being satisfied that the Claimant was not put on reasonable notice by other means. The Claimant's claim of unfair dismissal is well founded and succeeds, and she is entitled to a remedy for unfair dismissal (subject to the Tribunal's conclusions below).

Contributory fault

114. Issue 8. The Tribunal is satisfied the Claimant engaged in culpable conduct which caused her dismissal. In the Tribunal's assessment, the Claimant is 100% culpable for the sequence of events which led to her dismissal. The Claimant failed to discharge her duty to make sure the grades E1 forwarded to her were final grades based on completed student work on Units 2 and 3 which E1 had assessed; the Claimant failed to internally verify the grading of Units 2 and 3; the Claimant forwarded Unit 2 and 3 predicted grades to the Academic Board, not final grades; and at the Academic Board meeting on 3 July 2020 the Claimant unwittingly allowed the Academic Board to finalise the grades for Units 2 and 3 and confirm HNC/HCP certificates based on those grades. Had the Claimant properly performed her responsibilities before the Academic Board met on 3 July 2020, none of this would have happened. The only other potentially blameworthy person is E1, but E1 was a much more junior employee than the Claimant who she was responsible for line-managing. By October 2020, E1 had left the Respondent's employment, and it would have been a wholly pyrrhic exercise for the Respondent to seek to hold E1 to account at a disciplinary hearing (every possible disciplinary sanction would have been pointless). The Tribunal does not disagree with Pearson's conclusion [674-676] that the Claimant (as Curriculum Leader) had not appropriately briefed E1 regarding the requirements for submitting student grades. On grounds of contributory fault, the Claimant's compensatory award for unfair dismissal shall be reduced to nil.

'Polkey'

115. Issue 9. Had the Respondent applied a fair disciplinary and dismissal procedure, the Tribunal is satisfied there is a 100% chance the Claimant would have been fairly dismissed for the reasons for which she was dismissed. Whatever procedural flaws there may have been in the Respondent's disciplinary process, the Tribunal is

satisfied the evidence before the Respondent's decision-makers at the time – and before the Tribunal at the final merits hearing – clearly established the Claimant was guilty of a serious breach of her professional duties constituting gross misconduct which the Respondent was entitled to summarily dismiss her for. The Tribunal does not accept the Claimant's submission that "*engaging the [Polkey] exercise is a sea of speculation*" (para. 79) – there is more than enough uncontested material before the Tribunal to address the *Polkey* issue in an informed manner. The Tribunal rejects the Claimant's submission (stated by counsel in response to a question from EJ Tinnion concerning whether the Claimant accepted being guilty of any misconduct at all) that the Claimant's conduct fell to be considered as a performance issue, not a conduct issue. In the Tribunal's judgment, the Respondent acted well within the band of reasonable responses in treating what happened on the Claimant's "*watch*" in the period June – July 2020 as a conduct issue for which she could properly be held to account at a disciplinary hearing. On *Polkey* grounds, the Claimant's compensatory award for unfair dismissal shall be reduced to nil.

Claimant's sickness absence in December 2019 (direct race discrimination, s.13 Equality Act 2010) (harassment related to race, s.26 Equality Act 2010)

116. Issues 11(a), 13, 14-18, 21-23. The Tribunal does not have jurisdiction to consider the Claimant's claim of harassment or direct race discrimination relating to the Respondent's handling of the Claimant's sickness absence in December 2019. The index incident (which extended into January 2020) was over by the end of January 2020. The Claimant had three months from then – ie, until 30 April 2020 - to present an ET1 claim alleging race discrimination or harassment relating to Ms. El-Khadiri's conduct. The Claimant did not do so. Ms. El-Khadiri's conduct relating to this period of sickness absence was an isolated event which did not form part of any wider continuing act. The Tribunal finds no basis for linking the Claimant's sickness absence in December 2019/January 2020 to the sequence of events in June – July 2020 concerning the assessment, grading and internal verification of the Unit 2 and 3 grades - the two events had nothing to do with each other. The Tribunal does not consider it just and equitable to extend time to allow the Claimant to pursue these claims out of time. The Claimant's closing submissions did not identify any basis for concluding that it would be just and equitable to extend time in respect of these claims. The Tribunal does not find there to be any basis for extending time: the Claimant is an intelligent individual, who was a member of a trade union at the time, which could (and likely would) have advised her of her right to bring a Tribunal claim in respect of this matter as well as the limited period of time she had to do so.

Not properly investigating E1's actions, putting blame on Claimant, holding Claimant responsible for E1's actions (direct race discrimination, s.13 Equality Act 2010) (harassment related to race, s.26 Equality Act 2010)

117. Issues 11(b), 13. The Tribunal finds this claim (which the Tribunal finds to be part of a continuing act which culminated in the Claimant's dismissal on 8 February 2021) is not well founded. Mr. Humphreys' did investigate E1's actions, and interviewed E1 [535] as well as the Claimant [536] in the course of his investigation. The Tribunal finds that the Respondent held the Claimant responsible and accountable for her own acts and omissions, and did not hold her responsible for acts and omissions which could only fairly be attributed to E1 alone. It must also be born in mind that in

determining the Claimant's accountability, the Claimant was E1's line manager at the relevant time, hence it was her duty, as his line manager, to ensure that he performed the duties of his post. If and to the extent the Respondent took this into consideration, it was fair and reasonable for it to do so.

118. The Tribunal is not satisfied that Ms. Marshall or Mr. Hunter either did or would have treated the three 'live' comparators the Claimant relies upon for her direct race discrimination claim – Lloyd Phillips/E5 (white Afro-Caribbean tutor), William Henry/E6 (Afro-Caribbean tutor), and E1 (African-Eritrean) – any more favourably than they treated her. At the time the Claimant was dismissed (and even before Mr. Humphreys' investigation had commenced) E1 had already left the Respondent's employment, hence there was nothing Ms. Marshall or Mr. Hunter could do relating to E1 other than hold a pointless disciplinary hearing (although the Tribunal notes that the Respondent did report both the Claimant and E1's conduct to Pearson, suggesting they were both treated the same). The Tribunal accepts Ms. Marshall's evidence that it is not the Respondent's norm to conduct a disciplinary for a former employee. In June 2012 – more than 6 years before Ms. Marshall first obtained employment with the Respondent – Mr. Henry was given a first written warning for handing an exam paper back to a student after it had been handed in to him as invigilator [163]. The Respondent (Mary Primington) held Mr. Henry's actions were not gross misconduct. This historic incident involving Mr. Henry bears no relationship to the misconduct alleged against the Claimant and sheds no light on Ms. Marshall's or Mr. Hunter's treatment of the Claimant. In September 2018 – again, one month before Ms. Marshall joined the Respondent's employment in October 2018 – the Respondent (Nick Clarke, Director) issued a first written warning to Mr. Phillips based on a finding that he acted unprofessionally (but not committed gross misconduct) by giving £20 to a student on 3 occasions (after they told him they were not attending college due to having no money) and had also acted unprofessionally in relation to an allegation that he had performed hypnotherapy on a student going through a bereavement. Again, this historic incident involving Mr. Henry bears no relationship to the misconduct alleged against the Claimant and sheds no light on Ms. Marshall's or Mr. Hunter's treatment of the Claimant.

119. Issues 14-18. The Tribunal rejects the Claimant's case that she was harassed by the Respondent not properly investigating E1's actions, and wrongly putting the blame on her and holding her responsible for E1's actions. The conduct the Claimant alleges here did not happen, hence the question of whether that conduct was unwanted is moot. If the Tribunal is wrong, and this conduct did in fact occur, the Tribunal is satisfied that the conduct of Mr. Humphreys, Ms. Marshall and Mr. Hunter was not related to the Claimant's race or ethnic/national origin (it was not put to Mr. Humphreys that his investigation was influenced or shaped by the Claimant's race). The Tribunal is satisfied that the Respondent's treatment of E1 in comparison to its treatment of the Claimant regarding the investigation and subsequent disciplinary hearing had neither the purpose nor the effect of violating the Claimant's dignity, nor did that treatment have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. If the Claimant's perception at the time was that it did, that perception was unreasonable.

Not taking into consideration unblemished record (direct race discrimination, s.13 Equality Act 2010) (harassment related to race, s.26 Equality Act 2010)

120. Issues 11(d), 13. The Tribunal finds this claim (which the Tribunal finds to be part of a continuing act which culminated in the Claimant's dismissal on 8 February 2021) is not well founded. Ms. Marshall was well aware when she dismissed the Claimant that the Claimant had a clean disciplinary record and her work had not previously been called into question – Ms. Marshall mentioned these facts, which she never challenged, in the dismissal letter [585] ("*You stated that you had never had any disciplinary issues and your work has never been called into question*"). The Tribunal is satisfied these facts were taken into consideration by Ms. Marshall, so the treatment alleged here – that she did not - did not occur. When the Claimant complaints Ms. Marshall did not take these matters into consideration, what she really means is Ms. Marshall decided these facts did not provide sufficient mitigation to avoid dismissal, a conclusion which the Tribunal has found Ms. Marshall was entitled to reach. The Tribunal does not accept Ms. Marshall would have treated a hypothetical comparator (eg a white-skinned British citizen of white British ethnicity/ national origin) with a clear disciplinary and work record any differently or any more favourably – facing the same allegations on the same evidence, the Tribunal is satisfied a hypothetical comparator would also have been dismissed (absent compelling personal mitigating factors). Similarly, at the appeal hearing and in the appeal outcome letter [630], Mr. Hunter explained why the Claimant's long service to the College and clean disciplinary record did not change the fact that (1) each disciplinary process is treated separately in relation to severity (2) the Claimant had been found guilty of gross misconduct (3) the Claimant had been warned that a potential outcome was summary dismissal.

121. For the reasons already stated, the Tribunal is not satisfied that Ms. Marshall or Mr. Hunter either did or would have treated the three comparators the Claimant relies upon for her direct race discrimination claim – Lloyd Phillips/E5 (white Afro-Caribbean tutor), William Henry/E6 (Afro-Caribbean tutor), and E1 (African-Eritrean) – any more favourably than she treated the Claimant. The Tribunal notes it has no evidence concerning the disciplinary or work record of these comparators.

122. Issues 14-18. The Tribunal rejects the Claimant's case that not taking into consideration her unblemished disciplinary and work record when choosing to dismiss her (and subsequently dismiss her appeal against dismissal) was an act of harassment under s.26 of the Equality Act 2010. While the dismissal itself was certainly unwanted conduct (1) that conduct was not related to the Claimant's race (2) that conduct did not have the purpose or effect of violating the Claimant's dignity (3) that conduct did not have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Disciplinary and dismissal procedures are never welcome exercises for employees subject to those procedures, but in this case the Respondent conducted the Claimant's disciplinary and appeal hearings in a fair, reasonable and respectful manner. Any perception on the Claimant's part that those hearings were not so conducted was unreasonable.

Decision that summary dismissal was appropriate sanction (direct race discrimination, s.13 Equality Act 2010) (harassment/race, s.26 Equality Act 2010)

123. Issues 11(e), 13. The Tribunal finds this claim is not well founded. While it is true that the Claimant was summarily dismissed whilst E1 was not, the reason for that is simple (and non-discriminatory): because E1 had left the Respondent's employment in September 2020 E1 (before Mr. Humphreys' investigation had even begun), making it impossible for the Respondent to dismiss E1 or apply any other disciplinary sanction to him. Unlike the Claimant, neither Mr. Henry (in 2012) nor Mr. Phillips (in 2018) were found guilty of gross misconduct (and the facts of their two cases/situations appear to bear no resemblance to the facts in the Claimant's case), hence it is unsurprising that the Respondent decided to apply a routine sanction for gross misconduct in the Claimant's case – summary dismissal – while those two individuals received lesser sanctions for their lesser misconduct. The Tribunal is satisfied the difference in the Respondent's treatment of the Claimant compared to its treatment of E1, Mr. Henry and Mr. Phillips was not because of, or in any way related to, the Claimant's race. For the reasons already given, the Tribunal is satisfied that the Respondent would have also summarily dismissed a hypothetical comparator (a white British citizen of white British ethnicity/national origin) who held the Claimant's post (Curriculum Leader, Lead Internal Verifier for HNC/HCP, E1's line manager) for the same misconduct for which the Claimant was dismissed (absent compelling mitigating personal circumstances).

124. Issues 14-18. The Tribunal accepts the Claimant's summary dismissal was unwanted conduct. For the reasons already given, the Tribunal rejects the Claimant's case that her summary dismissal was related to her race – she was summarily dismissed for conduct, no other reason, and her summary dismissal was not related to her race but because of her gross misconduct. In summarily dismissing her, the Tribunal concludes it was not the Respondent's purpose to violate the Claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for her. Ms. Marshall's purpose in summarily dismissing the Claimant was to give the Claimant the appropriate disciplinary sanction for the gross misconduct she had found the Claimant to be guilty of. The Claimant's summary dismissal did not have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. While the Tribunal accepts the Claimant would have been upset by her dismissal, the Tribunal does not accept her summary dismissal had the effect of violating her dignity – this was not a case where the Claimant was summarily dismissed without the benefit of a prior investigation or disciplinary hearing, or was, for example, summarily dismissed in front of students or other staff members.

Subjecting Claimant to two further investigation meetings on other courses she managed where no evidence was found against her (direct race discrimination, s.13 Equality Act 2010) (harassment related to race, s.26 Equality Act 2010)

125. Issue 11(c), 14-18, 21-23. It is unclear whether this claim was withdrawn or not – at the beginning of the final merits hearing, the Claimant's counsel stated his client was considering its withdrawal, and the facts below barely featured at all at that hearing. However, the Tribunal has no note recording this claim was subsequently withdraw, and the Respondent addressed this claim in closing submissions,

suggesting it believes it was not withdrawn. On that basis, the Tribunal addresses it below.

126. Facts. In December 2020 the Claimant was responsible for line-managing three members of staff (E2, E3, E4) who were responsible for internally reviewing and then uploading onto the 'Gateway' the grades of a particular maths unit (Access to Human Sciences and Social Work Maths Unit). Following the discovery of a material discrepancy between internally moderated grades and the grades uploaded onto the Gateway, Rosie Francis (Head of Teaching and Learning) was tasked to conduct an investigation. On 17 December 2020, the Claimant was interviewed by Ms. Francis because she was their line manager. The Claimant was subsequently interviewed a second time by Ms. Francis on 18 December 2020. The Claimant was never herself accused of misconduct. Following a disciplinary hearing on 25 February 2021 and 3 March 2021 before Ms. Marshall involving E4, by letter dated 18 March 2021 Ms. Marshall notified E4 of her finding that E4 had no case to answer [616-618). Following a disciplinary hearing on 2 March 2021 before Ms. Marshall involving E3, by letter dated 18 March 2021 Ms. Marshall notified E3 of her finding that E3 had no case to answer [613-615]. Following a disciplinary hearing on 2 March 2021 before Ms. Marshall involving E2, by letter dated 18 March 2021 Ms. Marshall notified E2 of her finding that E2 had no case to answer [610-612]. In all three cases, new evidence had come to light which provided sufficient evidence that E2, E3 and E4 had coursework from students enabling them to change the grades awarded to students.

127. The Claimant's claim of direct race discrimination relating to her two interview is not well founded. As a threshold matter, the Claimant's claim was presented out of time. The Claimant's two interviews occurred in December 2020, and there is no evidence the Claimant had any further involvement in this particular disciplinary process after then. The Claimant did not present an ET1 making a claim about this matter within 3 months of 18 December 2020, and did not contact ACAS until 6 May 2021. The Claimant's closing submissions did not identify any basis for concluding that it would be just and equitable to extend time in respect of this claim. The Tribunal does not find there to be any basis for extending time: as already mentioned, the Claimant is an intelligent individual, who was a member of a trade union at the time, which could (and likely would) have advised her of her right to bring a Tribunal claim.

128. The Tribunal addresses the merits of this claim below should it be found that the Tribunal has erred in finding that it lacks jurisdiction and/or erred in not extending time. As the line manager of E2, E3 and E4 at the time, it was appropriate for Ms. Francis to interview the Claimant as part of her investigatory fact-finding role. By interviewing the Claimant, the Claimant was not treated less favourably than the Respondent would have treated a hypothetical comparator – the Tribunal finds that the Respondent would have interviewed the line manager of E2, E3 and E4 no matter what their particular citizenship, skin colour or ethnic/national original was. In interviewing the Claimant, for the reasons already given the Respondent did not treat the Claimant less favourably than it treated the Claimant's three live comparators (and E1 was of course interviewed by Mr. Humphreys during the course of his investigation). The Claimant has not proven primary facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent is liable for direct race discrimination under s.13 of the Equality Act 2010 in relation to these two interviews. If that is wrong and she has proven such primary facts, the

Respondent has shown that it did not breach that provision.

129. The Claimant's claim of harassment related to race relating to these interviews is not well founded. Even if the Claimant did not want to be interviewed, and the two interviews were unwanted conduct, neither interview was in any way shape or form related to the Claimant's race. As explained above, the reason the Claimant was interviewed was because she was the line manager of E2, E3 and E4 at the time, hence it was appropriate for Ms. Francis to interview her as part of her investigatory fact-finding role concerning the conduct of those three individuals. The Claimant has not established (and did not allege in her witness statement) that either of the two interviews were conducted in a non-professional, non-respectful, or non-reasonable way. The Tribunal finds that those interviews did not have either the purpose or the effect of violating the Claimant's dignity – part and parcel of being someone's line manager is a duty to answer questions at interview if the conduct of those line managed is called into question. The Tribunal also finds that neither the purpose nor the effect of these two interviews was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. If that was her perception at the time, that perception was unreasonable. The Claimant has not proven primary facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent is liable for harassment related to race under s.26 of the Equality Act 2010 in relation to the two interviews. If that is wrong and she has proven such facts, the Respondent has shown it did not breach that provision.

Wrongful dismissal/notice pay (breach of contract)

130. Issue 20. The Claimant's breach of contract claim seeking her contractual notice pay is not well founded. For the reasons already stated, the Claimant was guilty of gross misconduct entitling the Respondent to summarily dismiss her without paying her contractual notice pay entitlement.

Remedy hearing

131. In light of the Tribunal's conclusions above, the Claimant has succeeded on one claim only – unfair dismissal – and in terms of financial compensation will only be entitled to a basic award, not a compensatory award. It is hoped that the parties can resolve the Claimant's unfair dismissal remedies entitlement between themselves, but if that is not possible, a remedies hearing will be listed to determine remedy.

Signed (electronically): EJ Tinnion

Date of signature: 27 October 2022

Date sent to parties: 28 October 2022

APPENDIX

Unfair dismissal (ss.94-98 Employment Rights Act 1996)

1. It is agreed the Claimant's employment terminated on 8 February 2021.
2. Was the reason/principal reason for the Claimant's dismissal conduct?
3. Did the Respondent genuinely believe the Claimant was guilty of misconduct?
4. Did the Respondent believe the Claimant was guilty of misconduct on reasonable grounds?
5. At the time the Respondent formed this belief, had the Respondent carried out a reasonable investigation into the misconduct alleged?
6. Did the Respondent conduct a fair disciplinary/dismissal procedure?
7. Did the Respondent act reasonably in treating conduct as sufficient reason to dismiss the Claimant - was her dismissal for conduct within the band of reasonable responses open to the Respondent at the time?
8. If the Claimant was unfairly dismissed, did she cause or contribute to her dismissal by culpable conduct? If yes, to what extent?
9. If the Claimant was unfairly dismissed, is there a chance the Claimant would have been fairly dismissed had a fair disciplinary/dismissal procedure been applied – if so, how great a chance?

Direct race discrimination (s.13 Equality Act 2010)

10. For the protected characteristic of race, the Claimant relies upon (a) her nationality – Israeli (b) her ethnic origin – Middle Eastern.
11. Did the Respondent treat the Claimant less favourably than the comparators identified below in relation to the following alleged treatment:
    a. Respondent's handling of Claimant's sickness absence in December 2019;
    b. Respondent did not properly investigate the actions of E1, put the blame on the Claimant, held Claimant responsible for E1's actions;
    c. Respondent subjected Claimant to two further investigation meetings on other courses that she managed where no evidence was found against her;
    d. Respondent did not take into consideration Claimant's unblemished previous record;
    e. Respondent's decision that summary dismissal of Claimant was the appropriate sanction.

12. The Claimant's comparators are:
    a. E5 (white Afro-Caribbean tutor);
    b. E6 (Afro-Caribbean tutor);
    c. E1 (African-Eritrean);
    d. hypothetical comparator.
13. If the Respondent treated the Claimant less favourably than it treated the comparators above (or would have treated a hypothetical comparator), was the Claimant treated less favourably because of her race?

Harassment related to race (s.26 Equality Act 2010)

14. Did the Respondent engaged in the conduct referred to at paras. 11(a)-(e) above?
15. Was that conduct unwanted?
16. Was that conduct related to the Claimant's race?
17. Did any unwanted conduct related to race have the purpose or effect of:
    a. violating the Claimant's dignity, or
    b. creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
18. If it did, was it reasonable – taking into account the other circumstances of the case, including the perception of the Claimant – for that conduct to have that effect?

Breach of contract (wrongful dismissal/notice pay)

19. It is agreed that the Claimant was summarily dismissed and not paid notice pay.
20. Did the Claimant commit gross misconduct, entitling the Respondent not to pay her notice pay for her notice pay on summary dismissal?

Jurisdiction (Equality Act 2010 claims)

21. Are the events complained of part of a continuing act of discrimination or separate isolated events?
22. Were the claims in respect of those events presented in time?
23. If not, is it just and equitable to extend time to allow the Tribunal to hear any out of time claims?