EMPLOYMENT TRIBUNALS

Claimant:	**Dr Paul Leaney**
Respondent:	**Loughborough University**
Heard at:	Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
On:	4 July 2022 (reading day – parties did not attend)
	5, 6, 8 July 2022
	11 July 2022 (deliberations – parties did not attend)
Before:	Employment Judge Adkinson sitting alone
Appearances	
For the claimant:	Mr D Flood, Counsel
For the respondent:	Ms T Hand, Counsel

JUDGMENT

After hearing from the parties and for the reasons set out below IT IS ORDERED THAT the claim for unfair dismissal fails and therefore is dismissed.

REASONS

1. The Claimant (Dr Paul Leaney) commenced early conciliation on 17 February 2021, which concluded on 23 March 2021. He presented this claim on 22 April 2021. He claims that he was constructively unfairly dismissed on 31 December 2020. He alleges the Respondent (Loughborough University or more simply, the University) fundamentally breached the implied term of trust and confidence. The Respondent denies the claim.

The hearing

2. Dr Leaney was represented by Mr D Flood of Counsel and the University by Ms T Hand of Counsel. I would like to thank both of them for the help that they have given to the Tribunal and in particular the efficiency with which they have conducted their cross-examination and for their written and oral submissions as well.

3. I heard oral evidence from Dr Leaney himself and also from Ms Adèle MacKinlay. Ms MacKinlay was at all material times Director of People and

Organisational Development at the University but left for irrelevant reasons in September 2021 and now works elsewhere. I have taken account of these witnesses' evidence in making my decision.

4. In addition to that, Dr Leaney wanted to call on 3 other witnesses: Marie Leaney (his wife), Student A and Student S. The University indicated at the start of the hearing that they would have no questions for these witnesses if they were to give oral evidence. After discussion everyone has agreed that I should treat the witnesses as though they had given the evidence on oath, confirmed their statements as accurate and true but had not been asked any questions about it. This is what I have done. I am unaware of any provision in the rules that forbids such an approach and it seems to me sensible to avoid requiring witnesses to attend and give oral evidence just for the sake of it.

5. There was an agreed bundle of documents which ran to a total of roughly 830 pages. As I indicated I would do at the start of the hearing, I have taken into account those documents to which I have been referred.

6. Each party made written and oral submissions. I have taken them into account when making my decision.

7. The hearing proceeded as follows.

   7.1. The hearing began as an attended hearing;

   7.2. Day 1 was set aside for the Tribunal to read into the case and to read the statements.

   7.3. On day 2, Dr Leaney presented his case, and we started the University's case as well.

   7.4. On Day 3, we concluded the University's case at about lunchtime.

   7.5. By agreement, the Tribunal did not sit on Day 4. This was at the parties' request to allow the advocates time to prepare their submissions in both written and oral form.

   7.6. By agreement, each party attended on day 5 by video link to make oral submissions. In advance of this, each party sent to the Tribunal and each other brief and succinct written submissions too.

   7.7. I concluded that while there may be not many factual disputes, the case was quite involved (as demonstrated by the length of time to hear evidence from 2 witnesses) and I required time to consider my decision. I therefore reserved my decision. This is that decision.

8. At the beginning of the hearing, I made an Anonymity Order in respect of the numerous students who are connected to this case – some more than others. I have issued that Order separately and my reasons for that Order are contained upon it. Before issuing it, neither Dr Leaney nor the University indicated any objection to an Order in those terms and no third party has made any application for that Order to be stayed, varied or set aside.

9. No party has complained that this has been an unfair hearing. I am satisfied that this has been a fair hearing.

Issues

10. The issues were agreed. I have re-worded them below in light of the questions posed in **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1 EWCA** (see below). It still reflects however the agreed position in my opinion.

    10.1. What was most recent act (or omission) that triggered or caused Dr Leaney to resign?

    10.2. Has the employee affirmed the contract since that act?

    10.3. If no, was the act or omission itself a repudiatory breach?

    10.4. If no, was it part of a course of conduct which taken together amount to breach of implied term of trust and confidence?

    10.5. If yes to either of the preceding questions, did Dr Leaney resign in response to that breach (whether it was the sole reason or just one of many reasons)?

    10.6. If Dr Leaney was dismissed, what was the reason for the breach of contract?

    10.7. Was it a potentially fair reason?

    10.8. Did the University act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant, including following a fair procedure?

11. Dr Leaney identified the alleged breaches in his claim as follows:

"51. In the intervening period, the Claimant met with the Vice-Chancellor in the hope that the Claimant's concerns about the University could be allayed somewhat. This was then followed up by the Claimant sending an email to the Vice-Chancellor on the 23rd March 2020 timed at 12:35pm, dropping off information to the Vice-Chancellor in relation to the nature of the Claimant's concerns. In response to this however, Adèle MacKinlay wrote to the Claimant by email dated 27th April timed at 8:26am, stating,

" 'Prior to lockdown and the Easter break you delivered a file of documents to the Vice-Chancellor's office which I understand to be the full suite of emails and other correspondence associated with the last year of your tenure as Warden and the various issues that were raised by both yourself and the University during that period. The Vice-Chancellor and I have spoken and again, in line with my email dated 28th January 2020 I confirm that the University has no desire to open a dialogue into the matters raised by both parties. I would encourage you to draw a line under the events of last year so that you and your family can move on'

"52. By way of email dated 4th May 2020 timed at 8:35pm, the Claimant responded substantively to Adèle MacKinlay's email and in particular stated,

“ ‘I would obviously like to draw a line under the events of this last year or so and I wish to reassure you that I will do that, despite it being difficult for me to do. It is a difficult thing for me to do because the student (Student X) is still at the University and I am still vulnerable because [they have] not drawn a line under it. Over the past few weeks Student X has written a series of twenty-five articles which were published on the Facebook page [redacted by me pursuant to the anonymity order] . These articles, made publicly available worldwide, cover all [their] mental health issues and both [their] attempted suicides - and although [they do] not mention me at all, the University’s later support for [them] does not come out very well. I am not a regular user of social media, but after a number of people pointed them out to me, I decided to have a look and I was shocked at what I was reading … I have now worked at Loughborough University for more than 41 years as an academic (including periods of Programme Director and latterly as Director of Undergraduate Studies) and as a Warden, and until this incident in Nov 2018 have never received any complaints from the University in either of these roles. These roles have given me a very clear insight into the workings of both the academic schools and the support services. I observe that the centralisation of the Warden system by Warden support services over the past few years has resulted in the Wardens’ service being downgraded to a purely administrative role. I understand that this system brings them in line with most other universities in the country, but any transition that LU needs to make can be managed a lot better …’

“53. In the weeks that followed, the Claimant sought to engage with other senior managers in relation to his concerns, in an effort to try and again allay his fears about the ongoing working relationship with the University. Unfortunately, those conversations did not provide the Claimant with any comfort, and as such by way of email dated 28th September 2020 the Claimant wrote to Adèle MacKinlay to tender his resignation as University Teacher, giving the appropriate notice of a term.

“…

“56. The specific reasons as to why the Claimant considers that there was a repudiatory breach of the implied term of trust and confidence are as follows:

“a) The Respondent did not follow its own processes, procedures, and ordinances in dealing with completely false allegations against him, that came to the Respondent through a local medical centre, which has no data sharing arrangements with the University whatsoever.

“b) The information was received inappropriately from a nurse, dealing with an ill student patient, that was subsequently interpreted by the University as an allegation of ‘deeply inappropriate behaviour’ by the Claimant as a staff member of the Respondent.

"c) The matter was taken very seriously by the University, which is why the integrity of the process was of such importance, but the subsequent investigation into the Claimant was so flawed that it led to the necessity for him to put in a grievance, after two further investigations into his grievance, with the initial investigation subsequently being put aside as being 'not fit for purpose'.

"d) The Claimant pursued the Respondent's internal process thoroughly, and then sought to discuss matters with senior managers, right up until late spring 2020, but neither the internal process nor any subsequent conversations that he had allayed the Claimant's concerns.

"e) Without legitimate investigation, the Claimant considers that he has not been comprehensively cleared of any of the allegations made against him of wrongdoing, and that he had put his faith in the internal processes to achieve this, and that he was relying on being put in front of an Appeal Panel to raise his concerns, but this was denied to him on two occasions.

"f) Ultimately, he felt completely unsafe working for an employer that is either incapable or unwilling to apply integrity of processes in investigating matters, that are seen to be so serious as could be construed as potential gross misconduct, and also safeguarding completely innocent staff from false and malicious allegations from students.…"

12. At one point during the hearing, I raised an issue about the legal status of the University's statutes and ordinances which had featured heavily in this case, as I shall come to. The reason is that these statutes and ordinances require approval of the University Court, which is its formal governing body and amendment in some (possibly all) cases requires approval of the Privy Council. However, as the University pointed out, Dr Leaney has relied on – and only relied on – the breach of the implied term of trust and confidence. It was agreed therefore that they their true legal status and effect is not relevant. Therefore I do not consider this is an issue for me to resolve.

13. There has been no dispute raised by the parties that, and I am satisfied legally that:

13.1. it is legally possible for one individual to be employed under two separate contracts of employment with another individual. Thus it is therefore possible that Dr Leaney was employed by the University as a Warden and, at the same time and separately, to be employed by the University as a lecturer;

13.2. if an employee has two separate and distinct contracts of employment with the same employer, then what happens in relation to one contract of employment could undermine the trust and confidence between the parties in the other contract of employment. It is a question of fact and degree whether that is what happened.

I have therefore not considered this matter further.

14. The University's documentation describes the role of Warden as an "office" and says it is not a position of employment. I do not understand on what

basis the University believes this. However I do not believe it is relevant for me to decide. It is agreed whether it be an office or employment (or both), things that happened in relation to the role of Warden it might affect his other employment in the University.

Findings of fact

Witnesses generally

15. I deal firstly with Dr Leaney. I am satisfied that Dr Leaney is a credible witness who was doing his best to tell me what he honestly and truthfully believes the situation to be.

16. However, the tenor of his evidence came across often that he was be more focussed on process and less inclined to be able to take a step back and look at a pragmatic or flexible way forward. For example, in later documents he said that he wanted to draw a line under things. However it is apparent he was unable to do so.

17. Another example is how he responded to the matter in the first place. I acknowledge he had legitimate complaints about the initial investigation and that he was not told of the allegations. However no formal disciplinary action was recommended but he was asked to meet with Dr Alonso (his line manager). In my view a reasonable person would have attended that meeting even if afterwards they raised a grievance, because it may have resolved all issues. I think it demonstrates his focus on process that instead his first reaction was to launch a grievance and to refuse to meet with Dr Alonso while that was being dealt with. Thus when he makes points about the failure to follow procedure and how it affected him, I believe I must be cautious to weigh up whether that effect was objectively justified. I have done that in making my findings.

18. As for Dr Leaney's other witnesses, the students' evidence can be described more or less as character evidence that sheds no light on the employment relationship and the events within it. Mrs Leaney's evidence is primarily that of conjecture and expressions of anger and dissatisfaction with the University. Again, it does not take me any further forward in addressing the issues in this case. Therefore, although they are credible witnesses, I did not derive any help from them and so put their evidence to one side.

19. I turn to the evidence of Ms Adèle MacKinlay. I have not found her evidence reliable. My reasons are as follows.

    19.1. She was answering questions about events from 3½ years ago (as she repeatedly pointed out to me in cross-examination), and she no longer works there and so does not even have the passive benefit of working in the location where events happened to help her keep things fresh in her mind. The effect is that there was a vagueness in her evidence and uncertainty as to its accuracy.

    19.2. However there are matters that suggested she was subconsciously assuming that the University had done everything correctly. The matters below, coupled with the fact

that she herself often reminded me how the passage of time made recall difficult, lead me to think that she sought to deal with concerns by assuming the best of the University and her erstwhile colleagues rather than recognising her memory was not sufficiently clear.

19.2.1. She was repeatedly clear in cross-examination that if other senior managers were doing things that were not allowed for by the statutes or ordinances of the University, she would have told them that they were acting outside of their powers. However, it is notable that there is no written evidence of her ever making these observations for example, to the Vice-Chancellor or to the Chief Operations Officer, whom she eventually and reluctantly accepted in cross-examination did things not permitted by the statutes or ordinances. There are numerous emails in the bundle – often from her or to her which shows the University was able to access them when considering disclosure, and often covering minor interactions. The absence of a single email or other document is striking.

19.2.2. In cross-examination, she asserted her letter of 21 June 2020 (the detailed acknowledgment of Dr Leaney's resignation as Warden, which was very critical of him and which she signed) was a letter she had written. However correspondence with the University's then solicitors showed this was not the case. She then changed her position and accepted they had written it and she had simply signed it. I do not accept that the mere passage of time is enough of an explanation for the error. It is a major change in position. She had prepared her statement in advance by reference to the bundle. Instructing external solicitors to draft such a strongly worded letter is something I expect she would remember, especially as the letter is more than a simple "acknowledgement of resignation". It also depended heavily on a note from the Vice-Chancellor, which also would take it out of the forgettable, mundane events of processing resignations. She then accepted that letter contains a number of significant inaccuracies.

19.2.3. Finally in her own statement she described the claimant as having been dismissed by the University. Dr Leaney drew attention to this, though concedes it is not determinative. I agree it is not determinative. It is clear that neither Ms MacKinlay nor the University accepted it dismissed him. However it does again suggest a lack of attention to the detail of what has happened or towards her evidence.

19.3. Therefore where there is doubt about her evidence, I have not accepted it unless there is other, independent evidence to support it or it is clearly and plainly correct. I have had this in mind when making my findings of fact.

Relevance of witnesses not called

20. The University did not call the Vice-Chancellor Professor Allison. He has retired since the events to which this relates. While he wrote the notes that the external solicitor converted into Ms MacKinlay's acknowledgement of resignation, and involved himself in other aspects, I am not satisfied that the decision not to call him is of any relevance. The complaints focused on the handling of initial matter that triggered this case and his grievances about how the University handled it generally. I am not satisfied he has any particular allegation to answer. Indeed it was proportionate not to call him and so it furthered the overriding objective.

21. For similar reasons I think nothing turns on the failure to call Dr Alonso. While he was the person who triggered the initial disciplinary investigation and who wanted to meet with Dr Leaney to discuss concerns raised. His role is peripheral in that he had no involvement in the progression or otherwise of any grievances and would not be able to shed any light on the complaints raised by Dr Leaney in this claim. He has not particular claim to answer. The decision not to call his is of no relevance. Again, it was proportionate not to call him and so furthered the overriding objective.

22. I take a different view with Mr Taylor, the University's chief operating officer. It is clear from the papers he is the prime actor in why the claimant's grievance and appeal did not proceed. He is a clear witness to what happened and why the University's actions were or were not in accordance with its statutes, ordinances and policies. The allegation that the University obstructed Dr Leaney's appeal and that is part of the breach of contract needs answering. Mr Taylor is the person to answer it. Therefore I accept Dr Leaney's point: I would have expected the University to call him. The University advanced no reason about why he was not called. While the strict rules of evidence do not apply in Tribunals, I am aware that drawing inferences in this situation can be too easily and unfairly done. I have considered the civil cases of **Wisniewski v Central Manchester Health Authority [1998] PIQR 324 CA**, **Magdeev v Tsvetkov [2020] EWHC 887 (Comm) (esp [148]-[154])** and **Manzi v King's College Hospital NHS Foundation Trust [2018] MedLR 552 EWCA** as guidance. Applying the guidance, all of which is conveniently summarised in **Magdeev**, I have come to the following conclusions.

22.1. There is plenty of evidence Mr Taylor obstructed Dr Leaney's appeal and departed from the ordinances.

22.2. There is no good reason for his absence.

22.3. He could be expected to give evidence on the material issues.

22.4. His relevance would have been apparent from disclosure at the latest, given what the documents show and so well before the final hearing.

22.5. His evidence would relate to a fundamental and crucial part of the case.

22.6. There is nothing in the need to maintain proportionality that justifies not calling him.

23. In the circumstances this is one of those small number of cases where the failure to call him can be taken into account and so undermine the respondent's evidence and case on the issues. I have reflected on this in the decisions I have made below.

Findings of fact

24. With those observations in mind, I turn now to making my findings of fact on the balance of probabilities of the matters as are necessary me for me to be able to resolve the disputes in these proceedings.

About the claimant

25. Dr Leaney commenced employment with the University on 2 January 1979 as a Research Assistant. On 1 March 1982 he became a University Lecturer. On 25 June 2019 he reduced his workload with a view to retirement, and as a result his title changed to University Teacher. He retained that intention to retire at all times material to this claim.

26. He has had a significant number of responsibilities, including quite recently the Director of Undergraduate Studies in the Wolfson School of Engineering, at the University as well as the more senior roles of co-ordinating programmes, dealing with academic quality assurance matters, regulations and with the external examiners. His role also involves teaching students and requires him to have to interact with them both in groups and on an individual basis. The latter might include a situation where a student was struggling with the work set or studies in particular. He has also been involved in a significant amount of research, teaching and lecturing.

27. Whilst working at the University in his teaching capacity, he had also been the Warden of one or two of the University's halls of residence. He was appointed as a Sub-Warden of the Hazlerigg Rutland Hall in 1979 and was the Warden from 1983 through to 1988. He then stepped down as Warden for personal reasons. However he resumed the role on 1 September 1996 and held it through to his resignation from that role on 13 December 2019.

28. On 1 June 2009, he was appointed as the Warden of John Phillips Hall as well. He held that role until he resigned with effect from 13 December 2019.

29. I have noted the University describes the role of Warden as an office rather than employment. I have also noted that it is not relevant for me to decide whether that is correct. For the sake of simplicity (but without deciding), I am going to refer to Dr Leaney being employed as a Warden.

30. Dr Leaney has an unblemished employment record both as Warden and in his academic roles. This formally remained the case after the incident of 10 November 2018 (to which I shall come) and to termination of his employment. In particular the University did not at any time before 10 November 2018 formally or informally raise concerns about his conduct or performance as Warden of Hazlerigg Rutland Hall and of John Phillips Hall.

About the University

31. The Respondent is a public university located in Loughborough, north Leicestershire. It has many Departments and Schools: The one that is relevant for these purposes is the Wolfson School of Engineering, of which Dr Leaney was a member at all materials times. Professor Paul Conway was the Dean of the School.

32. The University's then Vice-Chancellor was Professor Robert Allison.

33. The University had a number of halls of residence that provide accommodation to students. Its halls of residence were originally operated essentially as autonomous units. However at some point (the date does not matter) the University appointed Dr Manuel Alonso as the Associate Chief Operating Officer and Director of Student Services. Dr Alonso was responsible for the halls of residence overall. It is clear he had taken steps to try and bring them into a series of common practices.

The University's statutes and ordinances

34. The University is governed by a number of statutes and ordinances, some (if not all) of which require the approval of the Privy Council to take effect or be amended.

35. Statute V sets out the role of the Vice-Chancellor. Article 3 provides:

> "3. The Vice-Chancellor shall, subject to such directions as may be given by the Council, exercise general supervision over the University and shall be generally responsible to the Council for maintaining and promoting the efficiency and good order of the University."

36. Statue XXI provides so far as relevant:

> "Staff
>
> "1. Council shall ensure that there are procedures in place in relation to:
>
> " (i) The handling of disciplinary cases, including the dismissal of members of staff by reason of misconduct and for appeals against disciplinary action;…
>
> " (v) The handling of grievances raised by members of staff.…
>
> "5. The following Ordinances have been promulgated:-
>
> " Ordinance XXXV Staff Disciplinary Policy and Procedure
>
> " …
>
> " Ordinance XXXVII Staff Grievance Policy and Procedure.…"

37. There is no dispute these Ordinances apply to Dr Leaney in his employment as University Teacher and it appears they were applied by default to his role as Warden despite the terms of appointment of Warden containing their own provisions, to which I will come.

38. Ordinance VIII deals with University governance and sets out the University Council. Paragraph 8 provides so far as relevant:

"8. Subject to the Charter and the Statutes, the Council shall have the following Primary Responsibilities:…

"Employment

" viii. To be the employing authority for all staff in the University and to be responsible for establishing a human resources strategy.

" ix. To appoint the Vice-Chancellor …

"9. Subject to the Charter, the Statutes and this Ordinance, the Council shall, in addition to all other powers vested in it, have the following powers:…

" v. To make, amend or repeal Statutes and Ordinances in accordance with paragraphs 16 and of the Charter and within this Ordinance."

39. Ordinance XXXV (Staff Disciplinary Police and Procedure) sets out the disciplinary policy. It provides as follows so far as relevant:

"3. Investigation

"3.1 Prior to formal disciplinary action being taken … the facts of the case must be investigated. It is important to carry out necessary investigations of potential disciplinary matters, impartially and without unreasonable delay, in order to establish the facts of the case.

"…

"3.6 Any investigation should:

"(a) Identify the alleged breach of discipline, if any.

…

"(i) At the end of the investigation, the investigating officer will produce a report outlining the findings of the investigation only."

40. University Ordinance XXXVII (Staff Grievance Policy and Procedure) sets out the grievance policy and procedure. It applies to the Dr Leaney. It says as follows so far as relevant:

"1.2 The University will use its best endeavours to deal objectively and constructively with all grievances and employees using this procedure will be dealt with fairly and as quickly as possible.

"1.3 An employee may raise a grievance about action which the University has taken, or is contemplating taking or has failed to take, in relation to them, or about the actions of work colleagues.

"1.4 Human Resources (HR) should be advised, by the manager considering the grievance, of the complaint and will be available to provide advice and support throughout the process.

"1.5 Throughout this document, reference to "days" means calendar days, but bank holidays and University closure days will not be counted.

"…"

41. Paragraph 3 provides for an informal procedure to try find a mutually acceptable resolution.

42. If that fails paragraph 4 it provides a formal stage and provides (so far as relevant):

"4.1 If the matter is not resolved and the employee wishes to raise a formal grievance, they must set out the details, including the remedy sought, in a written statement that should be sent to their Head of Department/Section. The statement should set out the grounds for the grievance and include any supporting documentary evidence. … A copy of the grievance should also be sent to the Director of Human Resources.

4.2 The person considering the grievance will meet the employee to discuss the matter within 14 days of receipt of the written statement. The employee may be accompanied, at this meeting, by a work colleague, or a union representative and the manager will be accompanied by an HR representative. In some cases, it may be necessary to adjourn the meeting to allow for an investigation of the issues to take place, which may include hearing from witnesses.

"…"

43. The policy proceeds to provide for the production of a conclusions. Paragraph 5 deals with appeals and says as follows:

"5.1 An employee who is not satisfied with the decision reached at the first formal stage will have 21 days, from the receipt of the written decision, to lodge an appeal, by submitting a written statement, including remedy sought and a list of witnesses (if any) to be called in support of the case, to the Director of Human Resources, stating the grounds for the appeal. If an appeal is not received within this period, no further action will be taken on the grievance and all interested parties will be informed that the grievance procedure has been concluded.

"5.2 Upon receipt of the written statement, the Director of Human Resources will convene an appeal hearing to be heard by a panel comprising two senior managers within the University and a lay member of Council."

"5.3 The panel hearing the appeal must not have been previously directly involved in any way with the grievance. An appeal hearing will be convened to take place within 21 days of receipt of the written statement."

44. Paragraph 6 provides that, in exceptional circumstances, the time limits can be extended.

45. Paragraph 9 deals with vexatious or malicious grievances and says as follows:

"9.1 An employee, who raises a grievance that is not upheld and is found to be vexatious or malicious, may face disciplinary action."

46. Paragraph 11 deals with mediation, and paragraph 11.1 reads as follows:

"11.1 If either the employee, or the manager, considers that the matter might be best resolved through mediation, they should refer it to the Director

of Human Resources, as soon as possible. The Director of Human Resources will arrange for a mutually agreeable third party, who may be a suitably experienced manager, or colleague from another organisation, e.g. ACAS, to assist the parties in trying to resolve the matter.

"11.2 An employee participating in mediation to resolve an issue, under this policy, will not subsequently be debarred from either commencing or taking, such procedures further."

47. It is trite law that written documents are to be construed objectively in light of the relevant factual matrix. While strictly a legal question, I deal with it here as it forms a convenient point to do so and is relevant to the later factual findings I must make. I conclude that objectively the policies show the following things.

47.1. Paragraph 5.2 presents a mandatory obligation to convene a panel upon receipt of the written statement of appeal (this was conceded in cross-examination).

47.2. The University cannot refuse an appeal simply because a manager believes that mediation is a better or suitable alternative. The way that paragraphs 11.1 and 11.2 are worded in my view can only be read as mediation being a voluntary process.

47.3. There is no power to postpone or delay an appeal pending mediation unless that could be classed as exceptional circumstances. As the policy contemplates mediation as a voluntary process, postponing or delaying an appeal to insist it takes places is not an exception circumstance.

47.4. The University cannot refuse to entertain a grievance or to entertain an appeal simply because it believes the grievance or appeal (or part of it) is vexatious or malicious. The ordinance makes clear the remedy is to conclude the process and if appropriate to commence separate, follow-on disciplinary proceedings instead.

48. There is a table of authorities that sets out who hears the various appeals against grievance outcomes. The appeal body depends on the status of the employee. In Dr Leaney's case the appeal panel would be a committee of 3 people that includes a lay member of the Council.

49. As Ms MacKinlay explained, trying to find lay members of Council who are able to attend appeal meetings could prove difficult because it required a coordination of their diaries, and getting a response from them from them within an appropriate timeframe. Therefore the 21-day limit was often difficult to achieve and had to be extended. It is not necessary for me to decide if that might be an exception circumstance, but it would seem to be at least arguable that it could be in a given case.

50. The situation for Wardens is somewhat confusing. The documents I have are numerous. Each differs from the other. Only one is signed. Many are undated. They are all badly, clumsily and amateurishly drafted. Resolving whether Warden is an office or an employment would not assist to resolve

the issue. It is not entirely clear which ones actually represent the terms and conditions at the termination of the Dr Leaney's employment as Warden.

51. In my opinion I do not need to decide. In this case the University decided to follow the formal disciplinary process provided for in its Ordinances, with Dr Leaney's agreement. I would add as follows: If the University has proceeded on this basis then they are obligated to follow the whole process – they cannot pick and choose. The University did not argue otherwise.

10 November 2018

52. The event that triggered this employment dispute happened on 10 November 2018.

53. The halls of residence are divided up into flats in which a number of students live and share common facilities. The flats themselves consist of a number of bedrooms and therefore each flat is effectively a household of students.

54. In one of the flats lived a student called Student X. The flat was in Hazelrigg Rutland Hall and so Dr Leaney was the Warden of the flat. Student X committed an act of self-harm on 10 November 2018. One of their flatmates, Student S, called an ambulance and Student X was treated for their injuries.

55. On becoming aware of the incident, Dr Leaney informed Dr Alonso about what had happened.

56. On 11 November 2018, students from the flat in which Student X resided and from the opposite flat contacted Dr Leaney about this incident. He arranged a meeting with them on 19 November 2018.

57. He met by agreement Student X before and individually before the meeting with the students generally. He then met the students as a group. Although he has set out the details of the conversation in his evidence to the Tribunal, I do not believe that it is necessary for me to resolve whether or not his description of what happened at those meetings is factually correct, except to observe that it is Dr Leaney's genuine belief that he has behaved properly and appropriately and dealt with the situation appropriately at all times. I am satisfied that he believed that and was trying to act in the students' best interests.

58. The University has its own health centre at which Students can register. Although it is on campus, it is a separate organisation. Student X was registered with this service.

Contact from the University Health Centre

59. On 23 November 2018, Nurse H Underdown emailed Dr Alonso with the subject "Warden Concerns". She wrote as follows:

> "Just a quick one about some concerns a student has spoken to me about how a Warden reacted to an episode of self-harm. I am happy to speak to the Warden myself about how best to respond to incidences of self-harm/overdoses however thought maybe it should be brought to your attention. [Student X] is in agreement with me speaking to you about it and

happy for me to share what's been happening with [their] mental health in this email. [Student X] lives in the Hazlerigg-Rutland hall.

"For some background, [Student X] has been struggling with [their] mental health and self-harm and took an intentional overdose on the 9/11 which required hospital attendance. [They] were discharged shortly after. [They are] having high level CBT and is engaging well with myself and the GP at the medical centre. [They state they were] called to a meeting in [their] flat with the other students, 2x sub-Wardens and the hall Warden [i.e. Dr Leaney]. [They were] told by the Warden [they] needed to apologise to the whole flat for the "worry [they] caused them" and he told [they] were "selfish". [Student X] reports to have found this very overwhelming, during this meeting the Warden discussed [Student X's] mental health to other students there and said that [Student X] "had 6 weeks to show [they] were making an effort with [their] mental health otherwise [they] wouldn't be able to stay at University". Then the other students were all encouraged to tell [Student X] how [their] self-harm had made them feel and they were asked if they wanted [them] to move halls. In the meeting the students were told [Student X] had took an overdoes which [Student X] wasn't comfortable with. [Student X] felt [they] were being punished and at no point consented to this information being shared or wanted a meeting.

"He has since requested copies of appointment letters (which he has retained) and asked [Student X] to forward confirmation texts of appointments from the medical centre. [Student X] was very distressed when I saw [them] about this, [Student X] felt powerless and was scared [their] course would be terminated if [they] did not provide the evidence.

"I appreciate this is [their] perception of events but I'm sure you'll agree it sounds at best a poor response. I'm happy to do some training with the Wardens on responses to DSH [deliberate self-harm] if you think it would be helpful. …"

60. Dr Alonso responded the same day as follows.

"<u>If substantiated</u> this is totally unacceptable. We have in the past, and with the student's consent, spoken to flat mates to try to create a supportive atmosphere and ensure everyone is clear about boundaries. This does not sound like that type of approach at all. …"

I have emphasised the words "If substantiated" to demonstrate it is clear that Dr Alonso did not prejudge whether Student X's allegations were well-founded.

Commencement of a disciplinary process

61. Two days later, Dr Alonso wrote to Mr Paul Cox-Stone (University HR advisor). Dr Alonso said that he would like to pursue the matter in line with the disciplinary policies. He stated if the allegations were proven he would be looking at removing the Warden from his position.

62. Mr Cox-Stone replied saying that he agreed it appeared to be a serious breach of trust and confidence, not to mention the student's confidential information and that he thought Dr Alonso's approach was "sensible".

63. On 26 November 2018, Dr Alonso approached Ms Angela Truby, the Head of Operations Student Services, and said as follows:

"I need someone to investigate this so I can consider disciplinary action. Genuinely open question - do you have capacity to do this. …"

She agreed.

64. On 30 November 2018, the University wrote to Student X telling them that the matter was being investigated by Ms Truby.

65. On 2 December 2018, there was a second incident that involved deliberate self-harm by a student known as Student M. Dr Leaney dealt with this and there has been no criticism or suggestion his conduct in relation to Student M was inappropriate.

66. For reasons that are not clear, it was not until 4 December 2018 that Dr Alonso actually told Dr Leaney that the disciplinary proceedings had begun and that Ms Truby was investigating. I can see no good reason for telling Student X first and Dr Leaney second or for what I consider to be a significant delay telling Dr Leaney of the investigation.

Dr Alonso met with Dr Leaney first and wrote afterwards an email to confirm the discussions:

"Following on from our conversation earlier, I write to confirm that I am in receipt of information that leads me to you responding to an incident of self-harm by a student in your hall in a deeply inappropriate manner. If substantiated this represents a potential breach of discipline in your Warden role.

"As you may know, your Warden role is subject to an agreement rather than a contract of employment. As such, the University's Disciplinary Procedure [link provided] does not apply. However, I have received advice from colleagues in Human Resources and in investigating this matter we will mirror the procedure as far as possible.…"

He then confirmed that Ms Truby had been appointed as the investigator.

The investigation and outcome

67. Ms Truby met with Dr Leaney on 19 December 2018. At no point prior to that meeting had Ms Truby or Dr Alonso set out what the key allegation was against Dr Leaney.

68. She prepared her report and sent it to Dr Alonso on 20 December 2018. Mr Cox-Stone had provided her with a template for preparation of the report. She did not use it for unknown reasons. The report concludes as follows:

"This was a very unfortunate event that should not have happened.

To hold an open session to berate a suicidal, self-harming and traumatised person was ill-judged and naïve. However, I don't believe it was malicious, it was an approached based in old fashioned thinking around those who try or do commit suicide, that they are selfish, self-absorbed, silly and manipulative.

I believe it was well-intentioned and an attempt to support to whole flat, but it displayed a real lack of understanding of what [Student X] was

experiencing. Using open arbitration as if it was a run of the mill flat dispute was totally inappropriate.…"

69. On 11 January 2019, Dr Alonso sent the report to Dr Leaney and wrote as follows:

"I have now had the opportunity to review the report more fully. Having reviewed the evidence, I do not think there is a formal case to answer, however, the report gives me concerns in terms of your judgment in this situation.

"I would like to meet with you next week to explain this in more detail. …"

70. Therefore it is apparent to the reasonable reader that the disciplinary process was going no further, but Dr Alonso had concerns to be resolved informally.

Dr Leaney's reaction

71. On 15 January 2019 Dr Leaney met with Professor Allison to express his concerns about how he perceived Dr Alonso had been treating him. Dr Leaney emailed to himself a note of the meeting shortly afterwards. I have no reason not to accept its accuracy of what was discussed. So far as relevant he said as follows. He emphasised that he had 30 years of unblemished service as Warden. He expressed negative views about Dr Alonso's management style. He went on to describe the situation as being a manufactured situation and that he found the investigative report's conclusion

"slanderous, deeply offensive to me and could not be further from the truth".

72. He said that he was seeking an informal solution but was not going to have his name associated with that conclusion on his University file. He also emphasised how the investigative phase had lasted 33 days and had put him and his wife

"through hell".

73. On 21 January 2019, Dr Alonso chased up Dr Leaney indicating that he was still waiting to discuss the outcome of the disciplinary report. Dr Leaney replied on 23 January 2019 as follows:

"I have decided to submit an informal grievance that follows University Governance (Ordinance XXXVII) and according to section 3.2 this needs to be done with the COO (Richard Taylor). I will be doing that today. Under these circumstances I am sure you will agree with me that for us to meet would be inappropriate."

74. Dr Alonso replied to that indicating that he agreed. Therefore, the meeting that Dr Alonso wanted did not take place.

Dr Leaney submits an informal grievance

75. On 23 January 2019, Dr Leaney submitted the informal grievance to Mr Richard Taylor, the Chief Operating Officer, with the subject "Informal grievance under 3.2 of Ordinance XXXVII". It begins as follows:

"In good faith I would like to raise an informal grievance with you under 3.2 of ordinance XXXVII regarding the way my Warden line manager (Manuel

Alonso) has dealt with me over a self-harming incident in Hazlerigg-Rutland Hall. I wish to use this procedure to seek a resolution of matters affecting my employment as Warden. As we stand there has been a total collapse of trust and confidence between [Dr Alonso] and myself. This has occurred because of the way I have been dealt with by [Dr Alonso]. In dealing with me [Dr Alonso] has been unprofessional, unfair and biased, and a study of the evidence will reveal this.

"My grievance is that a study of all the evidence currently available (some of which is attached to this email) will reveal [Dr Alonso] to have:

"● Demonstrated behaviour that could be regarded as victimisation, bullying and harassment over me - constituting an abuse of power.

"● Brought about a serious breach of trust and confidence.

"● Not followed due process (i.e. that rules, regulations and codes of practice/conduct have not been adhered to).

"● Demonstrated conduct that is detrimental to the interest of the University.

"● Demonstrated an unacceptable standard of performance and behaviour.

"…

"In seeking a 'resolution of matters affecting my employment' all I ask is that the University uses all means available to it to establish the full truth of what happened here. I ask for nothing else. I will fully cooperate with the "University in helping to establish the full truth. Once we can agree that the full truth has come out and been established then I will abide completely and fully with any appropriate outcome the University decides. I will do this without complaint. …"

76. His letter continued to set out the grievance in quite some significant detail, reciting to it the history of the investigation, the delay and Dr Alonso's reply to the outcome of the formal investigation.

77. He made it a point in his grievance that the notes of the interview with Student S are wrong accordingly to Student S themselves and that Student T was interviewed by Ms Truby but notes of Student T are missing from the investigative report.

78. He also pointed out at no time were the allegations ever set out to him, and he did not know what the allegations were against him.

79. He also stressed he had concerns over the future of his job when the report would have been on the file and yet the allegations had not been explained to him in detail.

Mr Euden's informal investigation into the grievance

80. Mr Taylor appointed Mr Chris Euden, who was the London Operations Director, to undertake the first stage investigation.

81. On 1 February 2019, Mr Euden met with Dr Leaney and his wife to discuss his grievance. He also met with Ms Truby as well to discuss the disciplinary

report that had been produced. Though the informal stage in the grievance process, he produced a thorough report He set out his conclusions in correspondence on 7 February 2019 as follows:

"Having reviewed all the available evidence, I believe [Dr Alonso] was within his rights to investigate the events in [Hazlerigg-Rutland] hall following the attempted suicide of student A. Based on the evidence I have seen there was a possibility that best practice had not been followed and therefore the investigation was justified. I therefore have come to the judgement that [Dr Alonso] had prima facie grounds to initiate an investigation.

82. In the report itself, Mr Euden observed as follows:

"The advice that [Dr Alonso] received from Paull Cox-Stone … was that the process should mirror the University disciplinary procedure (Ordinance XXXV). In following this advice some aspects of the procedure could be viewed as either incomplete or confusing, these are:

"1. The email from [Dr Alonso] to [Dr Leaney] (4 Dec 2018) was not clear enough in making the allegation in that it did not explicitly state the following:

"A. Informing [Dr Leaney] of the date/time and place of the alleged incident.

"B. Whether other staff or students were involved.

"It is also not clear as to whether [Dr Leaney] was told that he could be accompanied at any meetings required as part of the investigation.

"2. The investigation report did not follow the recommended format that was provided to [Ms Truby] by Paul Cox-Stone in that it did [not] identify a breach of discipline or clearly establish if [Dr Leaney] was being unfairly singled out. … and did not explicitly or clearly answer some of the questions that the ordinance requires namely:

"A. Identify the alleged breach of discipline, if any.

"B. Establish if the standards of other employees are acceptable or whether this employee is being unfairly singled out.

"C. If the alleged breach of discipline is a result of failure to follow published rules, policies or procedures, establish whether the employee has been made aware of them. …"

He also concluded that Dr Alonso's reply after receiving the report (that he still wanted to meet with Dr Leaney) might well have left Dr Leaney wondering what the outcome would be. He added that, in any event, Dr Alonso was not following the disciplinary procedures by sending the invite.

83. In his conclusions and recommendations, Mr Euden concluded (so far as relevant):

"1. In looking at the grievance I do not believe that [Dr Leaney] has raised it in a vexatious manner.

"…

"4. While the investigation was justified, I do believe that its execution did not follow best practice. The recommended report format was not followed and the allegations against [Dr Leaney] are not sufficiently clear. There were oversights in ensuring that [Dr Leaney] knew he could be accompanied, and the timeline was not made clear to him. The findings of the report were ambiguous and the communication to [Dr Leaney] as to the outcome was not as clear as it could have been. …"

84. Mr Euden then set out some recommendations:

"6. I would like to recommend the following:

"a. Using this report as context, consideration is given to a professionally mediated meeting between [Dr Alonso and Dr Leaney] to reset the relationship.

"…

"e. Staff accused of a breach in discipline must know:

" i. What the alleged breach is

" ii. When it allegedly occurred

" iii. Whom it involved

"Assuming the staff member already knows the full circumstances of a case must be avoided…."

Response to Mr Euden's investigation

85. On 18 February 2019, Mr Taylor asked Dr Alonso if he would agree to the proposed mediation. Dr Alonso did agree to mediation.

86. Dr Leaney did not. On 6 March 2019, Dr Leaney lodged an appeal against the outcome of the grievance and Mr Euden's report. Strictly, following the ordinance, this was not an appeal but a request that Mr Euden's informal outcome proceed to a formal grievance investigation. He attached to his grievance a written statement which provided a fuller account. He wrote:

"… Although I would like to resolve the matter by cooperating with Loughborough University … I have come to the conclusion that a meeting with [Dr Alonso] will not address the matter appropriately because [Dr Alonso] is not in a position to enable my suggested remedy. My trust and confidence in [Dr Alonso] will be restored if [the University] can address the following points:

"1) On the basis of all the actions I followed as Warden I still do not know what I have specifically done wrong. I need to know what specific action is wrong (if any) and what I should have done in the situation I found myself in, as matters arose at the time, in executing my Warden duties through my detailed interactions with the students i.e. with Student X and with [their] flatmates which I was dealing with as two separate matters. To this day nothing specific has been point out to me.

"2) I still need to know what the allegation against me is or was."

"…

"4) I ask to be re-assured that nothing is left in the [University] (personnel) files on me about any unsubstantiated wrong-doing. For example, I request that the summary and conclusion … are removed completely…."

He attached a number of documents in support.

87. On 11 March 2019, Mr Taylor emailed Dr Leaney asking him to meet with Dr Alonso. Although Mr Euden's report had concluded that the University's investigation was defective for never identifying with sufficient clarity the alleged disciplinary incident, Mr Taylor said that in his view those concerns had been set out quite clearly, most recently in an email that he had sent on 26 February. That email was appended to the email of 11 March 2019 and read as follows:

"I've responded to the 'who' raised concerns (the Medical Centre) and the 'when' (23.11.18). The 'what' I've outlined below. More specifically, the concern is that permitting a student with these suggested mental health issues to attend a flat meeting where other students then commented on the student was not appropriate. But the detail of the situation needs to be discussed with [Dr Alonso], face-to-face, to conclude the matter, but we're in danger of not getting to that part of the process."

88. In my view Mr Taylor is quite wrong. The email of 26 February does not set out the 'who': it incorrectly identifies the Medical Centre as being the person who is relevant for this preliminary process whereas in fact it is the incident involving Student X and other students of Student X's flat. The 'when' is wrong because it is not the disclosure of the email that is important for the disciplinary process but the alleged inappropriate meeting in the flat with Student X and Their flatmates. The 'what' is vague and non-specific. In my opinion this demonstrates that Mr Taylor at best had not taken steps to familiarise himself with the subject-matter of the grievance or at worst was indifferent. It shows Mr Taylor had already made up his mind on the issue since he appeared to ignore Mr Euden's clear conclusions about the failures in the process but gives no reason for disregarding them.

Mr Ahlawat's formal grievance investigation

89. On 20 March 2019, Dr Leaney met Ms MacKinlay. She was alive to the fact that Dr Leaney's appeal was not an appeal strictly-speaking, but a request to make the grievance a formal grievance. This shows she was familiar with the University's ordinance on grievances.

90. On 21 March 2019, she sent an email to him confirming the contents of their discussions. I am satisfied that Ms MacKinlay's note of that meeting is sufficiently accurate to rely on. I see Dr Leaney made his own note of it, but her note was not challenged.

91. Thus, on 20 March 2019 she told Dr Leaney that the investigation by Chris Euden was an informal process and was done with the hope of avoiding a formal process. She told him that the University would appoint Mr Vipin Ahlawat, supported by Carolyn Kenney from HR to conduct the formal investigation. She confirmed that if Dr Leaney did not agree with Vipin Ahlawat's investigation, he could at that point appeal and confirmed the

appeal would comprise two senior managers within the University and a lay member of the University's Council. This too reflects the ordinances.

92. On 21 March 2019 Ms MacKinlay told Ms Kenney that Mr Ahlawat was to re-do the investigation formally under the grievance procedure.

93. On 26 March 2019, Ms Kenney emailed Dr Leaney to arrange a meeting with Mr Ahlawat and copied into Dr Leaney's union representative, Dr Jones. Dr Leaney confirmed his attendance and the date it was set was for 3 April 2019 at 4 pm. The day before the meeting, Dr Leaney sent to Ms Kenney a copy of his previous grievance correspondence.

94. The meeting took place as planned and lasted for a duration of 20 minutes. Dr Leaney was accompanied by his trade union representative, Dr Jones. The transcript showed that Dr Leaney went into the detail of what happened in response to questions. He finished by saying that

"[if Dr Alonso] acknowledges his wrongdoing, that's me done. There are other things that will need to be done by someone else"

He then referred to the data sharing arrangements between the medical centre and University.

Afterwards Dr Leaney sent to Mr Ahlawat various documents that he believed were relevant to the issue.

95. On 17 April 2019, Mr Ahlawat met with Dr Alonso. The following exchanges took place during that discussion (page 310):

"[Mr Ahlawat]: Question 2 - Were these safeguarding concerns reported immediately to social services by [Dr Alonso] upon receipt of following all relevant procedures. Is there verifiable evidence of this?

"[Dr Alonso]: This is an irrelevant question in my view. I checked with the Mental Health team that Student X was known to them. I was not dealing with [Nurse Underwood's] email as a safeguarding issue. I was dealing with it as a complaint about a staff member. Our safeguarding responsibilities were already being covered.

"…

"[Mr Ahlawat]: Question 12 - What are (or were) the allegations against me, who made them and when were they made?

"[Dr Alonso]: I accept I should have put the allegation in my first email to [Dr Leaney] however I was trying to keep an open mind and let the investigation establish what had happened. I don't accept that [Dr Leaney] doesn't know what they are or who made them.

"[Mr Ahlawat]: What might be causing the confusion is [Dr Leaney's] belief you received other emails about him.

"[Dr Alonso]: There were no other emails, just the one from [Nurse Underwood] that [Dr Leaney] had already seen. This was the only email in the investigation.

"[Mr Ahlawat]: Question 13 - What is it I have done wrong? It has never been identified.

"[Dr Alonso]: The problem is that [Dr Leaney] refused to sit down with me and discuss my concerns after the [A Truby] investigation.…"

96. On 26 April 2019, Mr Ahlawat provided the outcome of the grievance in a letter addressed to Dr Leaney. He wrote, so far as is relevant as follows:

"Taking each of your statements in turn:

"1. That you have suffered significant mental anguish and your family has suffered emotional distress as a result of Dr Alonso's decision to initiate an investigation in November 2018. …

He wrote that he believed Dr Alonso was obliged to investigate, but that he appeared at the time to be inexperienced of disciplinary matters with Wardens. He continued:

"2. That the reason for the investigation was not made clear to you. I have decided to uphold this aspect of your grievance. Dr Alonso has accepted he should have included the allegation in the letter he gave you in your meeting on 3 December. …

"3. That the investigation phase from 23 November to 11 January was too long. I have decided to uphold this aspect of your grievance. I accept there was adequate time to complete the investigation before the Christmas break …"

"4. The report being erroneous and due to an incorrectly run investigation. I have decided to uphold this aspect of your grievance. [Ms] Truby's investigation and report did not mirror University policy and procedure as per the advice given by the HR Partner. It did not fully establish the facts, beyond that the meeting involving the student and flat mates had taken place, that you were present, and the student's self-harm and suicide attempt were referred to during the meeting. The shortcomings of [Ms] Truby's investigation and report have already been acknowledged by [Mr] Euden in his report.

"5. That the distress was exacerbated by Dr Alonso's failure to follow University policy and procedure, particularly in relation to safeguarding, data protection and the informal stage of your grievance. I have decided not to uphold this aspect of your grievance …"

97. Mr Ahlawat also addressed safeguarding concerns that Dr Leaney raised. He concluded Dr Alonso ensured safeguarding responsibilities were in place before instigating the investigation. He also dealt with the data processing issue of communications from the medical centre to its University.

98. However, Mr Ahlawat did uphold, in part, an allegation that Dr Alonso had made mistakes which contravened data protection policy and, possibly, the law. This is because Ms Truby included the full email from the Nurse in her report.

99. Mr Ahlawat recommended, so far as relevant:

"With your agreement, I would like to share this letter with Richard Taylor including the following recommendations to resolve some of the issues raised in your grievance.

"● Remove Angela Truby's report from the record as not fit for purpose.

"● Arrange separate meetings with Dr Alonso and Angela Truby to clarify how an investigation should be conducted (including the role of HR) and offer formal training.

"● Arrange for the University Information Governance Manager to review personal data sharing arrangements with the Medical Centre and Student Services.

"When we met, you stated that all you wanted to establish was the truth. I hope this letter has clarified what has become a complex and difficult situation for you. It is my belief the errors made by Dr Alonso and Angela Truby were due to lack of experience in disciplinary matters and no malice was intended. Nonetheless, I fully accept the impact events have had on you and have acknowledged this in my findings. As you will continue to be managed by Dr Alonso in your Warden role, I endorse Chris Euden's recommendation of mediation as the most constructive way forward and would urge you to give it serious consideration.

"This concludes Stage 1 of the grievance procedure defined in Ordinance XXXVII. You have right to appeal the outcome if you are not satisfied. You have 21 calendar days from the date on this letter to lodge this in writing with the Director of Human Resources and Organisational Development …"

Dr Leaney's appeal against Mr Ahlawat's conclusions

100. On 13 May 2019, Mr Leaney wrote to Ms MacKinlay lodging his appeal and setting out in a detailed document that followed the reasons for his appeal. Much of it is a recital of the facts to which I have already eluded.

101. On 14 May 2019, Ms MacKinlay replied:

"I acknowledge receipt of your appeal document.

"I understand that the grievance outcome is with our [Chief Operating Officer], Richard Taylor, who needs to determine the next steps. It would be premature, I believe, to entertain an appeal until we understand what action(s) he proposes to take.

"I will be back in touch shortly."

102. Mr Leaney replied to Ms MacKinlay on 17 May 2019. He said he had already waited 17 days for a possible response from Mr Taylor but had heard nothing and therefore that is why he lodged his appeal. He reiterated that he wanted Ms MacKinlay to process it.

103. She replied a couple of hours later, saying:

"Thank you for your note.

"Richard's response will be with you early next week. After digesting Richard's response, should you still wish to lodge an appeal, I will of course accept it.…"

104. On 19 May 2019, Dr Leaney emailed Ms MacKinlay as follows:

"I have, from the very beginning, followed due process to the letter and I continue to do so. On that basis I would like to re-confirm my appeal and ask you to progress it now so we can stick to the timescales specified in Ordinance XXXVII and specifically sections 1.5, 4.2, 4.4, 5.1, 5.2, 5.5(f) and, in particular section 5.3: 'An appeal hearing will be convened to take place within 21 days of receipt of the written statement'… "

105. There is no evidence about why Ms MacKinlay felt that she was justified in departing from the ordinance which she was familiar with. The ordinance provides Dr Leaney had 21 days to appeal from Mr Ahlawat's letter. Mr Ahlawat's report says the same. Ms MacKinlay told him the same at the start. As observed above the processing of an appeal is compulsory.

106. Given she knew the process prescribed by the ordinance, she would have known that what followed was out with the ordinance and was beyond the powers that the ordinance made available to Mr Taylor and Professor Allison. She told me she would have told them of the process and reminded them of what they could do and would have told them if they were acting contrary to the ordinance. I have referred above to the surprising lack of any document showing this is what happened, when compared to the multitudinous documents of detailing every minor interaction. I conclude that she knew of the process, knew when Mr Taylor and Professor Allison were not following the process but she never raised it with them. Instead all the evidence shows she at best went along with their disregard for the ordinance.

Mr Taylor's response to Mr Ahlawat's report

107. On 20 May 2019, Mr Taylor responded to Mr Ahlawat indicating that:

107.1. he had accepted the recommendation that Ms Truby's report is set aside because it is not fit for the purpose intended;

107.2. a meeting with Dr Alonso and Ms Truby be convened to clarify how to conduct an investigation.

107.3. in his view is that the grievance should not have deliberated on the data sharing arrangements in the way that it did and therefore he saw no reason for that to be taken further through the process.

107.4. data breaches and safeguarding matters relating to Dr Alonso in relation to third parties are within his remit and should not be a matter for the grievance appeal panel.

108. Mr Taylor does not set out on what basis he has the right to dictate what Mr Ahlawat should and should not deliberate on, or on what basis the data breaches and safeguarding matters can be withheld from consideration by the appeal panel. The ordinance confers no such power on him or anyone else. From his job he would have known of the existence of the ordinances and should have known of their terms, or at the very least what they might cover – even if he had to look it up or seek advice. In any case he had access to HR advice and to Ms MacKinlay in particular. I conclude that (at best) he was indifferent to the ordinances.

109. Mr Taylor continued:

"I note that you endorse Chris Euden's recommendations of mediation as the most constructive way forwards. My view is that there must now be a mediated meeting convened by Dr Alonso as the responsible line manager, with Dr Leaney that moves the relationship to a tenable and sustainable footing. I will be writing to Dr Alonso and Dr Leaney to inform them of this direction and will identify an appropriate senior colleague to mediate the meeting. I will require that this meeting takes place within the next two weeks, addresses the original matter of concern. I shall not entertain further investigation or deliberation of the issues until this meeting has taken place.

"I now have major concerns about this matter. Dr Leaney has submitted an appeal before I have deliberated on the issues and raises matters which are potentially vexatious against Dr Alonso. I have made numerous reasonable requests to Dr Leaney to meet with Dr Alonso to progress the situation, in line, amongst other things, with Chris Euden's original report. Dr Leaney has not met with his line manager now for six months. Given this, I feel I have no alternative but to refer this matter to Vice-Chancellor under Statute V…."

110. Based on what the ordinances say and the evidence generally I find as a fact:

110.1. Mr Taylor did not have the power to order there be a mediation. Mediation is voluntary. Therefore his requirement it take place was something beyond his powers.

110.2. Mr Taylor is not able to decide if the allegations are vexatious. That is for the investigation or appeal panel. Besides even if they were he had no power to stop an appeal. The ordinance is clear that the remedy for vexatious grievances is subsequent disciplinary proceedings. Mr Taylor also appears to be wilfully ignoring the fact that a lot of Dr Leaney's complaints had been upheld, in particular that the investigative process was flawed. This would have been plain to him so it cannot have been an accidental oversight.

110.3. As for his criticism of Dr Leaney submitting an appeal before he has deliberated, it overlooks (a) the rules that the grievance outcome triggers the time limit for making the appeal, (b) what Ms MacKinlay told him at the start and, (c) Mr Ahlawat's own letter advised him that he had to make an appeal within 21 days.

110.4. I repeat that as chief operating officer and with ready access to HR advice, I conclude that (at best) he was indifferent to the ordinances.

111. On 20 May 2019, Dr Leaney emailed to confirm that he was insisting on his right to an appeal.

112. Despite this Mr Taylor then asked Ms Lamb, the Deputy Director of Human Resources and Organisational Development, to facilitate the mediation between Dr Leaney and Dr Alonso.

113. Mr Taylor then emailed Dr Leaney and Dr Alonso, copying in Ms Lamb and Ms MacKinlay, on 20 May at 16:08. He said, so far as relevant as follows:

"… I have said that "there must now be a mediated meeting convened by Dr Alonso as the responsible line manager, with Dr Leaney, that moves the relationship to a tenable and sustainable footing. I will be writing to Dr Alonso and Dr Leaney to inform them of this direction and will identify an appropriate senior colleague to mediate the meeting. I will require that this meeting takes place within the next two weeks, addresses the original matter of concern.

"…

"[Mr Ahlawat's] report recommends that [Ms Truby's] report is set aside. I fully agree with this recommendation. I think it is also helpful to note, given colleagues now need to meet, that [Dr Alonso] had not intended to take formal action based on [Ms Truby's] report. It is however necessary that the original matters that were disclosed to Student Services, that raised concerns with [Dr Alonso], are discussed between the different parties. Not only do I believe this to be necessary, I also think it is essential in ensuring everyone understands why these were a concern and how we move on in a productive way.

"[Mr Euden] and [Mr Ahlawat] have both recommended that the meeting should be mediated. I have therefore asked Anne Lamb, a senior colleague not previously involved in these deliberations, to fulfil that role.

"As the responsible manager I ask [Dr Alonso] to take the lead in establishing a time for a meeting, noting my requirement that it takes place in the next two weeks. I suggest a small number of alternative times are offered to [Ms Lamb] and [Dr Leaney] and that all reasonable steps are taken to ensure the meeting takes place.…"

114. Ms Lamb contacted Dr Leaney on 20 May to ask if he could give some times for a meeting.

115. Dr Leaney replied that evening to the email indicating that he had appealed, as was within his rights to do so saying:

"I continue to stand ready to cooperate with [Loughborough University] as I have confidence in the governance of [Loughborough University] and I believe trust and confidence can be restored if we follow due process."

I find as a fact that it would be clear that Dr Leaney wanted to pursue his appeal, that he was entitled to insist on that under the ordinance, and he felt that trust and confidence had been damaged if not destroyed by the University.

116. Mr Taylor replied the next day as follows:

"For clarity, are you refusing to participate in my requirement for a mediated meeting (as recommended now by two reports) and/or re-stating your wish to appeal along the lines of the matters dismissed by [Mr Ahlawat's] report?

"The former is unacceptable. The latter I have stated I do not believe constitute appropriate matters for the grievance process as they relate to data and safeguarding issues concerning a third party. However valid or invalid your claims (noting [Mr Ahlawat] formed a view that they were invalid) it is unfair to Dr Alonso for a grievance appeal, brought by yourself,

to be the vehicle for them to be considered. Given my concerns, I have this second matter to the Vice-Chancellor…."

Again, it is quite apparent he had still not had regard to the ordinance itself or sought advice. The fact he made plain this position supports again the fact it is unlikely Ms MacKinlay told him he was acting outside his powers.

117. Dr Leaney replied to that email, which confirmed that he was still seeking to appeal his grievance.

118. Mr Taylor replied on 22 May 2019 as follows:

"Mediated Meeting

"I have now given you a reasonable management instruction to meet with Dr Alonso on multiple occasions. This is the recommendation from two reports including the formal grievance. Whilst other routes may be open to you, the University is under no obligation to wait for those. Not only do I see such a meeting as very important to moving forwards, regardless of the grievance it alarms me that operationally, you are not prepared to meet with your manager. Whilst your correspondence has been perfectly civil, I do not agree that you are co-operating with due process. For the sake of clarity, failure to follow a reasonable management instruction is a disciplinary matter and, if you continue to refuse, I shall ask HR to instigate disciplinary procedures."

119. Dr Leaney replied to that the same day:

"I continue to have trust and confidence in the governance of [Loughborough University] and will continue to follow due process. I am sure I will be advised on that but at some stage I will need to know when the matter is closed as far as the University is concerned as I assume that would be after the decision of the appeal panel.

I also assume we are still following Ordinance XXXVII, and the specified timescales (for now at least) following my appeal document, but thank-you for referring the matter to the [Vice-Chancellor]."

120. Because Dr Leaney declined to mediate, Ms Lamb formally abandoned any attempt to organise a mediation on 22 May 2019.

121. Dr Leaney was concerned about the University's actions and so consulted his trade union representative again, Dr Jones, to enquire about his rights under the ordinance. On 23 May, Dr Jones confirmed to Dr Leaney that in his view:

121.1. the appeal cannot be declined on the grounds given by Mr Taylor,

121.2. Mr Taylor could only take disciplinary action in relation to the grievance appeal, if it was vexatious,

121.3. that disciplinary action could only occur after the appeal was concluded, and

121.4. the instruction to meet with a manager is something that Mr Taylor was entitled to insist upon.

This is all apparent from reading the ordinance and in my opinion Dr Jones's opinion reflected the reality.

122. On 24 May 2019, Dr Leaney emailed Mr Taylor, copying in the Vice-Chancellor Professor Allison and Ms MacKinlay, saying as follows:

"If you have a requirement for me to meet [Dr Alonso] then I will do that.

"However, I am advised that there is no reason why the appeal cannot go ahead and should, therefore, take place according to procedures by a fortnight today (which will be 21 days after the final date I had to lodge my appeal which was 17May 2019). Once the appeal panel has responded I will accept that as the University's final decision and recommendations…."

The fact that Dr Leaney said he was prepared to meet Dr Alonso is indicative of his co-operation and willingness to accept when he was wrong.

Professor Allison's involvement

123. Mr Taylor referred the matter to the Vice-Chancellor. On 25 May 2019 Professor Allison wrote to Dr Leaney and asked him to set out in a brief and succinct way the basis of his appeal.

124. On 30 May 2019, Dr Leaney replied. However, that clarification was such that Professor Allison was still unclear as to the grounds for appeal. This is not surprising because Dr Leaney's document could not be fairly described as brief and succinct.

125. Therefore, on 31 May 2019, Professor Allison again asked for clarification and specifically asked Dr Leaney to set out:

125.1. the parts of any policy that he believed had not been followed,

125.2. especially those parts from which the failure to follow meant the University had denied Dr Leaney the opportunity for him to account for himself, clear his name and be exonerated.

126. Dr Leaney replied on 3 June 2019:

"… my appeal is based on two grounds of not following [Loughborough University] policy and procedure on (1) safeguarding and (2) data protection. However item 1) dominates my mind.

"1. The most clear-cut statement of the safeguarding policy document you sent me … "The duty to investigate suspected abuse or harm rests with statutory services: primarily Social Care Services and the Police. Under no circumstances should a member of University staff attempt to investigate suspected abuse or harm". This is exactly what [Dr Alonso] … did - he undertook an investigation into me. However, the investigation into me should have been overseen by Social Services.

"2. [Dr Alonso] received an email from Nurse Underdown … which I refer to as NHS data. He should not have received this NHS data (data that identified me and a vulnerable student) as Nurse Underdown should have report this to her clinical lead. However, [Dr Alonso] did receive this NHS data so he had a responsibility to take the appropriate action. Any use of this confidential data by [Dr Alonso] needs to have a 'lawful basis'. When [Dr Alonso] initiated an investigation into me, based on the that

confidential data, he was breaking [University] policy and procedures on data protection as that data was now being disseminated within [Loughborough University] without a lawful basis. I know it has been suggested to me that 'legitimate interest' applies but this is erroneous as the [Loughborough University] investigation into me was not 'absolutely essential' or 'necessary' as there was a much more appropriate basis for [Dr Alonso] to address the concerns reported to him in the NHS account of my behaviour that he received…"

He then went on to set out more detail and recount the history, which I have already alluded to.

No attempt to arrange a panel to hear the appeal

127. Ms MacKinlay told me she had taken steps to organise an appeal panel. She told me that the Vice-Chancellor's office would take charge of organising and liaising with the lay members to make up the panel.

128. The bundle contains no evidence that any steps were ever taken to formally organise an appeal panel. If the University had taken steps, whether through both Ms MacKinlay or the Vice-Chancellor's office to arrange one, then I would expect to have seen emails at least from Ms MacKinlay to the Vice-Chancellor's Office to start making the arrangements. Ms MacKinlay explained that the details may be held by the Vice-Chancellor's office. That explanation is speculative. Even if it is correct, the Vice-Chancellor's office is of course part of the University and this is a claim against the University, not a particular section of it. It also does not explain why emails from her showing the commencement of arrangements were not available – particularly when set against the significant number of emails in the bundle that were authored by Ms MacKinlay.

129. In my view the lack of any emails and vague evidence about what steps had been taken to organise an appeal panel to hear Dr Leaney's appeal leads me to conclude that in fact no steps were taken by the University to organise an appeal panel to hear Dr Leaney's appeal.

130. I have mentioned it at this point in the history for convenience. However I want to emphasise that the University never at any time attempted to convene an appeal panel.

Dr Leaney's resignation as Warden

131. No appeal was convened, however. On 7 June 2019 Dr Leaney wrote to Ms MacKinlay, copying in Professor Allison, resigning as Warden. He wrote as follows:

"…

"I lodged an appeal with you on 13May19 (well in advance of my appeal deadline of 17May19) against the outcome of my grievance. Since submitting my appeal I have been consistent in explaining the need for my appeal to go ahead. Today is 21 days from 17May19 and the evident situation is that an appeal panel has not be convened despite my reasonable expectations from Ordinance XXXVII.

"It is clear to me that I do not attract the confidence of the relevant [Loughborough University] authorities in my role as Warden. This puts me in an untenable position so I am compelled to resign my Warden office. I will, of course, work out my notice period.

"Up until 3Dec18 I had always enjoyed being a Warden and I like to think I have played a small part in contributing to the 'Loughborough Experience' for many students over many decades.

"I have been committed to following due process, for just over 6 months now, which has been a very difficult period for me and my family. I now regard myself as having exhausted the internal [University] processes. I have done my best but I genuinely do not understand why the University cannot accept the case I am making about flaws within the system that leave Wardens (and subWardens) unsupported and exposed. It is with some sadness that I am resigning my Warden office, but I have no alternative.…"

132. Ms MacKinlay acknowledged receipt of the resignation and said that she would provide a more substantive response to it at a later date.

The University's response to the resignation

133. After learning of Dr Leaney's resignation, Professor Allison prepared a document and sent it through to HR entitled

"Dr Paul Leaney's position as Warden of Hazlerigg-Rutland and John Phillips Halls".

In it he wrote:

"Paul Leaney has given me concerns for some time.

"His approach to being a Warden and setting an example to students at times does not meet expectations. Two examples are standing on chairs to address groups of students / guests and some of the drinking games he allows to be played on high table evenings.

"Paul's opinion is that he is a critical friend to the students. This is not the role of a Warden. Paul should be a leadership figure, setting standards and ensuring good behaviour.

"Paul is fundamentally wrong in his approach to dealing with [Student X] that has led us to this point but even more worryingly at no point has he been willing to acknowledge the same.

"Paul has refused to follow a reasonable management instruction to meet with his line manager. This includes a management instruction from the COO [Mr Taylor], one of the most senior members of staff. When he did agree to meet, shortly before the meeting he laid down conditions that meant mediation would have been impossible - in other words by setting conditions Paul effectively cancelled the meeting.

"Paul does not accept [Dr Alonso] has the right to line manage him. Paul is of the view that as Warden he is, in effect, autonomous. This is despite having a contract of employment as Warden which can reasonably expect him to follow a line management structure and be line managed.

"…

"In writing his letter of resignation Paul Leaney is correct. The University no longer has any confidence in him and he should be removed as Warden [of both halls] with immediate effect."

134. None of these allegations are supported by any investigation. None of the allegations have been put to Dr Leaney or raised with him informally. As noted there is no disciplinary record that supports any of these allegations. The only investigation is the flawed one that Ms Truby conducted. Therefore, the phrases

"given me concerns for some time";

"does not meet expectations";

"[that he was] fundamentally wrong in his approach", and

"refused to follow a reasonable management instruction"

are completely contrary to all of the objective evidence. In short, the statement is unsupportable. It also fails to take into account that mediation is not something that the University has the power to force Dr Leaney to undertake. Therefore when it says that he has refused to follow a reasonable management instruction, it does not properly account for the fact that the management instruction was not reasonable or one that could be given in any event.

135. On 12 June 2019, Ms MacKinlay sent the letter to Ms Jane Byford, solicitor, at the VWV Solicitors. She asked Ms Byford to draft a letter to send to Dr Leaney to confirm the details of his resignation. Ms MacKinlay also included some other documentation that is not in the bundle but there is no suggestion that there was anything controversial about that documentation. Ms Byford produced a draft letter and sent it to the University for Ms MacKinlay to read and consider. I should indicate there is no suggestion that Ms Byford has done anything improper or acted beyond her instructions in drafting the letter of resignation. Indeed, given the information she was provided with by Ms MacKinlay, it seems that Ms Byford could only have drafted a letter of the type that she sent to Ms MacKinlay for approval and sending out. That letter is dated 21 June 2019 and signed by Ms MacKinlay.

136. Ms MacKinlay initially told me in evidence that she had written and that she had signed it because it reflected her views. However, under cross-examination and being shown the document from Professor Allison and the email to Ms Byford, she accepted that in fact this letter was something that had been written by a solicitor and she had simply put her name to it. AS I noted above it undermines her evidence that she did not remember instructing solicitors to write such a significant document. The letter is more or less word for word what Professor Allison says. It reads as follows:

"The University has had concerns for some time about your approach to the role of Warden, in particular that you have not been meeting the University's expectations in terms of setting an example to students and being a leadership figure who sets appropriate standards and ensures good behaviour from students. As a result of these concerns, [Dr Alonso], who

has responsibility for Wardens at Loughborough, proposed to meet with you to discuss his concerns. You subsequently submitted a grievance before this meeting could take place. The outcome of the grievance was a recommendation to have a mediated conversation with Dr Alonso. Mr Taylor consequently requested that you meet with Dr Alonso to discuss the situation and try to find a way forward. However, you refused to accept this reasonable instruction of Mr Taylor to meet with Dr Alonso and when you did eventually agree to meet, you set down conditions prior to any such meeting which meant that any kind of mediation would have been impossible.

"Your appeal raised several complex issues and resulted in the unprecedented step of the [chief operating officer] referring the matter to the Vice-Chancellor under Statute V. As a result, the Vice-Chancellor wrote to you asking for clarification of your grounds of appeal, with your reply raising further issues which you were asked to clarify. This resulted in a delay in responding to your appeal but in the circumstances, this was entirely reasonable and fair. In the meantime, you chose to speak publicly about your issues with Dr Alonso and Mr Taylor, in front of students, which was entirely inappropriate, further calling into question the trust and confidence the University has in you being able to carry out your role as Warden of Rigg-Rut.

"Your resignation as Warden […] is accepted. The University will not require you to carry out any of your duties as Warden between now and the termination of your role on 13 December 2019, although you will continue to receive your allowance during this period. As you occupy [the Warden's lodge] in order to fulfil your role as Warden, you and your family are required to vacate these premises by 13 December 2019."

137. Because this letter is more or less lifted from Professor Allison's letter, it has the same problems. However it has the extra difficulty that it would be placed on Dr Leaney's personnel record so that in future should the University ever need to look at past issues, it would be there for anyone and everyone to read.

138. It is in my view an unreasonable letter and should never have been written. Ms MacKinlay should not have signed it. It does not stand up to scrutiny against the facts of this case.

Further contact with Professor Allison

139. On 1 October 2019, Professor Allison, through his personal assistant, contacted Dr Leaney saying that he would personally like to do something to recognise his contribution to the University as the Hall Warden and that he would like to speak to Dr Leaney by telephone. Dr Leaney replied saying that he kindly accepted the invitation.

140. However, Dr Leaney was concerned about:

140.1. the issues that had been raised surrounding Student X;

140.2. Ms MacKinlay's letter was now on his personnel record; and

140.3. the lack of progress had been made in his appeal.

141. He became concerned about what he described as his safety in the work environment. What he meant by this was as follows. As a teacher at the University, he would be working alongside students continuously teaching them, assessing them, helping them to understand the topics on the degree for which they are reading and so forth. He felt vulnerable because of how the issues raised by Student X with Nurse Underdown had been handled by the University. He worried that any student in future could raise the allegations of a like nature and he would be unsupported by the University. He also worried that the flawed report of Ms Truby report was still on his file. Therefore he was concerned that he would be vulnerable in the work he did with students.

142. He therefore contacted Professor Allison and asked for a personal, private and confidential chat between himself, Professor Allison and Dr Leaney's wife. The meeting took place. He showed the letter of 21 June 2019 to Professor Allison but did not ask Professor Allison to take any further action. Nothing else of consequence appears to have happened at that meeting.

143. On 21 November 2019, Professor Allison hosted a meal attended by Dr Leaney and his wife and other friends of Dr Leaney as a thank you for the years of service as Hall Warden.

144. At around this time in the background and unknown to Dr Leaney, the University was undertaking various enquiries in relation to data protection issues that Dr Leaney had raised. Dr Leaney gave me a lot of detail about these matters in his evidence. But he did not know of them at the time. They cannot therefore have been on his mind. They cannot therefore possibly affect the question of whether or not there has been a fundamental breach of contract. They are therefore irrelevant and I consider them no further.

Dr Leaney's response to the letter acknowledging his resignation

145. There appears to be a gap until 4 January 2020 in which nothing of relevance happened. On 4 January 2020 Dr Leaney emailed Ms MacKinlay to contest the contents of her letter of 21 June 2019. Explaining the delay he wrote as follows:

> "I am responding to your letter to me dated 21Jun19. As required, I have now vacated the premises at [the Warden's Lodge]. I have had to buy a new house and move, after twenty years in [the Lodge], and done so in a relatively short space of time. I have, therefore, been somewhat preoccupied and unable to focus on much other than my academic work commitment, moving home and managing personal commitments including those to my large (and active) family. However, I now feel able to respond to your letter dated … which caused me a great deal of upset. I had no idea that the University had concerns that I had not been setting appropriate standards and ensuring good behaviour from students.…"

146. I do appreciate that moving house and finding somewhere to live, plus work commitments, can be very demanding. However, I am not persuaded by that, or anything he said in cross-examination, that that in and of itself justifies a delay of just under six months. I accept that Dr Leaney was disturbed by the letter: He raised it after all with Dr Allison. However it

seems to me that he was perfectly able, if he wished to, to have responded more quickly.

147. The letter set out some of the history and repeated his reasons for declining mediation but in particular he wrote as follows:

"The appeal I submitted was very important to me. I had at no point been given the opportunity to defend myself or explain my decision to anyone at Loughborough University. No one ever looked at my emails which clearly documented every stage of my dealings with [Student X] and the other students in [their] flat. The appeal was the only platform that I had to put my case forward and defend myself. I have sought detailed scrutiny of my actions, but this has not happened."

148. He said that he believed that Mr Taylor had wanted to stop the appeal going ahead because he did not want Dr Leaney to bring up issues of safeguarding or data protection on the basis that it was unfair to Dr Alonso. He reiterated his view that Mr Taylor did not have the right to prevent the appeal happening and that if Mr Taylor had felt it was vexatious, he should have made that point to the appeal panel or start disciplinary proceedings after the appeal, if the panel had so determined that it was vexatious. He added:

"… By the time it became clear that the appeal was not going to happen within the time limit I was in no fit mental state to continue and realising that the University could not be held to account for its own ordinances, I resigned on 07Jun19. I felt I had no alternative.

"…

"I then receive a letter from you (dated 21Jun19) stating that the University had other concerns completely unrelated to the appeal. I am, therefore, asking you to supply me with all the evidence of the concerns you said the University had about me with particular reference to the times when I have not met the Universities expectations of setting an example to students and being a leadership figure who sets appropriate standards and ensures good behaviour from students. I maintain that I have always followed University policy and procedures in representing the University's interests in executing my role as Warden. I will defend myself robustly, with evidence, in that regard.

"I would ask you to tell me why the University has at no point informed me of the concerns you state in your letter … at any point over the past 23 years and therefore not given me the opportunity to account for myself? I have not completed a PDR [practice development review] in my role as Warden since [Dr Alonso] took over the management of the Wardens' service and this should surely have been an obvious platform for the University to share their concerns with me? Why was I not offered that opportunity? At no stage was I informed that the University had concerns about me. I have always regarded myself as completely and totally accountable to the University in my role as Warden.

"I would like this information [by 17 January 2020]… as soon as possible as it concerns me that information regarding unproven concerns about my ability to carry out my role is being collected, and stored without my

knowledge and, presumably, over a long period of time as you state 'the University has had concerns for some time'. This statement of yours makes your letter sound more like a dismissal letter rather than a letter accepting my resignation."

149. It was suggested that this could have been treated as a grievance. Ms MacKinlay accepted that a grievance does not have to be entitled 'grievance', for example, or be on a particular form – it is about the substance. Clearly in this letter, Dr Leaney is raising a significant number of concerns about the contents of the resignation letter and the allegations within it. In the circumstance I conclude that Ms MacKinlay did not give this full consideration or think about whether and how it should progress.

The University suggests "drawing a line under matters"

150. On 21 January 2020, Ms MacKinlay confirmed that she had received the letter. She understood some correspondence had been sent to Professor Allison and therefore she needed to speak to him before responding.

151. On 28 January 2020, Ms MacKinlay provided a more substantive response:

"I have reflected significantly on your detailed email of 04 January 2020 over the course of the last few weeks, and consulted with the respected senior members of my team to whom you refer and who are copied here.

"Firstly, and most importantly, I am sorry that you have experienced distress in the months leading up to your resignation as Warden and subsequently during your family home move. I am also sorry that my letter of 21 June 2019 caused you upset.

"I believe that the issues which [Dr Alonso] had with your Wardenship are known, if not accepted, by yourself, and that there were multiple opportunities to discuss them with him, either with or without mediation. We are now some six months after your resignation as Warden and I do not believe reopening dialogue at this point in time is appropriate; the time to discuss your role as Warden has passed.

"I hope that we may now be able to draw a line under the matter."

152. Considering what Ms MacKinlay has said and all the circumstances above, it is not obvious what the issues are that Dr Alonso had with Dr Leaney's Wardenship. The fact that Ms MacKinlay does not herself spell it out is telling. It is contrary to the findings of Mr Euden's report and Mr Ahlawat's report. Overall I am left with the impression that Ms MacKinlay was simply trying to impede Dr Leaney and bring the appeal to an end. She knew of the ordinances and was not following them. It is clear her superiors had not followed them. She did not tell them of their errors. In my view she was simply seeking to shut down any suggestion this appeal might need to continue.

153. Dr Leaney replied to that the same day:

"Thank-you for letting me know where you, and some senior managers, stand on the matter.

"I have never been told what the issues are with me and there is no basis for your comments in your letter to me dated 21June19.

"I have never refused to meet [Dr Alonso], in his role as my manager, over any Warden operational matter.

"I am sorry that the matter seems to have taken up your time and required your significant reflection. I note your desire to close down the dialogue. For that reason I will endeavour not to bother you further…."

154. On 14 February 2020, Dr Leaney met with the Vice-Chancellor, Professor Allison, to discuss his grievance and to explain his concerns. The next day, he delivered to Professor Allison a significant number of documents that related to the grievance. Professor Allison passed these to Ms MacKinlay.

155. Ms MacKinlay does not reply until 27 April 2020 when she wrote:

"Prior to lock-down [which started in late March 2020] and the Easter break, you delivered a file of documents to the Vice-Chancellor's office which I understand to be the full suite of emails and other correspondence associated with the last year of your tenure as Warden and the various issues that were raised by both yourself and the University during that period.

"The Vice-Chancellor and I have spoken, and again, in line with my email dated 28 January 2020, I confirm that the University has no desire to reopen a dialogue into the matters raised by both parties. I would encourage you to draw a line under the events of last year so that you and your family can move on."

Dr Leaney withdraws his appeal

156. Dr Leaney replied on 4 May 2020:

"I would obviously like to draw a line under the events of the last year or so and I wish to reassure you that I will do that, despite it being a difficult thing for me to do.

"It is a difficult thing for me to do because [Student X] is still at the University and I am still vulnerable because [Student X] has not drawn a line under it. Over the past few weeks [Student X] has written a series of 25 articles which were published on the Facebook page [redacted by me pursuant to the anonymity order]. These articles, made publicly available worldwide, cover all [Student X's] mental health issues and both [Student X's] attempted suicides - and although [Student X] doesn't mention me at all, the University's later support for [them] does not come out very well. I am not a regular user of social media but after a number of people pointed them out to me I decided to have a look and I was shocked at what I was reading.

Next time, however, it could be about me and while the articles are clearly the thoughts of a deeply disturbed person (for whatever reason) they could well lead to undeserved reputational damage or worse. This damage could also apply to anyone around Student X as making false allegations is a pattern of behaviour by [them]."

He reiterated that he had worked at Loughborough University for 41 years as an academic and as a Warden and, until this incident, he never received any complaints from the University in any of those roles. He finished as follows:

"Just to confirm that, yes, I agree the time has come to end the dialogue between me and the University on the matter and for me to draw a line under the matter. I do this in the belief that [the University] now have a good handle on the situation surround (sic) [Student X] and that all relevant parties will now be protected by [the University] acting appropriately, including any affected students and staff in contact with [Student X]."

He copied it to the Vice-Chancellor, Professor Allison.

157. Whether or not Dr Leaney's of 28 January 2020 was the withdrawal of the appeal (there was argument about the use of the word "endeavour"), the last paragraph in my view makes it very clear to a reasonable reader that Dr Leaney has decided not to pursue the matter further, and instead put the matter behind him. Dr Leaney told me in his evidence-in-chief that what he meant by that phrase was that he could go no further than he already had with the University directly himself and so any direct dialogue had now ended. He described it as a steppingstone in the process that culminated in his decision to resign. But whatever his intention behind the words, one has to interpret them as to what they would mean to the reasonable reader, since of course the reader has no idea what is going through the writer's mind.

158. Dr Leaney told me in his evidence that the period following after he wrote that letter through to the end of June are the busiest periods of the year for him as both lecturer and as Director of Undergraduate Studies. That is because of the student assessments and quality assurance processes that take place at the end of the academic teaching year. He indicated that he needed to concentrate on that before he could find the "head space" to consider how to respond to the question of where he went from Ms MacKinlay's correspondence of 4 May. I accept this as accurate.

159. Because of the University's refusal to allow the appeal to proceed and obstructive attitude, it is no wonder he withdrew his appeal. I find as a fact he was presented with "Hobson's choice": withdraw or keep battling to pursue the appeal which Mr Taylor was refusing to allow to proceed and Ms MacKinlay was content to allow to be stalled also. I believe also that his phrase:

"I note your desire to close down the dialogue. For that reason I will endeavour not to bother you further…."

160. That he wrote on 28 January 2020 shows he felt that the University was trying to block progress. Based on the objective evidence I have seen, I agree that was correct.

Findings of fact about the appeal process

161. Based on the above I find as a fact that:

161.1. Mr Taylor decided that he was not going to allow an appeal to proceed. This is demonstrated in summary by his insistence on mediation, assertion that Dr Leaney was being potentially vexatious towards Dr Alonso, failure to abide by the ordinances and failure to direct that an appeal panel be convened. I also believe the tenor of his letters can be described as written in such

a way to dissuade Dr Leaney from exercising his right to appeal. He was, in summary, unjustifiably obstructive.

161.2. Ms MacKinlay took no steps to convene an appeal panel. Given Dr Leaney had plainly appealed, and Mr Taylor was not going to allow it to proceed, Ms MacKinlay was merely giving effect to her manager's wish.

161.3. Ms MacKinlay never told anyone senior to her that they were acting contrary to the ordinances. If she genuinely were concerned about that possibility and sought to have the University follow its own procedures correctly, she would have raised it. There is no evidence that she was unable to do so for whatever reason.

161.4. If the University were concerned to ensure the claimant had his appeal, then they would have advised Professor Allison of the claimant's right and, rather than asking him to involve himself as Mr Taylor did, they would instead have advised him of the need to source a lay member for the appeal panel.

162. Therefore I find as a fact the University acted as it did to stop Dr Leaney's right to an appeal against the outcome of the grievance set out in Mr Ahlawat's report. I do not need to decide if it were deliberate disregard for his rights or merely a complete unawareness of them.

Meeting with Professor Conway

163. On 28 June 2020, Dr Leaney sent an email to Professor Conway asking to talk to him. It is therefore quite apparent that the 28 June must be the point at which he gained the "head space" to be able to consider how to proceed further. He asked to have a conversation with him because he felt unsafe in his work and his ability to work effectively was very likely to become obvious. He also said that the Covid situation also complicated things. The topics shows that Dr Leaney had decided he did not want to draw a line under matters after all.

164. They had a meeting on 29 June by Microsoft Teams. He also prepared a note that he emailed to Professor Conway setting out in summary his concerns. These were that the University had not protected him from allegations from the University Medical Centre made by a student patient under treatment from the NHS for mental health purposes. He also said:

2) …[We] have the Covid situation to deal with - and all this is in additional strain on everyone. However I list specifically the items of extra strain on me … a) I am at a vulnerable age for Covid at 65 … b) Added strain - of dealing with remote learning arrangements. … c) Added strain - of dropping [certain] resources …"

"Also added strain in relation to one of the modules, which was proving to be too challenging and his teaching load has doubled despite the fact that he has reduced his working hours as he approached retirement.

"…

"The key reason for me is Reason 1 [that is the not protecting him] above as all the matters in Reason 2 could have been negotiated one way or another. Nevertheless taking all the above into account I feel my work position is becoming untenable.

"I see myself needing to retire before my planned dated of 30Sept21 and I need to discuss this with you and seek your support for an appropriate way of dealing with my situation. Whatever happens I am committed to seeking out my obligations for 19/20 academic year up-to 30Sept20 at least."

165. That date in September 2020 of course is very close to the date that he actually resigned, the 28 September 2020. It seems to be the reasonable inference that can be drawn from this email 29 June 2020 is that Dr Leaney was already considering the possibility of resigning or retiring early because of the pressure caused by his concerns about the Student X incident and the effects of Covid and the increase in workload upon him.

166. At the conversation, Dr Leaney and Professor Conway talked at some length about how the School could help him in relation to the second point, namely the work detail, and Professor Conway said he could make some mitigating arrangements.

167. As for item number 1 (the Student X incident), Professor Conway said it was something that had been referred back to University management because it was beyond Professor Conway's competence to deal with it because he was not Dr Leaney's employer, or line manager in that regard.

Dr Leaney's state of mind after the meeting with Professor Conway

168. Dr Leaney says he realised at this point the University was not going to help him. I accept he decided that there was no point returning the University about the issue. That is inherently plausible, especially when one considers how the University obstructed his appeal.

Dr Leaney's actions after the meeting

169. Dr Leaney contacted a solicitor on 1 July 2020 to take advice. He told me he followed advice that he was given. I was given no reason to doubt the advice was not competent and did not cover the various options and risks that might result from taking a particular option.

170. He says that there were disruptions caused by holidays but there was contact between his solicitor and the University from about 1 July 2020 onwards.

171. I was presented with no evidence that he continued to work under protest, yet alone that he told the University that he worked under protest from this point.

172. He told me that his solicitors and the University negotiated, but about what and to what end I do not know. None of the documents are in the bundle and there is no oral evidence on it.

173. Nothing came from the negotiations. That was for him the final straw and he pinned that final straw as occurring on 7 September 2020.

174. He described the situation in his mind as follows in his evidence in chief, which I accept as accurate:

> "After all I had been though, I felt bereft of any support from my employer and after 40 years of successfully working with students, and fellow academic staff members, I had lost trust and confidence in my employer. With things gearing up with start of the new academic year I became more and more anxious about having to deal with students and contacted my (new) GP practice. My GP signed me off sick from 10th September 2020, with work stress and anxiety … This was my first day off sick ever, in over 40 years continuous employment
>
> "…
>
> "Having never been off sick at all in 40 years it just felt wrong to me, it did not feel that was the right thing to do, and it was solving nothing. The University never made any real effort to address the issues I was trying to raise and, in fact, blocked me at every stage possible causing the matter to be dragged out over a protracted period of time. The breakdown with my employer seemed complete and I had no alternative but to tender my resignation which I did by email on 28th September 2020 17:23. … In that email I precis what I have been put through by my employer from December 2018 to September 2020. On 30th September 2020 …[Ms MacKinlay] writes to me an email acknowledging my resignation."

Dr Leaney's resignation

175. As set out above, Dr Leaney resigned on 28 September 2020. His resignation email set out what had caused him to resign. In my view nothing turns on the contents of that email.

176. He resigned on notice. The leaving date was set as 31 December 2020.

Finding of fact about the last act and reason for delay

177. The difficulty for the Tribunal is that there is no evidence of what was discussed between the parties during the negotiations from 1 July 2020 to 7 September 2020. However it means I have nothing to enable me to understand what it was (or when whatever it was occurred) that led to him on 7 September 2020 considering that it was the last straw and that nothing would change. I do not consider his evidence in chief addresses that point.

178. I make no criticism of Mr Leaney not disclosing to me the advice given to him by his solicitor. He is entitled to withhold it. However absent any evidence I must assume he was advised reasonably competently and was aware of the risks of the choices available to him.

179. I can only work on the assumption that Dr Leaney was not given any misleading impression that issues would have been resolved by the University or that it acted in an underhand manner, because there is no evidence to point to an opposite conclusion and it seems to me that in such circumstances it is only proper to work on the assumption that the University was not misleading.

180. What is a clear fact is that on 29 June 2020 he was told by Professor Conway that he could not help him in relation to the matters arising from the incident with Student X.

181. Therefore, when Dr Leaney says it was 7 September 2020 that was the final straw, there is nothing in the evidence I have seen that justifies that assertion.

182. It seems to me that the point at which he knew that things were not going to get better must have been 29 June 2020. He knew the University was not going to do anything. That is supported also by the fact that Dr Leaney at that point felt that he had no choice but to involve external help. Therefore, the last act that can be relevant in my view is 29 June 2020.

183. I find as a fact that Dr Leaney had responsibilities to the University and other students up to about 29 June 2020 because of the positions of responsibility that he held. That is inherently plausible, tallies with his own credible evidence on the issue and there is no evidence that gives me cause for doubt. I accept and find that if he resigned before that date, there would be an adverse impact on the students, the School and the University generally. The students would in particular suffer at a time when they are completing work or exams for assessment which will affect the grade for their ultimate qualification. It was reasonable for him to put that first and to focus on it, rather than on his own dispute.

184. However from 29 June or thereabouts those responsibilities had reduced, if not gone. There is of course a summer vacation when students are gone. I heard no evidence on this but believe it is not going too far to recognise he would still be working during the summer. However I have no evidence to suggest that his responsibilities were such that he could not resign from 29 June 2020 without causing unfair and damaging disruption to others e.g. to students.

185. It also clear that Dr Leaney realised resignation was now a step he needed to consider taking. I come to this conclusion because he wrote to Professor Conway:

"Whatever happens I am committed to seeking out my obligations for 19/20 academic year up-to 30Sept20 at least."

I remarked on the proximity of that date to his actual resignation. While I doubt it is a coincidence, I do not think it matters and so make no decision on whether it was or was not. What is relevant is this: In my view it shows termination of employment was on his mind at that date. This shows in turn he knew he could resign now. Nothing Professor Conway said changed anything.

186. I mention his impending retirement. I accept Dr Leaney's evidence that he would not have resigned at this time if there had not been the issues with his grievance and the attempt to appeal, which I have described above. While he was close to retirement. I see no evidence that suggests he intended to bring it forward in any event and use these events as a cover or excuse to do so.

No evidence of continues working under protest

187. Dr Leaney may have instructed solicitors on 1 July 2020 but it does not follow that he therefore continued to work under protest. Employees often instruct solicitors over disputes but are not continuing their employment under protest. There needs to be something to show it was the case. I also reflect on the fact that at no point in the prior events (such as the blocking of his appeal) did he say to the University that he was working under protest. On balance I am satisfied that he did not work under protest from 29 June 2020, alternatively that if he did, he did not disclose it to his employer.

Law

188. I have been referred to a number of cases but I cite here only those which I believe are necessary to understand my decision.

Statute

189. The **Employment Rights Act 1996 section 95** provides so far as relevant:

"(1) For the purposes of this Part an employee is dismissed by his employer if (and, …, only if):…

"(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

190. **Section 98** requires any dismissal to be for a potentially fair reason and, if it is, for fairness to be determined in accordance with the equity and substantial merits of the case (having regard to the size and administrative resources of the employer)

191. **Section 111** entitles a claimant to bring a claim for unfair dismissal.

Case law

192. In **Western Excavating (ECC) Ltd v Sharp [1978] QB 761 EWCA** Lord Denning MR said that:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

Implied term of trust and confidence

193. In every employment contract there is a term implied that the employer shall not without reasonable and proper cause conduct itself in manner

calculated to or likely to destroy or seriously damage relation of confidence and trust between the employer and employee: **Omilaju v Waltham Forest LBC No2 [2005] ICR 481 EWCA**.

194. A breach of the implied term is by very nature repudiatory: **Kaur** and **Morrow v Safeway Stores [2002] IRLR 9 EAT**. While bad practice by an employer is a factor to consider, it is not enough by itself to amount to a fundamental breach.

195. In **Omilaju** the court of appeal gave tribunals guidance about factors to consider when there are a series of acts and an employee alleges the final act in that series caused the employee to quit (what is called the final straw)

195.1. The final act should be an act in a series whose cumulative effect is to amount to a breach of the implied term.

195.2. "an act in a series" means, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

195.3. It need not be of the same character as preceding acts.

Remedy of the breach

196. Once there is a repudiatory breach, it cannot be remedied: **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 EWCA**.

Role in resignation

197. A fundamental breach must play a part in resignation but need not be only or effective cause: **Wright v N Ayrshire Council [2014] ICR 77 EAT**.

Key questions

198. In **Kaur** the Court set out five questions the Tribunal should ask in a case for constructive unfair dismissal

198.1. What was most recent act (or omission) that triggered or caused the employee to resign?

198.2. Has the employee affirmed the contract since that act?

198.3. If no, was the act or omission itself a repudiatory breach?

198.4. If no, was it part of a course of conduct which taken together amount to breach of implied term of trust and confidence?

198.5. If yes to either of the preceding questions, did the employee resign in response to that breach?

Affirmation

199. A person must make up his mind soon after the conduct of which he complains about occurred (**Buckland**) although given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there has really been an affirmation. In **Buckland** for example, the fact that the claimant was a lecturer who has

responsibilities to students which he believed he had to honour until the end of term was itself a factor that pointed towards the conclusion his continued employment was not affirmed by a delay while he discharged those responsibilities. Mere delay by itself did not constitute an affirmation of the contract, but if the delay went on for too long it could be very persuasive evidence of an affirmation: **WE Cox Toner (International) Ltd v Crook [1981] ICR 823 EAT**.

200. It is only affirmation after last act that matters because previous breaches can be taken into account even if after those previous breaches the employee affirmed the contract affirmed: **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1 EWCA**.

Objective assessment

201. The Tribunal must assess the matter objectively. The motives of the parties or their subjective intentions are irrelevant: **Leeds Dental Team v Rose [2014] ICR 94 EAT**.

Conclusions

What was most recent act (or omission) that triggered or caused Dr Leaney to resign?

202. Based on my findings of fact, the most recent event that triggered or caused Dr Leaney to resign was when Professor Conway told him he could not do anything about the things arising from the grievance or attempted appeal which arose out the incident with Student X.

203. Therefore the date of the last event is 29 June 2020.

204. It does not matter at this point if it is a breach of the implied term or not.

Has the employee affirmed the contract since that act?

205. Based on my findings of fact, I conclude that Dr Leaney affirmed his contract of employment after this event. My reasons are as follows:

206. Firstly as I set out in my findings of fact I do not accept that the conversations between him and the University through his lawyers from July through to the start of September are relevant. I have no evidence about what was discussed or about the nature of the communications. As I set out above, there is no evidence that the University misled Dr Leaney in some way to cause him to postpone his resignation or decision to resign.

207. In any case I do not accept that the fact that there may be negotiations ongoing alleviates Dr Leaney of what might be described as the obligation to make up his mind. On 29 June he knew he was out of options: The University clearly was not going to take the matter forward and Professor Conway could not help him. He had all the relevant information to enable him to be aware of the situation. He knew how head been treated. He had also received legal advice from 1 July or thereabouts. I am entitled to assume that the advice he received was competent and he was aware of the choices he had to make and the legal consequences and risks of making a choice. I make this assumption because I have heard no evidence to suggest otherwise.

208. I also reflect on the fact that delay itself must be seen in context , as pointed out in **Buckland**. However, unlike **Buckland**, the responsibilities that might have justified Dr Leaney choosing not to resign or to delay making his mind up do not apply by the 29 June 2020 since the factors he relied on no longer had such demands on him. In my view Dr Leaney's particular responsibilities and the dependence of innocent third parties (i.e. students) are not relevant after this time.

209. Therefore I conclude that Dr Leaney affirmed his contract of employment after 29 June 2020. In summary this is because:

209.1. of the delay between 29 June 2020 and his resignation on 28 September 2020 (nearly 3 months);

209.2. no evidence about those negotiations and, in particular no evidence the University misled him;

209.3. he did not work from 29 June 2020 under protest;

209.4. being in receipt of competent legal advice; and

209.5. the absence of any other particular circumstances that would justify such a delay in considering whether to resign or in tendering that resignation.

210. I do not consider the fact there was a long notice period is relevant since the **Employment Rights Act 1996** contemplates a resignation in response to a fundamental breach can be with or without notice and no argument has been advanced to suggest the fact the resignation was on notice is indicative of something that would undermine the claim.

Conclusions on last act and affirmation

211. Applying **Kaur**, the claim must fail at this stage.

Conclusion

212. Because the claim fails at that stage, I do not need to go on to determine the other questions identified in **Kaur**.

213. In the circumstances, the claim is dismissed.

Employment Judge Adkinson

Date: 5 August 2022

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