EMPLOYMENT TRIBUNALS

Claimant: Professor G Beattie

Respondent: University of Manchester

HELD AT: Manchester **ON:** 2-6 June, 8 July and in chambers on 10 July 2014

BEFORE: Employment Judge Franey (sitting alone)

REPRESENTATION:
Claimant: Ms E Hodgetts, Counsel
Respondent: Miss J Woodward, Counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well founded. The claimant was unfairly dismissed.

2. The complaint of breach of contract in relation to the notice period succeeds.

3. For the purpose of unfair dismissal remedy the claimant contributed to his own dismissal and any basic or compensatory award will be subject to a 25% reduction.

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Employment Judge Franey
August 2014

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

REASONS

1. These are the reasons for the Reserved Judgment set out above.

Claim and Response Forms

2. By a claim form presented on 6 February 2013 the claimant complained of unfair dismissal and breach of contract in relation to his notice period arising out of his summary dismissal with effect from 9 November 2012 from his position as a Professor of Psychology. On the face of it, he had been dismissed following allegations relating to work outside the respondent university but he maintained that the true reason for dismissal was to enable the university to distance itself from some research which the university feared was about to portray it as institutionally racist.

3. By its response form filed on 13 March 2013 the respondent resisted both claims on the basis that it was a fair dismissal for gross misconduct.

Issues

4. Prior to the Hearing, both parties had completed proposed Lists of Issues which differed in some points of detail.

5. On behalf of the claimant, Ms Hodgetts confirmed that it was no longer argued that the reason for dismissal was the research about racism. The claimant's case was that the concerns about this research influenced the way in which the investigation into the allegations against him was conducted. As a consequence, the claimant accepted that the respondent had shown a potentially fair reason for dismissal, namely misconduct, and that the respondent had a genuine belief that the claimant was guilty of misconduct.

6. It followed that the sole liability issue for the Tribunal to determine in the unfair dismissal complaint was whether that dismissal was fair or unfair under section 98(4) of the Employment Rights Act 1996.

7. As to remedy, the claimant confirmed that he was seeking reinstatement should his complaint of unfair dismissal be upheld, and it was agreed that matters relating solely to remedy would be left to a further Hearing, if required. However, evidence and submissions relating to contributory fault and the possibility of any "**Polkey**" reduction would be addressed in the main part of the Hearing.

8. As to the complaint in respect of notice pay, the sole issue was whether the respondent could establish on the balance of probabilities that the claimant had been guilty of gross misconduct which deprived him of his right to notice upon termination.

Witness Evidence

9. I read all the witness statements and documents before any of the witnesses gave oral evidence.

10. The respondent called three witnesses to give evidence in person: Karen Heaton, who was the Human Resources Director with some involvement in the relevant processes; Professor Maggie Gale, who was a member of the disciplinary panel which decided to dismiss the claimant; and Dame Sue Ion, who was a lay member of the Board of Governors who chaired the panel which rejected his appeal against dismissal.

11. In addition, the respondent relied on a brief witness statement from its Internal Control Accountant, Laurence Clarke, producing some notes which appeared in the bundle. I attached less weight to that witness statement than if Mr Clarke had attended to give evidence in person.

12. The claimant gave evidence himself and also called Professor Alan North, who was the Dean of the Faculty and the claimant's line manager between 2006 and 2011.

Documents

13. The parties had agreed a bundle of documents in two lever arch files which ran to over 750 pages. I was not referred to every page in that bundle, and any reference to page numbers in these reasons is a reference to the bundle.

14. Some documents were added to the bundle by agreement during the course of the Hearing.

15. Before the evidence commenced the claimant made an application to add to the bundle extracts from two chapters of the publication "Our Racist Heart" which was the research project which he maintained had influenced the way he had been treated. These extracts had not been considered by disciplinary or appeal panel but were said on his behalf to be relevant to the concerns which the University had about that research. Firstly, some matters had been presented in lectures in 2010 and 2011 prior to publication of the material around the time of dismissal, and secondly because it would shed light upon the amount of time spent by his research assistants on such work, which was a live issue in the case. The respondent objected on the basis that this was not material before the decision makers at the relevant time and because the matter had not been addressed in the claimant's evidence in chief and therefore the respondent had not had an opportunity to address it in its own evidence. After considering the submissions on both sides, I declined to admit the documentation at this late stage, primarily because it did not seem to me to be relevant to the reasonableness of the decision to dismiss the claimant, which was the focus of the unfair dismissal complaint. The claimant had put his case very extensively and clearly at both the disciplinary and appeal stage, and at the latter stage in particular he had expressly drawn a link between this publication and his dismissal. Further, it seemed to me that his point concerning the knowledge of HR about this ongoing research and its influence on the investigation could properly be put to Mrs Heaton in cross examination without this material having to be added to an already extensive bundle of documents. (It transpired in any event that this point was not pursued in submissions).

Relevant Findings of Fact

16. I made the following findings of fact on the balance of probabilities to enable me to determine the issues in dispute.

The Respondent

17. The respondent university was created by the merger of Manchester Victoria University and UMIST in 2004. The merged University had four Faculties, each of which was headed by a Vice President and a Dean. One of those was the Faculty of Medical and Human Sciences, within which sat five Schools, including the School of Psychological Sciences. Each school was led by a Head of School supported by a Head of School Administration. The University is a substantial employer; within the School of Psychological Sciences alone there were over 200 staff employed.

Disciplinary Policies

18. The primary documents of the University are known as Statutes, with subsidiary documentation appearing as Ordinances, Regulations or simply policies. The Board of Governors had the responsibility, amongst other things, of approving Statutes, Ordinances and Regulations.

19. Statute XIII was concerned with disciplinary and related matters and extracts appeared at pages 152-159. Part III governed disciplinary procedures, and clause 9 on page 157 made clear that disciplinary action may be taken for conduct which amounted to a breach of any obligation or duty arising under financial regulations or any other rules, regulations or codes binding on a member of staff. The disciplinary procedures to be followed were outlined in clause 10 on page 158 which required the Board to prescribe by Ordinance disciplinary procedures for dealing with serious matters which had to include provision for a number of things, including a hearing by a panel at which the member of staff against whom a complaint had been made would be entitled to examine and cross examine witnesses. The disciplinary procedures were also to provide for:

> **"Designating a member of staff's conduct as constituting 'gross misconduct' such as to merit summary dismissal without notice…"**

20. The Ordinances giving effect to this provision appeared on pages 141-151. Provision for the conduct of panel hearings appeared in Ordinance XXII on page 145 which, in paragraph 17, provided as follows:

> **"In the case of an appeal hearing, the appeal may review all aspects of the case, but shall not normally take the form of a re-hearing of the evidence, and witnesses may only be called with the appeal panel's permission, which shall normally only be given if there is good reason why the evidence was not available at the previous hearing."**

21. Ordinance XXIV dealt with staff disciplinary procedures, and provided separate procedures for less serious matters and for serious misconduct (including gross misconduct). Paragraph 3 of that Ordinance on page 146-147 said:

> **"The Board will issue guidance for members of staff which indicates:**

(i) The types of misconduct that may lead to disciplinary action being taken under this ordinance;

(ii) Their categorisation in line with Statute XIII.10 as 'less serious', 'serious' or 'gross' and

(iii) The implications of repeated misconduct."

22. Despite this clear provision in the Ordinance, no written guidance had been issued to members of staff on what kind of conduct might amount to gross misconduct.

23. The Serious Misconduct Procedure appeared on pages 149-151. It made provision for suspension on full pay pending an investigation and it reiterated in clause 17 that:

"If the evidence in support of the complaint(s) is to be given by witnesses, the Respondent [to the complaint] shall be allowed a reasonable opportunity to cross examine them. If the issues are deemed by the Disciplinary Panel to be sensitive, arrangements may be made to assist a witness, such as allowing them to give evidence from behind a screen, or through a telephone or video link, or by restricting questions to those asked by a person accompanying the Respondent."

24. Clause 19 of the Ordinance set out the appropriate penalty if a complaint of serious misconduct was upheld. Four broad options were given. The first was directing the employee to remedy serious misconduct by appropriate action, including making financial restitution or paying compensation. The second was the issue of an oral, written or final written warning. The third was withholding pay or demotion, and the fourth was dismissal. In dismissal cases, the Ordinance provided (page 150) that:

"The disciplinary panel must also determine whether to designate the serious misconduct as 'gross misconduct' such as to merit summary dismissal without notice. If the serious misconduct is not so designated, notice of dismissal will be served and the disciplinary panel must determine whether or not the Respondent will be given payment in lieu of his or her notice period."

<u>Policies on Outside Work 2008-2011</u>

25. It is a notable feature of academic life that work for bodies other than the university is commonplace and indeed in many circumstances encouraged. Prior to 2011 the University had separate policies for outside work and consulting.

26. The Policy for Consulting from October 2008 appeared at pages 399-404. It recognised the value of consultancy work by academic and research staff, and the benefits that this could bring to the university. Such activity was to be recognised and rewarded. On page 399 the policy offered a definition of consultancy as follows:

"Consultancy is the provision of services to external clients based primarily on skills and expertise. This can be offering specialist opinion, by advising on technical issues or by solving problems. It would not usually make significant use of equipment or scientific facilities. Unlike research it does not have as its prime purpose the generation of new knowledge. Intellectual property is not normally expected to be developed in the course of a consultancy assignment, save for the copyright in any report which is produced. Assignments extending beyond the parameters of this definition are more likely to be

research activities, CPD, provision of testing and analytical services or some other type of arrangement.

For clarification, the following scholarly and academic activities are not classed as consultancy by the university, and are not the subject of this policy, even though fees may sometimes be paid to the staff member in return for the activity:

- **Teaching/lecturing/workshops**
- **RAE panel member**
- **Membership of Research Council of Government of similar committees**
- **Refereeing papers, or editorial board work**
- **External examining**
- **Reviewing books**
- **Comments to media**
- **Advising learned societies and charities, and charity work generally."**

27. The reference to "RAE" was a reference to the Research Assessment Exercise, a periodic national survey of research activities in each university with a view to evaluating the calibre of that research.

28. The policy went on to distinguish between university consultancy, where the university contracts with the external client to provide the services of a member of staff, and a private consultancy, where a member of staff contracts with the external client to provide the consulting services "in their own time in a personal and private capacity". Such a contract could not benefit from the support of the university nor use any of its facilities or resources.

29. In a section headed "Eligibility" on page 400, the policy said:

"Any more than incidental use of the services of other university staff in a consultancy assignment needs to be approved, fully costed and recovered as an expense item(s)."

30. On page 401 the policy made clear that it was the duty of a member of staff to disclose any proposed consultancy work to the Head of School and obtain permission before contracts were signed and any work was started, whilst in the case of Head of School approval had to be obtained from the relevant Dean. There was a reference to the staff intranet where more guidelines could be found. The policy indicated that approval would normally be given for a private consultancy if certain conditions were met, including that there would be no detriment to the staff member's management of his existing workload, no university resources were being used other than incidental resources, and the work did not put the university in a conflict of interest position.

31. An annual return to the Head of School was required for all consultancy work (page 404) with the Head of School making a consolidated return to the relevant Head of Faculty Administration. Failure to comply with the policy was to be considered a breach of contract and might result in disciplinary action.

32. The Policy on Outside Work in force prior to July 2011 appeared at pages 390-398. It began by recognising the value of staff undertaking consultancy and other work for outside bodies, and said that it was the policy of the university to encourage its staff to engage in consultancy, public duties and other work with outside bodies wherever appropriate. On page 391 the policy offered a definition of work for outside bodies which applied whether or not personal remuneration was involved. It covered activities within or related to the member of staff's professional field which were additional to the teaching, research and other requirements of the university appointment, but also to activities which were not directly related to the professional expertise of the member of staff but which involved substantial calls upon an individual's time or energies, or impinged upon professional engagement with the university in some other way, such as a potential conflict of interest. It included consultancy covered by the separate policy on consultancy and similar work (clause 2.2).

33. On pages 392-393 the policy sought to distinguish between work for outside bodies requiring formal approval and that which did not normally require formal approval. The former were set out in clause 2.4 which gave an indicative but not exhaustive list of work for outside bodies for which formal approval from the university was required. That list included the following bullet points:

- **"Provision of services and/or products (where the contract is between the university and outside body).**
- **Private consultancies.**
- **Regular journalistic work."**

34. In contrast, clause 2.5 offered an indicative but not exhaustive list of work for outside bodies for which formal approval from the university was <u>not</u> normally required. Two items appeared in the list, and the second in its entirety read as follows:

- **"Professional work involving academic scholarship. This includes (but is not limited to):**
  - **The authorship/editorship of books, articles and journals, technical or literary advice, reviewing, referring external examining;**
  - **Public lecturing and broadcasting connected with the member of staff's professional field;**
  - **Editorship of books, articles or journals coupled with whole or part ownership of the relevant book or journal by the Academic;**
  - **Offering ad hoc comment or opinion to inform media discussion in an area in which the member of staff has professional expertise."**

35. Clause 2.5 ended with the following paragraph:

"Some of these activities may require a contractual relationship with the outside body, in which case assistance and advice should be sought from the Contracts Team in the Directorate of Finance."

36. The policy distinguished approval for outside work from the requirement of disclosure. Clause 3.1 on page 394 set out eight reasons why the university required disclosure of work for outside bodies. They included "propriety" (that work for outside bodies should be academically and professionally appropriate and not bring the university into disrepute) and "probity". The following paragraph appeared in relation to probity:

> **"Potential conflicts of interest (whether they be with the university or with a third party) can only be avoided by full disclosure of work for outside bodies. Normally, where a member of staff undertakes outside work for a third party, he or she should not be involved in determining the final terms of any contract between that third party and the university. Work for outside bodies should be conducted within the university's regulations governing conflict of interest and conflict of commitment."**

37. The reasons also included the need for income to be set at a level so that the full costs to the university, both direct and indirect, were recovered.

38. Clause 5 of the policy on page 396 dealt with earnings and it included in clause 5.1 the following:

> **"The university will normally make it a condition of approval of work for outside bodies that the earnings generated by that work are disclosed to the university. In cases where the outside work is in the same professional area as the university appointment, disclosure of earnings will, in all cases, be a condition of granting approval. No one person's professional standing and ability to generate outside work is independent of the support of colleagues and the university even though this support may not be direct. Hence, any earnings from outside work should be fairly apportioned to the individual and the university so that the individual is properly remunerated for the work and the university is recompensed for its contribution where appropriate. Such disbursements are subject to internal and external audit."**

39. The policy went on to say that in most cases the university would allow all income received through outside work to be retained by the individual employee after the university's costs have been covered in full.

40. Clause 6 set out the process for obtaining approval where it was required, which for a Head of School required the approval of the Dean, and made reference in clause 6.2 to a declaration of interest form. A record of all work through outside bodies would be maintained by the university. The paper copy in the Hearing bundle at page 397 suggested that a web link for the relevant form was provided.

41. Clause 7 of the Outside Work Policy dealt with failure to disclose or obtain approval for work for outside bodies. It said it would be regarded as a disciplinary matter and subject to the regular disciplinary procedures. It was silent as to whether a breach was likely to be viewed as serious or gross misconduct.

<u>July 2011 Combined Policy on Outside Work</u>

42. On 13 July 2011 the Board of Governors approved a Combined Policy on Outside Work and Consultancy which appeared at pages 379-389. This policy was current at the time of the disciplinary proceedings against the claimant but it was accepted that the majority of the activity which formed the basis of the allegations against him had occurred prior to July 2011. The wording of the combined policy was

in some respects more restrictive than the wording of its two predecessor policies. In clause 2.9 on page 380 it said that:

> **"Private consultancy is where the member of staff contracts with the external client to provide the consulting services in their own time in a personal and private capacity. Such contracts cannot benefit from the support of the university nor use any of its facilities or resources."**

43. The requirement to disclose all proposed consultancy work and obtain formal permission appeared in clause 2.14 on page 381, and the new policy also offered a non-exhaustive list of situations where formal approval would be required or would not normally be required. In the former list (clause 2.15) there appeared:

> **"Provision of services and/or products to an outside body",**

whilst the latter list of work not normally requiring formal approval included the same exemption for "professional work involving academic scholarship" which might include public lecturing and broadcasting connected with the professional field or ad hoc comment or opinion to inform media discussion in an area in which a member of staff had professional expertise.

44. The new policy preserved the principle of requiring disclosure even if approval was not required and said at clause 3.2 at the top of page 383:

> **"To avoid potential conflicts of interest, there must be full disclosure of all work for outside bodies."**

Financial Regulations

45. The financial regulations of the university as approved by the Board in May 2010 appeared at pages 371-378. Clause 7.11 on page 374 read as follows:

> **"Unless otherwise stated in a member of staff's contract, outside consultancies or other paid work must not be accepted without the consent of the relevant budget holder (and in the case of a Head of School, the Dean of the relevant Faculty). Applications for permission to undertake such work must be made according to the policies and procedures available from the Director of Human Resources."**

46. Clause 10.24 on page 376 set out the expectation that staff at all levels would observe the university's Code of Conduct in respect of conflicts of interest and related matters. Those principles included accountability, openness and honesty. The clause in the Financial Regulations went on to say this:

> **"The ordinance stresses the need for members of the university to conduct themselves with due regard to probity and propriety in the course of their employment and in their other dealings with the university. They must declare to the appropriate authority, in accordance with the issued guidance, any personal interests that may compromise or reasonably be deemed to compromise their impartiality, conflict with their duty as an employee or result in private benefit. Detailed rules on the registration and declaration of interests by staff and lay members of university bodies are contained in the Financial Procedures."**

47. The financial procedures themselves did not appear in the bundle, but there was a version of the financial regulations updated in November 2011 at pages 364-370. Both versions made clear that the failure to comply with financial regulations

could result in disciplinary action. The updated version offered a link to the form for applying to undertake private consultancies and other paid work.

Consensual Relationships

48. Finally, the university had a policy on consensual relationships between members of staff which appeared at pages 405-409. A romantic/sexual relationship between two members of staff had to be reported to the Head of Faculty/line manager and breach of the policy could lead to disciplinary action.

The Claimant

49. The claimant was first employed by the respondent as a Professor of Psychology in 1994 and was appointed Head of Department in 2000. When the merged university was formed he was appointed the first Head of the School of Psychological Sciences on a fixed term appointment.

50. There was no definitive signed copy of a statement of terms and conditions in evidence before me. At pages 36-43 there appeared a sample of a principal statement of terms and conditions for a Head of School (although clause 41 of that document required the recipient to declare any personal interests to the Head of School) which the claimant accepted in cross examination he may possibly have received in 2004. It made clear in clauses 39-43 that there was a requirement to conduct oneself with probity and propriety, to adhere to the Code of Conduct, financial procedures and any other policies, and at clauses 41-43 on page 39 there appeared the following:

> **"(41) You must declare any personal interest in the Register of interests maintained by your Head of School. A personal interest may include but is not limited to an interest which might reasonably be deemed to compromise your impartiality, conflict with your duty as an employee or could potentially lead to a conflict of interests whether or not it leads to a private benefit. For further examples of personal interests, please refer to paragraphs 10.58-10.62 of the University's Financial Procedures.**
>
> **(42) You must declare any significant conflict of interest to your Head of School with immediate effect. For examples of significant conflicts of interest please refer to paragraphs 10.63 and 10.64 of the University's Financial Procedures.**
>
> **(43) A failure to comply with the university's requirements in relation to Codes of Conduct and conflicts of interest will be treated very seriously and may, depending on the circumstances, amount to gross misconduct."**

51. The general terms of appointment of professors appeared at page 44 and included a duty to observe the laws of the university for the time being in force.

52. At the time the claimant was first appointed Head of School, the Dean of the Faculty (his immediate line manager) was Professor Gordon, but in 2006 Professor North was appointed Dean of the Faculty of Medical and Human Sciences. He remained in post until March 2011 when he was succeeded as Dean by Professor Jacobs.

Claimant's Media Work

53. The claimant starting doing media work (initially print articles) long before he joined Manchester University, and wrote about psychology in a popular way for prestigious academic journals and magazines such as Nature, New Scientist and New Society. This was in addition to the publication of academic articles and publication of books. His output was prolific. As time went on he became more involved in television and radio appearances, presenting two radio series on Radio 5 Live prior to 2000 and presenting a documentary for BBC1 about his own background in Belfast and his life as a Professor and social observer. His TV work took off, however, with the first series of Big Brother in 2000 in which he appeared as the show's resident psychologist commenting on the behaviour of the show's participants. He filmed his Big Brother work at weekends. He also presented a series called "The Body Politic" for ITV's News at Ten analysing the body language of politicians prior to the 2005 General Election.

54. Importantly, there was no suggestion by the university that the claimant was in any way neglecting his core university duties. Unusually for a Head of School he maintained a teaching workload as well as a research workload, fitting in his outside media work largely in his own time. The description "workaholic" was used by the claimant himself and by others. It is clear that he was very successful as Head of School, to the point that in September 2010 he was persuaded by Professor North to stay on for an extra academic year rather than complete his fixed term in that position. Despite the managerial responsibilities that came with that role he remained prolific in terms of his output of books, research papers and academic book chapters. He was also successful in obtaining external funding for his research from Research Councils, charities and commercial sources such as Tesco. He acted as an academic referee for 17 journals and reviewed grants for a number of research councils. He also prepared the relevant part of the university's submission to the 2008 RAE. His professional activities included lecturing, supervising projects and performing as a key note speaker at national and internal conferences. He worked as an external examiner at a number of other institutions.

55. The university were aware of the claimant's media work. He was featured in the Alumni magazine in May 2005 and described as a "media star". He mentioned particular aspects of his media work in presentations to senior staff, including presentations in August 2006 (page 481) and a presentation in March 2008 to the Board of Governors, for which he received an email of thanks from the President, Professor Gilbert (page 477). He made a presentation to an audience including Professor North and the President in June 2009, the presentation slides appearing at page 478-480.

56. In November 2010 the university issued a press release about an annual summit which billed the claimant as follows:

> **"On Thursday, Big Brother's resident psychologist, Professor Geoff Beattie, talks about his glittering research career. The keynote session, part of a communication workshop, includes an explanation of how Geoff's media and communication work has improved his research skills and inspired others to get involved in university education."**

57. In April 2011 the claimant was asked by the university to speak at a "Star Lecture" to 'A' Level psychology students in which he was billed by the university as someone who had appeared on a variety of television programmes and been the resident psychologist in Big Brother for ten series. It was clear that the university thought his media profile would help make the university attractive to 'A' Level students considering reading psychology at degree level.

58. The claimant's media work also featured in the relevant part of the university RAE exercise in 2008 (page 512). The highlights section included matters undertaken by a number of individuals including the claimant, and made reference to his position as a resident psychologist on "The Farm of Fussy Eaters", his presentation of "The Body Politic" in 2005, and his position as an expert commentator on a range of international and national news channels. These were all regarded as significant "esteem indicators" and therefore something which the university regarded as a significant positive feature of his work.

Performance and Development Reviews ("PDRs")

59. There was some mention of media work in annual PDRs. The process was that the claimant would fill in a preparation form which he and the Dean would then discuss. Professor North's practice whilst Dean was to summarise the discussion in a letter some time later. He would read the claimant's preparation form shortly before their meeting.

60. The 2009 PDR appeared at pages 460-464, and included on page 462 a list of what the claimant thought had gone well. It included research matters and also the assertion that (as with previous years) the claimant had managed to exploit the media to bring his research out to a much more general (and sometimes very large) audience. He gave a list of five TV programmes which he had either presented or co-presented, and made it clear that he had been a guest and expert commentator on a range of news programmes. His PDR form included this:

> **"In addition, I did approximately 141 radio interviews. These were only practical through themed topics including "mood and weather", "gender differences in driving behaviour" and "the effects of low literacy and numeracy skills on psychological state" in specific radio day slots."**

61. Professor North's letter after this meeting appeared at pages 475-476 (12 November 2009) and said this:

> **"Geoff has a substantial portfolio of activity with television, and his own research work has featured on several programmes around the world."**

62. The May 2010 PDR preparation document appeared at pages 465-469. It included reference to the claimant having been the keynote speaker at the 50th Anniversary Conference of the Marketing Society in November 2009, and Professor North's subsequent letter appeared at page 514. He recorded that the claimant had put in place satisfactory actions to remedy a poor performance in the National Student Survey for the school.

63. The PDR preparation document for a meeting with Professor Jacobs in 2011 appeared at pages 470-474. It referred on page 471 to "excellent and extensive

media coverage of my media research", and to the claimant having done more than 400 interviews.

Research Assistants

64. When the claimant was first appointed Head of School he agreed with the Dean, Professor Gordon, that he could have a Research Assistant ("RA") as "compensation" for the extra managerial duties that came with his new post. This was an arrangement common in the university and in many cases the Head of School would use the RA to do teaching which the Head was unable to do. However, the claimant took a different path. He enjoyed lecturing and was well regarded by students in a way that was important for the National Student Survey results. On his unchallenged evidence he asked Professor Gordon if the RA could help with research, media work and marking popular courses, and Professor Gordon agreed.

65. When Professor North was appointed Dean in September 2006 he was informed that the claimant had an RA supported by the school under his supervision, but the matter was discussed explicitly with the claimant in 2007 when the claimant's position as Head of School was renewed for a second three year term. Professor North agreed that the appointment of the RA could continue, and it was his understanding that the RA would assist the claimant both in his research activity and his media activity. He later confirmed his position in a letter of 15 April 2012 at page 297.

66. In fact, during the period with which this case was concerned there were three RAs working with the claimant. The RA appointed to help him with his work was Laura McGuire who filled that role between August 2008 and May 2010. She then moved to an RA post funded by the Equality and Diversity Department before moving to an RA post in the Sustainable Consumption Institute ("SCI") in June 2011. These were all appointments within the School working with the claimant, although the funding sources and the nature of the work differed. The Sustainable Consumption Institute was established following the receipt of significant funding from Tesco to which the claimant made a notable contribution.

67. When Laura McGuire moved to the Equality and Diversity role she was replaced by Dr Doron Cohen, who filled that role on a casual basis to December 2010 and was then appointed more formally for 2011. From December 2011 his role was split 50% between the SCI and 50% on another matter.

68. Finally, Laura Sale filled an RA post with the SCI from August 2008 to January 2011, then spent six months working on a matter known as "Commercial Projects" before returning to SCI funded work in August 2011.

69. At some point after her appointment (during 2010, according to the claimant – page 722), the claimant and Laura McGuire formed a relationship but it was not declared to the Dean or entered in the Register of interests. The claimant regarded it as common knowledge and did not seek to hide it.

70. As well as the three RAs from time to time the claimant also had a Personal Assistant, Ms Lavelle, who worked with him until she retired in October 2011.

Register of interests

71. The detailed rules for the registration of interests were not in evidence before me (the Financial Procedures to which page 377 made reference), but it was common ground that the claimant had not made personal entries in that register prior to August 2011. The entry he made then appeared at page 198. It was a pro forma document for the School of Psychological Sciences and it indicated that all members of the school were asked to complete the form, including a nil return if appropriate. The document would be referred to staff annually for amendment. Staff were asked to notify the Head of School or the Head of School Administration of any substantive changes. The form had four columns asking for the name of the organisation in question, the nature of the interest, whether it was pecuniary in nature, and whether it was an interest of the employee personally or held by a member of his or her family. The claimant simply wrote the following in the column headed "Nature of Interest" (emphasis as in the original):

"No conflict of interest – nothing which compromises my impartiality."

72. The form was to be returned to Jayne Ward, the Academic Group Administration Manager. She later said (18 June 2012 – page 335) that she had been present when the claimant signed the register and felt that he had been anxious about signing the register. She said he asked about his relationship (with Laura McGuire) being declared. No-one queried with the claimant the nil return which he entered on the register.

73. The Register for the school as a whole for the three years between 2010 and 2012 appeared at pages 505-507. In 2010 there were four interests declared and 18 nil returns received. In 2011 there were four interests declared and 63 nil returns. In 2012 there were ten interests declared and 59 nil returns. It was clear that a substantial proportion of staff were not even making a nil return, both while the claimant was Head of School and after he was succeeded by Professor Calam.

Montaldi Grievance October 2011

74. When the claimant returned for the new academic year in September 2011 he had been succeeded as Head of School by Professor Calam. The claimant had spent much of the summer in America, work which subsequently resulted in his appointment in 2012 to a post of Visiting Professor at the University of California.

75. On 2 November 2011 he was informed by the HR Director, Mrs Heaton, that a grievance had been lodged against him by Dr Daniela Montaldi, a Senior Lecturer and Head of the Division of Psychology. The claimant did not see the grievance at the time, but it was dated 23 October 2011 and addressed to the Dean, Professor Jacobs (pages 160-165). It provided a list of names of colleagues who (according to the grievance) had confirmed that they would be happy to speak to senior management to describe their experiences with the claimant. The grievance contained allegations which Dr Montaldi divided into three categories. Firstly, she alleged bullying and harassment by the claimant in the form of abusive behaviour, bad temper and rudeness, undermining staff, humiliating them or treating them abusively. Secondly, she accused him of inappropriate academic management, seeking to block individuals' academic progress and development, manipulating the

membership of committees to ensure decisions met his personal agenda, and seriously damaging the research environment. This part of her grievance included an allegation that the claimant insisted that junior researchers supported his other non academic activities. Thirdly, she alleged inappropriate financial management and misuse of funds, including an allegation of inappropriate appointment of young women to positions within the school without following procedures, blatant misuse of funds for the improvement of the National Student Survey score, and:

> **"Failing to make appropriate contributions to the university from the considerable income he gains from his very extensive and time consuming external work which draws extensively on facilities and staff at the university…"**

76. The outcome desired by Dr Montaldi appeared on page 162 and included the termination of the claimant's employment.

Clarke Investigation March 2012

77. Although no documentation relating to this was before me, Mrs Heaton informed me in evidence that the grievance was initially considered by Professor Ward supported by HR**.** However, in early 2012 a decision was taken to separate out the allegation of inappropriate financial management; that was to be considered by the Internal Control Accountant, Laurence Clarke. He received a file of information from Mrs Heaton on 1 March and had some discussions with her, as well as interviews with Dr Montaldi, Laura Sale and Dr Cohen. On 19 March he had a meeting with the claimant to let him know that he was investigating the complaint, and access to the claimant's computers and laptop was arranged. On 26 March Mr Clarke interviewed Laura McGuire, and a note of that meeting appeared at page 51. There was discussion about her involvement in the issue of invoices for outside work.

78. During March Mr Clarke produced an interim report which appeared at pages 172-211. It was undated, but appears to have been done at the very end of March after the interview of Laura McGuire on 26 March. It identified that there had been substantial outside work by the claimant for which invoices had been issued and/or remittances received, accompanied by numerous contracts and purchase orders. Examples were given, which included work for Nivea between April and October 2011. The report noted that the Nivea contract gave control of intellectual property to the company and restricted the claimant's work for possible competitors. It suggested that the outside work amounted to contracts with outside companies for which each individual item required approval, and that some contracts (such as Nivea) were private consultancy. The report then quoted from the Financial Regulations (and from the Financial Procedures which were not before my Hearing) and noted the August 2011 declaration by the claimant (page 198). It was suggested that there may have been a use of university resources on some of the outside work, and this was considered in section 5 of the report on pages 177-178. A number of occasions on which it appeared the claimant had claimed from the university expenses which had been claimed from an external body were identified. The recommendation was that it appeared that the claimant had failed to follow relevant sections of the Financial Regulations and the Policy on Outside Work and Consultancy.

79. The claimant was informed by Mrs Heaton in early April that there was a possibility he might be suspended, judging from an email which he sent on pages 53 to 55 on 8 April 2012. He made what he described as some "preliminary points", which included the fact that his outside work was always about promoting the university and was never just private work. His point was that his appearance gave the University of Manchester publicity for a pittance. The connections built up through media work had brought other benefits to the university, and any consultancy he did (such as Nivea) was always to provide newsworthy material for media and broadcast purposes. His email said he remembered being praised by the President for developing a strong media and commercial focus, which the students loved.

80. Being aware of what was happening, the claimant asked Professor North to put his views on paper and he did so in a letter of 15 April at page 297. The letter included the following:

> **"However, when your position as Head of School was renewed for a second three year term in 2007 we discussed explicitly the continuation of the Research Assistant to support you, and I was in full agreement with this. It was my understanding that this individual would assist you both in your research activity, and in your media activity. Indeed, I did not distinguish between your media engagement and your research because I considered them to [be] inextricably connected and both of value to the university.**
>
> **In the spring of 2010 you kindly agreed to continue as Head of School for a further year. I was grateful for this, given that I had consulted widely with others in the school and interviewed personally its professoriate, without identifying a suitable successor. At that time you mentioned, and I approved, the continuation of the Research Assistant support.**
>
> **I trust that this clarifies the question that you asked me. But allow me to add that it was not only myself that considered your role as Head of School to have been fulfilled in exemplary fashion. My view was shared by Alan Gilbert."**

81. There was a supplementary question posed by the claimant to Professor North on 18 April at page 357. He asked whether Professor North thought he should have been refunding the university for help from the RA for his media work. The response from Professor North was that he had no recollection of discussing financial aspects or of approving any request for outside work, but he went on to say:

> **"In all fairness nor did I ever see or approve any such request from other direct reports (such as Heads of School)…As I explained previously, much of the media work in which you were involved seemed to me to be in the context of your research work. I did not really consider (or even ask you) whether it was compensated either inside or outside the university system. It was your responsibility to declare outside work for which your received private compensation, not mine to enquire about it."**

82. Professor North was interviewed by Mr Clarke on 24 April 2012. The formal record of the interview appeared at pages 56-59. It was not presented to Professor North for him to amend or agree it. In the bundle there also appeared the handwritten notes taken by Mr Clarke of what Professor North said (pages 59A-59E), and those taken by Sean Clayton (at 59F-59J). In response to a question about time spent by Laura McGuire on media appearances and issuing invoices, Professor North was recorded as saying in the formal note:

> **"Media work to publicise university research."**

83. Those words did not appear in either version of the handwritten notes.

84. The formal note recorded on page 58 that Professor North was surprised that the claimant had not completed the details on the Register of Interest form, but in his evidence to my hearing Professor North denied that he had said that. Similarly, Mr Clarke had made a handwritten note on page 59E that Professor North had been "astonished" at the amount which the claimant had earned from outside work (put at over £345,000 between 2007 and January 2012), but in his evidence to my Hearing Professor North denied having said that he was astonished.

Suspension

85. Based on the information in the supplementary report of Mr Clarke a decision was taken by the President and Vice Chancellor to suspend the claimant. The claimant was notified on the telephone by Mrs Heaton on 26 April and suspension was confirmed in a letter of 3 May 2012 at pages 64-67. The letter informed the claimant that Professor Mike Grant had been appointed to be the investigating officer supported by Andrew Mullen, the Deputy Director of Human Resources. At this stage the allegations were six in number, which can be summarised as follows:

(a) That the claimant had undertaken a significant amount of outside work and consultancy involving research and media work with a value of at least £346,377 from 2007 to January 2012. The invoices were issued in his name with payments sent to his home address. It appeared some work had been private consultancy, such as the Nivea contract; there had been a failure to follow the procedures in the policy and there was a serious potential conflict of interest.

(b) That in undertaking this work the claimant had used a significant amount of the university's resources, including the time of the RAs and the Administrator, equipment, computers and premises. No evidence had been found of any agreement to reimburse the use of university staff or its resources.

(c) That on at least five of the invoices expenses had been claimed which had already been paid by the university.

(d) That the claimant failed to comply with the requirements of the Policy on Outside Work and Consultancy in relation to disclaimers of the university's responsibility.

(e) That the claimant failed to seek appropriate approval for his outside work contrary to the policy.

(f) That the declaration on the Register of Interest from August 2011 was incomplete because private benefits should have been listed on the Register.

86. Copies of the relevant Statutes, Ordinances, the Policy on Outside Work and Consultancy from 2011and the Financial Regulations were enclosed.

Claimant's Response to Allegations 18 May 2012

87. The claimant prepared a detailed written response to the suspension letter and the allegations formulated in it. It was dated 18 May and appeared at pages 254-292. The appendices ran from pages 293-309. The letter said that the claimant was probably in a unique position, that his work for outside bodies was known, celebrated and actively encouraged by the University and Manchester, and had been critical to the establishment of the SCI. His outside media work had also been of reputational and financial benefit for the university, through home and international student recruitment and PR, meaning that the Psychology Department was almost certainly the best known in the UK - contrary to how it had been when he first came to Manchester in 1994. He said that he had asked Fran Cassidy who sat on the board of the Marketing Society to use her existing knowledge of his activities to put a figure to the cost to the university if it were to pay for the PR exposure generated by one sample campaign. Her letter (at page 296) put the figure for one campaign at £200,000, and the claimant said that as he had been involved in 59 such campaigns in the relevant period the total value of the coverage would be £11.8 million. He said that his media work was always encouraged by his Deans, and had helped address the sharp fall in NSS ratings.

88. In a passage beginning on page 260 of the bundle he expressed the view that the university Financial Regulations did not apply as easily as they might to cases like this. The following passage appeared:

> **"The university distinguishes "private consultancy" (which requires formal approval) from "public lecturing and broadcasting connected with the member of staff's professional field" and "offering ad hoc comment or opinion to inform media discussion in an area in which the member of staff has professional expertise" (which do not formally require formal approval). But these latter descriptors ("ad hoc", comment, etc) do not cover easily the level of broadcasting/media work that Brian Cox and I (and a few others) do, or the payments we received (or the fact that effective comment requires background preparation and often significant background preparation)."**

89. He emphasised that neither of his previous Deans had raised the question of disclosure or reimbursement even once, despite knowing that he was doing work in the media.

90. He also asserted on page 263 that because his RA supported by the School was compensation for his role as Head of School, and because it was agreed that this person would assist with media activities as well as research, he assumed that the university would not want to be reimbursed for any time that person spent supporting him in media activities.

91. He went on to draw attention to some misapprehensions in Mr Clarke's report and gave a considerable degree of information about various PR campaigns which had required use of an RA. He said that 46 RA hours in total over five years would be a generous estimate of the amount of time they had spent. On page 269 he confirmed that an obsolete eye tracker device not being used in the Department had been used on a small scale for two pieces of research, including the work for Nivea. In total he estimated that over a five year period there had been 55 RA days in total spent on his outside work.

92. On page 270 he made the point that virtually all of this RA input into his "private" work had fed into both research and teaching, and a number of examples were given.

93. As to the inappropriate claiming of expenses, on page 276 the claimant accepted that this had been a stupid and embarrassing mistake, perhaps only comprehensible in the light of how busy he had been. He said he would of course happily refund any money double claimed immediately.

94. Overall, the claimant was suggesting in his letter that there were a number of special considerations in this case which required careful thought (page 284). The appendices to his letter included detailed comments on the Clarke report, copies of some of the material in which the university had publicised his media work and the letter from Professor North from 15 April 2012.

Professor Grant's Investigation

95. Assisted by Mr Mullen, Professor Grant began his investigation in May and completed it by the time of his report in the second half of June 2012. He interviewed Mr Clarke on 18 May and the claimant on 21 May, and then a number of other witnesses including Anna Reeder, the Head of School Administration, the three RAs, the Head of the SCI Professor Ulph, Professor North and Jayne Ward. It appeared from his report that he also interviewed the Head of Equality and Diversity, Mr Johnson, but no notes of that were produced.

96. The investigatory interview with the claimant on 21 May was recorded in notes that appeared in the bundle at pages 337-345. The notes were taken by an HR Assistant, Daniel Taylor. The claimant was unaccompanied. The notes recorded the claimant saying that he had not received any training as Head of School on Financial Regulations, and he thought it revealing that Professor North had received no request from any of the Faculty staff for outside work. There was an extensive discussion of the nature of the media work the claimant was doing and the position of the RAs. The claimant acknowledged (page 343) that he was not the best form filler, and he said that the Dean was aware that the claimant was not signing any declarations of interest.

97. Anticipating slightly, the interviews of Clarke, Cohen, Sale, Reeder and Ward were converted into witness statements and signed by those witnesses between 15 and 17 October in the run up to the disciplinary hearing. The notes from the claimant, Laura McGuire, Professor North and Professor Ulph were not turned into witness statements or provided to those individuals to approve and sign. In the appeal submission the claimant later made in February 2013 he produced an email from Laura McGuire dated 10 February 2013 at page 842 in which she said that there were quite a few important inaccuracies in the notes of her interview with Professor Grant and Mr Mullen.

Clarke Supplementary Report

98. Whilst the Grant investigation was ongoing, Mr Clarke produced a document with a number of comments on the claimant's letter of 18 May (pages 310-315), and he produced a supplementary report which appeared at pages 212-253. It was in this

report that the estimate of total outside income between 2007 and January 2012 was put at £346,377, and the conclusions in the interim report were said to remain valid. At pages 223-225 Mr Clarke produced as an appendix to his report a list of outside payments received by the claimant based on lists of invoices and remittance advices maintained at various times by either his PA or another colleague. There was also a considerable amount of material relating to the expenses issue.

Grant Report June 2012

99. Professor Grant's report at the end of June appeared at pages 166-171. He appended both the interim and supplementary reports of Mr Clarke, a copy of the July 2011 policy on outside work and consultancy, the claimant's written submissions to the investigators (his letter of 18 May) and Mr Clarke's comments on it, and a copy of the Consensual Relationships Policy. The report adopted Mr Clarke's findings and concluded that the claimant had not declared his relationship with Laura McGuire. The report noted on page 169 that it was not clear whether it pre-dated her engagement as a casual member of staff in 2008, but in fact Laura McGuire had not been asked when the relationship had begun.

100. The key findings of Professor Grant's report were set out on pages 169-170. Relevant for present purposes were the findings that the claimant had never sought permission for any of his outside work, in breach of the policy on outside work and consultancy, and that although Professor North had been aware of the media work and never raised the need for approval, disclosure or reimbursement "he was unaware of the precise nature and scale of the work". It was said that Professor North was also unaware of the extent to which university resources were committed to the work. The nil return in the Register of interests in August 2011 was noted despite the 55 private work transactions with a value of over £100,000 in the preceding 18 months, and it was said that the time spent by the RAs on supporting the outside private work appeared to be "of very limited and questionable value to the University". According to Dr Cohen and Laura Sale, each of them had spent significant amounts of time (sometimes as much as half their working time) on outside work, but none of their time had been quantified and charged to external clients.

101. The recommendation of Professor Grant and Mr Mullen was that the matters constituted serious misconduct and should go to a disciplinary panel.

Disciplinary Charges August 2012

102. By agreement there occurred a pause of a couple of months before the report was put to the President and Vice Chancellor Professor Rothwell. The discussions were about an alternative means of resolving matters. They were not successful, and on 9 August 2012 Mrs Heaton wrote to the claimant to confirm that the allegations would go to a disciplinary panel and that they could, if proven, amount to gross misconduct resulting in summary dismissal.

103. The allegations were formulated by Mrs Heaton with the benefit of legal advice as follows:

"(a) You undertook significant amounts of outside work in private consultancy for which you failed to observe the provisions of the university's Policy on Outside Work and Consultancy and which created a serious potential conflict of interest which you failed to declare in the school's Register of interests;

(b) In undertaking this work you used a significant amount of the university's resources (including the time of three Research Assistants and an Administrator, and use of university owned resources, including equipment, computers and premises) without any reimbursement to the university of the associated costs; and that

(c) Included in at least five invoices sent by you to private client companies were claims for monies you had already claimed via expenses you have submitted through the university."

104. Her letter went on to reiterate the key findings of the report in addition to those three allegations.

Dr Cohen and the Claimant's Signature

105. In the meantime the investigation into the other strands of the Montaldi grievance had been pursued. The claimant was cleared of any research misconduct. One of the matters which had arisen was whether Dr Cohen had falsified the claimant's signature on an application for ethics approval made in May 2010. Dr Cohen was interviewed about this on 3 August 2012 by Professor Calam and Mrs Heaton, and a note of that meeting appeared on page 358. It had been signed by Dr Cohen. He maintained that he had written the date on the form but had not signed it. The report of the panel of investigation of 13 August 2012 was not in the bundle but an extract appeared at page 360 provided to Mrs Heaton in October 2012 in the run up to the disciplinary hearing. The panel's conclusion was that the claimant's allegation that his signature had been forged "lacked credibility", and if it had been forged the only credible explanation was that it was done for expediency and with his full knowledge and blessing.

Claimant's Evidence

106. In gathering evidence to present his case to the disciplinary hearing the claimant obtained an email from the respondent's Director of Communications and Marketing, Alan Ferns. The email was on 24 August 2012 and it appeared at page 829. It included the following:

"(1) We do not measure the value of media appearances by individual members of university staff, but you clearly enjoy a high media profile and have done so for many years and in this way I would judge that you have made a notable contribution to building the university's media profile and external reputation.

(2) I do not think it is possible to demonstrate a link between an individual's media profile and student to a particular School or programme (even for a Head of School), but I have no doubt that your media appearances will have generated interest more broadly in studying psychology and encourage some prospective students to find out what courses this university offers in this field.

(3) You are correct in your observation that many requests from the media demand a speedy turnaround and response. I would not have expected you to have sought case-by-case approval from your Dean before responding to a media enquiry.

(4) Many of the requests that we receive from the media require our academic colleagues to do some background research or preparation, although in most cases this isn't arduous or time-consuming. It is a matter for the individual academic colleague to judge whether the amount of preparation required is reasonable and manageable before they decide to co-operate.

(5) I do think that scheduling your time to enable you to respond to media enquiries related to your university work was a legitimate use of your PA's time."

107. The claimant also emailed the Head of School Administration, Anna Reeder, about the Register of interests, expressing his puzzlement that no-one challenged his nil return every year despite everyone knowing about his media work. His initial email was sent on 15 September 2012 at page 504 and he received a response from her on 21 September 2012 at page 98. Her email said:

"I think it has always been entirely up to an individual (and their conscience) as to what they returned in their Register of interests and I am sure many, in the past, like you, did not believe their returns were of too much significance. Although we had to state – and prove – that we kept them up-to-date on the annual Compliance Return from the Head of School, until now, they have never gone anywhere but are kept on file within the school for audit purposes. However, I have a feeling that Alan North must have had it on his agenda at some stage and asked for Heads of School to send copies of their Register to him last year, or even the previous year, because that is when David Clarke sent his updated version to Alan, copied to me to keep on file – so perhaps you missed that request from him? There certainly was a push on then when the new policy documentation came out."

108. The claimant also took steps to address the question of how much RA time would be utilised in preparing for some of his media appearances. He obtained an estimate of that time from a company called Idox, and their letters of 11 October 2012 appeared at pages 683-686. Idox were asked to comment on how much research assistant time they would estimate would be needed if they were bidding to do work of the kind which the claimant had carried out. For these purposes Idox had been given by the claimant details of a number of matters on which he had worked, including the Kelkoo, Nivea and Herbal Essence matters. Ten matters in total were considered and the Idox estimate was 45.6 days.

109. The claimant subsequently used these estimates in preparing his own table of the matters on which he had worked between February 2007 and February 2012, which appeared at pages 688-694. There were 167 different matters on that schedule and the total RA assistance over that five year period was assessed by the claimant as 65.72 days. That was based on a 7.5 hour working day.

<u>Preparations for Disciplinary hearing</u>

110. On 9 October 2012 the claimant wrote to the Chairman of the Board of Governors expressing concern at the delay in bringing the matter to a disciplinary hearing. The response came the same day at page 100 saying that his concern could be raised at the disciplinary hearing, and the following day, 12 October 2012, an invitation to a disciplinary hearing on 7 November was issued at pages 101-102. That letter came from Mrs Heaton and it reiterated the three allegations and the eight key findings of the Grant report. The letter recorded that the claimant had been allowed some time limited access to his university emails despite being suspended.

The disciplinary panel was to be chaired by Councillor Khan sitting with Mr Gerry Yeung and Professor Maggie Gale.

111. It was in the week or so after this that the university arranged for witness statements to be signed by Dr Cohen, Mr Clarke, Laura Sale, Anna Reeder and Jane Ward, and on 18 October at page 104 a letter was issued to the claimant by Mrs Heaton confirming the composition of the panel, the HR support and enclosing all supporting papers which had also been sent to the panel itself.

112. For the first time the claimant saw the text of some of the Montaldi grievance. He was very concerned at some of its content. He sent an email on 22 October 2012 at pages 106-107 to Mrs Heaton. He pointed out that the complaints of bullying and harassment had never been put to him formally, and that the complaint letter had clearly been edited to remove the allegations of research misconduct but it should have been edited to remove the other matters too. He expressed his concern that the inclusion of the bullying and harassment allegations would affect the panel's perception of him and not allow a fair hearing.

113. He also expressed his concern in that email that some of the comments made by the witnesses interviewed by Professor Grant were based on hearsay and malicious rumour and had not been edited out of their witness statements. He asked whether he would have the opportunity to question Dr Cohen, Laura Sale, Anna Reeder and Jayne Ward at the hearing.

114. The response came from Mrs Heaton on 22 October on page 106. In relation to the Montaldi grievance she said it was normal for the panel to know what led to the investigation, and in relation to witness statements she said that the claimant would have the chance to present his case or an explanation. Her email said that:

> **"The panel will decide the format of the hearing and you will be given the opportunity to ask questions/seek clarification from witnesses presented."**

115. It was suggested that the claimant might prepare questions for those witnesses in advance, and he did so. He emailed them to Mrs Heaton on 24 October 2012. The questions for Dr Cohen appeared at pages 108-114 and for Laura Sale at pages 115-120. It is clear that the claimant considered he had a number of matters to put to them which would show that their testimony was inaccurate, particularly the amount of time they claimed to have been spending on his outside work.

116. There was a further exchange of emails on 25 and 26 October between the claimant and Mrs Heaton at pages 126-127. Mrs Heaton declined to obtain answers from those witnesses to the questions before the hearing, but a copy would be provided to them. In response to his request for an assurance that he would be able to put those questions at the hearing itself, she replied as follows:

> **"It is inappropriate for me to provide you the assurances you seek in your email as this is the panel's responsibility and within their remit. However it is the usual process to allow you to question those presenting the management case and witnesses. The panel may also question these individuals. The reverse is also generally the case in that those presenting the management case and the panel can put questions to you."**

117. Having seen the Montaldi grievance the claimant asked Dr Christine Rogers, a senior colleague within the School, to comment on it. She provided a three page response at pages 434-436 which was very supportive of the claimant and described some of the allegations made by Dr Montaldi as "outrageous and hypocritical".

Claimant's Response to Charges 29 October 2012

118. On 29 October 2012 the claimant wrote to the disciplinary panel (page 128) enclosing his response to the charges. There was a detailed response to each of the key findings of the Grant report and a list of necessary appendices. He considered it important to give some background to the case and the original complaint from Dr Montaldi because he feared that the complaint could influence the impression the panel members formed of him.

119. In total, the claimant provided approximately 350 pages of material for the panel. It began with an 11 page summary and then encompassed sections written by him with a number of supporting documents. He emphasised and in his view evidenced how the university had encouraged him from the start to do the media work; he asserted that the School had not been using the Register of interests properly and that very few members of staff included anything on the Register, and he said that his media activity was of enormous benefit to the university. He had been provided with an RA explicitly to help with his media activities as well as research and teaching, and he suggested that the estimate of amounts of time spent by Dr Cohen and Laura Sale on this media work was completely improbable, and completely at odds with their very high academic commitments and output. He said that he did not quantify staff time and charge it to external clients because he did not think that it was necessary, and he said that the staff time worked out at 13.14 RA days for each of the five years at issue. Quantification at the time would have been very difficult because it was fragmented and work that was done was then fed into academic talks, papers and books. He dealt with the other points about expenses, tax and the failure to declare a relationship with Laura McGuire on the Register of interests.

120. In addition he made some comments beginning on page 416 about how Professor Grant and Andrew Mullen had conducted their investigation. He said he was astounded that they had not come back to him about the estimates of time spent by Dr Cohen and Laura Sale, whose testimony simply seemed to have been accepted at face value. He suggested they had reasons to overstate their involvement in his media work, not least that they were hoping for a contract extension to work with Dr Montaldi (who had since become a Professor). Neither he nor Laura McGuire had seen their statements before they were presented to the panel to approve them, and there was malicious gossip, innuendo and hearsay in other witness statements. He suggested that the investigators had not checked what had been said by witnesses against official records to verify their accuracy.

121. The appendices to his submission included a number of the documents which he had been gathering in the course of preparing for the hearing, including the Idox report, emails from Dr Rogers and the letter from Professor North of April 2012.

Disciplinary Hearing 7 November 2012

122. The disciplinary hearing took place on 7 November 2012. The notes of the hearing appeared at pages 734-751. They were notes taken by Catherine Appleton of HR. The panel were advised by Heather Graham of HR, and the management case was presented by Professor Grant and Andrew Mullen. The claimant was accompanied by Roger Walden of his trade union, the UCU. Dr Walden was an experienced trade union official and a lecturer in Employment Law.

123. Councillor Khan opened the hearing by saying that it would concentrate only on financial regulation. There was then a discussion about witnesses which was recorded in the notes as follows, referring to the claimant as GB, and to Councillor Khan as AK:

> **"GB asked at what point witnesses could be called.**
>
> **AK explained that they would start with the university side and they could call any witnesses and then GB would have chance to put forward his case and could call any witnesses at that time if he so wished. AK explained that should GB wish to call witnesses he would be asked why they were being called and how they relate to the case relating to financial regulations.**
>
> **Andrew Mullen (AM) stated that the university side were not planning to call any witnesses but that some individuals were available to answer questions on their witness statements as required.**
>
> **GB stated that he had two witnesses to call."**

124. The witnesses for the management were available in a different room. The claimant and his representative were not told who they were but they included Dr Cohen and Laura Sale.

125. Professor Grant then summarised the management case and Dr Walden summarised the claimant's response in return. The points which the claimant made in his written submission were developed and discussion ensued. On page 739 the claimant was recorded as saying that the RAs had done 65 days over five years in total. He reiterated a number of times his position that it was all media work not private consultancy. He accepted that the income was around £300,000 over five years from that media work. Andrew Mullen (page 742) sought to draw a distinction between ad hoc responses to the media and work for which there was a contract and deliverables.

126. On page 743 the notes recorded that Professor North was called by the claimant as a witness. He was questioned by both sides. He said he had been surprised about the Montaldi grievance because nothing had been said to him at any stage by her. He said he did not know the details and scale of the claimant's work but that if it was £72,000 a year he did not regard that as unusual. He said it was never discussed where the money was going and it had never occurred to him. In response to a question of whether he saw it as private work, the note recorded him saying "not necessarily" and that it was "an integral part of university work, not done to get rich".

127. As to the Register of interests Professor North was recorded on page 745 as saying this to the disciplinary hearing:

> **"[Professor North] stated that he was [aware of consultancy regulations] as he had got permission from Alan Gilbert to do work himself. He said he didn't proactively ask to see the Register of interests and expects the Heads of Schools to do this themselves but that it is more a role for PSS staff (Professional Support Services). Clearly this should happen but the Head of School Administration or the Head of Faculty Administration should be responsible for it. Clearly this is not happening in [the Faculty]."**

128. There ensued a discussion about whether the resources used by the claimant were substantial. Professor North on page 745 was recorded as agreeing that compensation to the university was due if the resources were substantial, but he emphasised this was hard to define. He said he would not expect reimbursement for nominal use. At the top of page 746 Councillor Khan asked Professor North where he felt the claimant's estimate of 13 days a year from the Research Assistant fell, and Professor North's answer was recorded as follows:

> **"[Professor North] stated that this is 5-10% of work and he thinks it is equivocal and a tough call. He added that he feels it also depends what the individuals are getting from it. Is it against their will or does it benefit their career to do the work?"**

129. Three paragraphs down he was recorded as saying that the RAs were not authorised for private outside work but there was compensation for administration, being in meetings as Head of School.

130. After Professor North left, the claimant indicated that he had another witness to call (Dr Rogers) to discuss consensual relationships and conflicts of interest. He was asked by Councillor Khan to focus on the financial side of the case and Dr Rogers was not therefore called. The claimant had already canvassed her views about consensual relationships and conflicts of interest and the Register (pages 725 and 726) but he did not know what Dr Rogers was going to say about outside work and the Register of interests.

131. On page 747 the claimant explained that he though the panel might find this useful and the following exchange occurred in which Andrew Mullen was referred to as AM:

> **"GB stated that this [witness] was a School person relating to register of interests and asked if the panel would find this useful.**
>
> **AK stated that if it is a case of discussing that a system is in place but no-one uses it then he was unsure what a witness could further add to this point.**
>
> **GB further stated that the witness could discuss the media work in the teaching context.**
>
> **AM said it was accepted that arrangements were not implemented as they should have been.**
>
> **AK confirmed that this was accepted by the panel.**
>
> **It was decided that no further witnesses would be called."**

132. The discussion moved on to expenses before both sides summarised their cases. Professor Grant emphasised that the scale and nature of the outside work meant it was consultancy rather than media work exempt from the requirement to seek approval. The work had been supported by university resources. He submitted that it was hard for the claimant to plead ignorance when he had been Head of

School for seven years. He should have had a working knowledge of policy and no-one had visibility of the scale and nature of the work he had undertaken.

133. In response the claimant submitted that he had been encouraged by the university from the start, that his line manager knew the nature and scale of the work but not the financial recompense, that the university regulations did not properly consider broadcasting of this kind, that the university resources used had been minimal, that the Nivea contract had been atypical, and that he felt that there had been a campaign against him. His representative, Dr Walden, added that there had been a culture change from a more relaxed to a stricter approach with regard to the Register of interests, and the policy and outside work prior to 2011 had been much more vague. He said that other than Nivea, the claimant's work had been almost exclusively media work.

Dismissal Decision

134. The panel confirmed its decision in a letter from Councillor Khan on 9 November 2012 at pages 752-753. The letter reiterated the three allegations and confirmed that written submissions and additional information had been considered carefully. The conclusions were set out on the second page of the letter in relation to the three allegations as follows:

"(a) The evidence showed that you had undertaken significant amounts of outside work and you did not dispute this in any way. You argued that this work did not require formal approval under the Policy on Outside Work that was in operation at the time. The panel considered however that whilst some of the work may have been excluded as media work, where you were 'offering ad hoc comment or opinion to inform media discussion', by no means all of it was and therefore formal approval was required in line with the Policy.

The panel also noted that although your line manager, Professor Alan North (whom you called as a witness) was aware that you were undertaking significant media work, he was not aware of the extent or the detail, including income earned, nor of the fact that you were not taking steps to comply with the university's procedures. You accepted that you had failed to declare the work in the School's register of interests and whilst you put forward some mitigating arguments in this respect the panel concluded that the work should also have been declared in this document.

Overall, therefore, the panel considered that as a senior employee and Head of School it was your responsibility to ensure that these important procedures were adhered to and that you had failed to do so.

(b) Although you dispute the amount of time spent by yourself and others in undertaking this outside work, the panel was nonetheless satisfied that the amount of university resources used was significant and that you should have taken steps to ensure that appropriate costs were allocated and reimbursed. The fact that some of your media work may have been of some or even some significant value to the university as well as to you would not negate the need to ensure transparency and probity.

(c) Finally on balance the panel concluded that whilst there had been a breach of the financial regulations in relation to your expenses, they were prepared to accept your explanation that this was not deliberate and that you intended to repay any monies owed to the university and that you remain prepared to do so. The panel recommends that the university should make arrangements with you in this respect."

135. In relation to sanction, the letter said this:

> **"In summary, the panel did not consider that your explanations for your conduct provided mitigation, particularly in view of the fact that you held a senior position as the Head of School for seven years, and concluded that they should be designated as gross misconduct and that, regrettably, the appropriate penalty is the summary dismissal from your post."**

136. The claimant was given the right of appeal.

Appeal

137. The claimant's appeal letter was dated 21 November and appeared at pages 755-762. It was in two parts. The first two pages were a letter from Dr Walden. Five grounds of appeal were given. Firstly, the panel had failed properly to weigh the evidence and comprehend key points. "Virtually all" of the claimant's outside work fell within the exempt categories not requiring approval. Secondly, the panel had not justified its finding that significant university resources had been used. Thirdly, issue was taken with the finding on expenses. Fourthly, the penalty was said to be disproportionate and excessive. There should be no automatic assumption that dismissal is appropriate even if gross misconduct were proven. Fifthly, the disciplinary process had taken too long and the summary dismissal penalty was inconsistent with other cases.

138. The second part of the appeal letter was a document prepared by the claimant himself. It set out 11 grounds of appeal. In brief they were:

(1) Failure properly to characterise correctly the outside work since all of it (not "virtually all") was exempt.

(2) The rules and regulations at the time were ambiguous.

(3) The panel failed to consider the context in which the Register of interests was operating within the school and perhaps the university at the time.

(4) Others in administrative roles failed to meet their responsibilities.

(5) The claimant had not been provided with the opportunity to challenge witness statements that he considered unreliable. It was only at the hearing that he had discovered that the university was not calling any witnesses and therefore he had no opportunity to demonstrate that significant parts of their statements could be shown to be false.

(6) Highly prejudicial and irrelevant material was presented to the panel (the Montaldi grievance).

(7) The claimant had had no opportunity to correct errors in his witness statement.

(8) The outcome of the hearing was announced to a meeting with the school on 12 November prior to the outcome of the appeal.

(9) There had been unfair and unreasonable delay.

(10) The composition of the hearing panel was unconstitutional.

(11) The Board of Governors had failed to provide guidance to staff on what might constitute different forms of misconduct.

139. By a letter of 20 December 2012 the claimant was informed of the composition of the appeal panel. It was chaired by Dame Ion sitting with Pete Gibbs, Deputy Director of Human Resources at Manchester Metropolitan University, and Professor Fiona Devine, Head of the School of Social Sciences.

140. Prior to the appeal hearing Mrs Heaton prepared a summary of the Montaldi grievance which appeared at pages 768-770, which did not include any information about the allegations of unprofessional and bullying behaviour. She also prepared her own witness statement at pages 771-772 in which she addressed some of the claimant's numbered grounds of appeal. Some of her statement concerned delay and procedural matters, but in relation to ground 11 (the absence of guidance to staff on what would be gross misconduct) she accepted there was no formal guidance in place but said that every disciplinary and appeal panel had an HR adviser. Her witness statement did not address the question of guidance to staff.

141. On 5 February 2013 a document was produced which was a written response from the disciplinary panel to the grounds of appeal. A different version appeared at pages 901-911 which had in italic font some passages which it appeared Councillor Khan read out at the appeal hearing. There was no direct evidence before me as to the provenance of this document but I inferred that it was prepared by someone in the HR department (not Mrs Heaton) for Councillor Khan to rely on as the disciplinary panel case at the appeal hearing. That document dealt with each of the grounds of appeal and provided more information about the reasoning of the disciplinary panel. Much of the document mirrored the notes of the disciplinary hearing. In relation to what was said in their witness statements by Dr Cohen and Laura Sale, the following appeared at the foot of page 778:

> **"In the hearing there was discussion about the statement of the Research Associates, Laura Sale and Doron Cohen. Professor Beattie disputed the amount of time that they said they had spent on media work and referred to an independent research company which considered the work amounted to 65 days over five years which amounted to 13 days a year. Whilst they questioned Professor Beattie on this point effectively, the panel accepted his position on this as can be seen in the notes of the hearing when this issue was discussed with Professor North. Nonetheless even for one Research Associate this would equate to roughly £11,250 over five years, £22,500 if it applied to two."**

142. The impression this document gave was that the panel had proceeded on the basis of the claimant's own figures about the amount of RA time spent over the five year period. That was not, however, quite what Professor Gale said in her oral evidence to my Hearing. In cross examination she said that the panel had not made a finding that the claimant's figures were correct, nor a finding that the estimates given by Cohen and Sale were correct, but rather had only made a finding that there was difference between the two.

143. As to the ground concerning a disproportionate and excessive penalty, the response from the disciplinary panel said this:

"Professor Beattie had made no attempt to reimburse the university for the use of resources for his media work, even though it was clear that he had used university resources. At the hearing rather than accept he had used university resources and should have reimbursed the university he argued that this was not the case and chose to argue instead that his work was of benefit to both the university and the individuals themselves. Professor Beattie appeared to think that it was acceptable because of who he is and the value that he perceived he added to the university meant that it was not necessary then to comply with the university procedures and regulations.

The disciplinary panel did discuss the appropriate level of sanction and concluded that the conclusion they had reached with regard to the evidence indicated that the allegations which had been substantiated were so serious as to constitute gross misconduct with dismissal as the outcome. It did consider whether a final written warning could be issued as an alternative, but concluded that as the university's trust and confidence in Professor Beattie had been lost, this would not be appropriate. The only other option that the disciplinary panel could have considered was to dismiss Professor Beattie with notice, however given that their conclusion was that this was a case of gross misconduct it would have been inappropriate to do so."

144. This was the first occasion upon which the possibility of a sanction falling short of dismissal was mentioned, and the first occasion upon which a loss of trust and confidence was mentioned.

145. The position in relation to the disputed witness evidence was addressed against on page 781. The document reiterated the position that the disciplinary panel was prepared to make its decision based on an acceptance of Professor Beattie's position on this point and therefore did not consider it necessary to call these witnesses. It made the point that the claimant had not challenged that decision at the hearing.

146. Ground 11 was again misconstrued: the response was simply that there was no question in the panel's mind that the conduct was anything other than gross misconduct. The claimant's point was about the lack of guidance to staff, not the lack of guidance to the panel.

147. On 11 February the claimant supplied a detailed appeal submission. As with his submission to the disciplinary panel, it formed a covering document supported by a significant number of appendices. The submission itself ran to 43 pages between page 783 and page 825. His case was put very forcefully and very clearly. He set out in some detail once again why he maintained there were inaccuracies in the witness statements relied upon by management. He also commented on passages in the disciplinary panel response to his grounds of appeal. He pointed out that in assessing the university resources used, even on his estimates, the panel had ignored the testimony of Laura McGuire that she did much of the work in her own time. That had been apparent from her interview with Professor Grant on 31 May 2012 since she had said (page 349) that she did the majority of the scoring of the eye tracker device at weekends "purely for selfish reasons". He enclosed a further email from Ms McGuire of 10 February 2013 at page 842 reiterating that "the vast majority of help I gave for your media work was done on my own time".

148. In relation to the sanction, the claimant emphasised on page 815 that he was shocked and saddened to read the assertion that trust and confidence had been lost, when his media work had never been covered up. He questioned whether there was

something else (such as the Montaldi grievance) affecting that view. He went on to suggest that the work which led to the publication of "Our Racist Heart?" was also a factor, although this was not a matter pursued at my Hearing.

149. Having seen what the claimant said in his appeal submission about the reliability of the accounts of Dr Cohen and Laura Sale, arrangements were made for them to provide further comments on what he said. These additional documents appeared at pages 890-895 and were signed by each of them. They were sent to the claimant by email by Mrs Heaton on 19 February 2013 at page 896, and the claimant replied to say he was shocked that the new material was only sent to him so late. He said he had managed in the very short time available to locate critical evidence to show that the new statements were still highly inaccurate and included things that were false. He had managed to get emails from Dr Rogers on 19 February 2013 at pages 898 and 899 which took issue with a number of the statements of Dr Cohen in particular.

Appeal Hearing 20 February 2013

150. The appeal hearing took place on 20 February 2013. The files of papers from the disciplinary hearing were available for the appeal panel but the panel did not look at them. They focussed on the claimant's appeal letter, his appendix, his submission and the material put in by the disciplinary panel together with the new information from Human Resources (the statements of Mrs Heaton, Dr Cohen and Ms Sale). The notes of the appeal hearing appeared between pages 912 and 924. Dr Walden represented the claimant once again, and Councillor Khan presented the disciplinary panel case.

151. Objection was made by Dr Walden to the late statements from Ms Sale and Dr Cohen and the claimant went through his appeal submission and drew attention to particular parts of it. In response to questions from the disciplinary panel representatives he confirmed that he regarded every single piece of work as within the broadcasting exemption from needing approval, and that he had looked at the Outside Working Policy a few times over the years and the new policy when he was stepping down as Head of School in the middle of 2011 (page 917).

152. At the bottom of page 917 the claimant said he had been genuinely confused as to what should be declared. The following exchange was then recorded at the top of page 918:

> **"PG [Pete Gibbs] asked whether if he had been genuinely confused, had he not thought he should have recorded it anyway?**
>
> **GB [the claimant] replied that in retrospect, yes he had".**

At the foot of page 918 there ensued a discussion in which the claimant said that all broadcasting work needed some background activity by way of preparation and Dame Ion commented that he was proposing a unique definition of broadcasting.

153. In presenting the disciplinary panel case Councillor Khan made it clear that the panel considered that as Head of School the claimant should have made it his business to understand rules, regulations and policies, and that given the volume of

his external activity it was “unbelievable” that he did not consider at any point he should seek formal approval and document it in the Register of interests. The panel had not regarded the question of whether the work was of value to the university as relevant.

154. On page 923 Dr Walden queried the basis on which the panel had found there to be a fundamental loss of trust, since that had never been raised. He queried whether any other sanction had been considered. In response Ms Graham (the HR adviser for the disciplinary panel) said that in 20 years or more experience of HR, gross misconduct leads to summary dismissal. When asked whether the panel had taken into account the loss for the claimant of his job, career, and the effect on his family life, Councillor Khan responded by stating only that the evidence was the basis for the decision. Both sides then summed up and the appeal hearing concluded.

Appeal Outcome 28 February 2103

155. The decision of the appeal panel was set out in a letter from Dame Ion of 28 February 2013 at pages 925-928. The grounds of appeal taken from Dr Walden’s letter of 21 November (not from the claimant’s appendix document) were set out and the conclusions of the appeal panel confirmed.

156. In broad terms the appeal panel was satisfied that the disciplinary panel had weighed the evidence appropriately, and that there was no doubt that some of the work fell within the scope and spirit of the policy on outside work of which the claimant was or should have been aware, and therefore required formal approval. The appeal panel concurred with the view that significant university resources had been used, and agreed unanimously that the claimant’s actions had reasonably been considered to constitute gross misconduct and that dismissal was proportionate. The appeal panel considered that the claimant had ignored completely the requirements of the policy for consulting and the policy for outside work extant at the time, and that in reaching the view that the university resource used was significant, the appeal panel took account of the claimant’s views on the reliability of Dr Cohen and Laura Sale. Finally, the appeal panel concluded that the Montaldi grievance had not been taken into account by the disciplinary panel.

157. There was no express finding on the claimant’s argument that there was no guidance to staff on what would amount to gross misconduct.

158. The appeal was dismissed and dismissal upheld.

Relevant Legal Principles

Unfair Dismissal

159. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. A dismissal for a reason which relates to the employee’s conduct is a potentially fair reason for dismissal, but the test of whether it is fair or unfair appears in section 98(4) which reads as follows:

> **"…The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

160. In **British Home Stores v Burchell [1980] ICR 303**, Mr Justice Arnold identified three considerations which arise in misconduct cases. Firstly, did the employer have a genuine belief that the employee was guilty of the misconduct in question? Secondly, was that belief based on reasonable grounds? Thirdly, had that belief been formed following such investigation into the matter as was reasonable in all the circumstances? This formulation is commonly termed the "**Burchell** test".

161. If the **Burchell** test is answered in the affirmative, the Tribunal must still determine whether the decision of the employer to dismiss the employee rather than impose a different disciplinary sanction (or no sanction at all) was a reasonable one.

162. In relation to the questions of whether the employer had reasonable grounds for its belief, whether that belief was formed following a reasonable investigation (which encompasses procedural questions) and whether dismissal was a reasonable sanction, the test to be applied is that of the band or range of reasonable responses. As Aikens LJ put it in **Orr v Milton Keynes [2011] ICR 704**:

> **"The Employment Tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision to employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The Employment Tribunal must not simply consider whether *they* think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable' employer might have adopted…An Employment Tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice."**

163. In **Turner v East Midlands Trains Limited [2012] EWCA Civ 1470**, Elias LJ made the following observation in paragraph 20:

> **"…When determining whether an employer has acted as the hypothetical reasonable employer would do, it will be relevant to have regard to the nature and consequences of the allegations. These are part of all the circumstances of the case. So if the impact of a dismissal for misconduct will damage the employee's opportunity to take up further employment in the same field, or if the dismissal involves an allegation of immoral or criminal conduct which will harm the reputation of the employee, then a reasonable employer should have regard to the gravity of those consequences when determining the nature and scope of the appropriate investigation."**

164. Elias LJ went on to refer to the approach he had taken in the Employment Appeal Tribunal in **A v B [2003] IRLR 405**, a case which concerned serious allegations of criminal misbehaviour, which was approved by the Court of Appeal in

Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457. At paragraph 22 of **Turner** he said this:

> **"The test applied in A v B and Roldan is still whether a reasonable employer could have acted as the employer did. However, more will be expected of a reasonable employer where allegations of misconduct, and the consequence to the employee if they are proven, are particularly serious."**

165. In considering the fairness of the dismissal the appeal should be treated as part and parcel of the dismissal process: **Taylor v OCS Group Limited [2006] ICR 1602**.

166. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that any Code of Practice issued by ACAS shall be admissible in evidence, and that a Tribunal shall take into account any provision of such a code which appears relevant. The ACAS Code of Practice on Disciplinary and Grievance Procedures 2009 contains the following provisions:

> **"(2) Fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations. These should be set down in writing, be specific and clear. Employees and, where appropriate, their representatives should be involved in the development of rules and procedures. It is also important to help employees and managers understand what the rules and procedures are, where they can be found and how they are to be used…**
>
> **(12) …..At the [disciplinary] meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should given advance notice that they intend to do this…**
>
> **(23) Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but include things such as theft or fraud, physical violence, gross negligence or serious insubordination."**

167. In the employment context "gross misconduct" is used as convenient shorthand for conduct which amounts to a repudiatory breach of the contract of employment entitling the employer to terminate it without notice. In the unfair dismissal context, however, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances: **Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854**.

168. Exactly what type of behaviour amounts to gross misconduct will depend upon the facts of the individual case. In **Laws v London Chronicle (Indicator Newspapers) Limited [1959] 1 WLR 698**, the Court of Appeal considered the position of an employee who disobeyed a direct instruction from the Managing Director to remain in a particular room. Lord Evershed said that the question must be whether the conduct complained of shows that the employee has "disregarded the essential conditions of the contract of service", and that a single act of disobedience

could amount to gross misconduct if it was "wilful" in the sense that it connoted a deliberate flouting of the essential contractual conditions.

169. In **Attorney General v Blake [1998] 2 WLR 805**, Lord Woolf MR said this:

> **"There is more than one category of fiduciary relationship, and the different categories possess different characteristics and attract different kinds of fiduciary obligation. The most important of these is the relationship of trust and confidence, which arises whenever one party undertakes to act in the interests of another or places himself in a position where is obliged to act in the interests of another. The relationship between employer and employee is of this character. The core obligation of a fiduciary of this kind is the obligation of loyalty. The employer is entitled to the single-minded loyalty of his employee. The employee must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interests may conflict; he may not act for his own benefit or the benefit of a third party without the informed consent of his employer."**

170. In **Neary & Neary v Dean of Westminster [1999] IRLR 288** Lord Jauncey of Tullichettle, sitting as Special Commissioner, adjudicated on a petition brought by the Organist and Master of Choristers of Westminster Abbey following a dismissal from that post on the ground of gross misconduct. The two principal matters relied upon as amounting to gross misconduct were the taking of "fixing fees" for organising singers and musicians for performances in which members of the Abbey choir had taken part, and the retention by the employee of surpluses in respect of events which were organised on behalf of the Abbey. There was no suggestion of any dishonest conduct by the employee.

171. It was common ground in that case that the highest standards of integrity were expected of Abbey staff, and that a spirit of openness befitting a religious foundation was required. At paragraph 19 of the judgment Lord Jauncey recognised that the extent of the duty owed by employee to employer is dependent on the facts of each case. He said:

> **"The character of the institutional employer, the role played by the employee in that institution and the degree of trust required of the employee vis-a-vis the employer must all be considered in determining the extent of the duty and the seriousness of any breach thereof."**

172. After reviewing earlier authorities (including **Laws**) in paragraph 22 he said this:

> **"Conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."**

173. It follows that in the statutory context of section 98(4), even if the **Burchell** test is met, the Tribunal must still consider the following:

(a) Whether the employer acted within the band of reasonable responses in choosing to characterise the misconduct as gross misconduct, and if so

(b) Whether the employer acted within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal.

174. On the latter question the employee's length of service and disciplinary record are relevant (**Trusthouse Forte (Catering) Limited v Adonis [1984] IRLR 382**) as well as the attitude of the employee to his conduct (**Paul v East Surrey District Health Authority [1995] IRLR 305**).

Remedy for Unfair Dismissal

175. Although this hearing was not determining remedy, it was agreed that two matters going to remedy would be decided. The first was the possibility of a reduction to the compensatory award (should compensation be the appropriate remedy) pursuant to the principles set out in the decision of the House of Lords in **Polkey v A E Dayton Services Limited [1987] IRLR 503**.

176. The second was contributory fault. That is relevant not only to the basic and compensatory awards (sections 122(2) and 123(6) respectively), but also to whether an order for reinstatement or re-engagement should be made (sections 116(1)(c) and 116(3)(c) respectively. As to what conduct may fall within these provisions, assistance may be derived from the decision of the Court of Appeal in **Nelson v BBC (No 2) [1980] ICR 110** to the effect that the statutory wording means that some reduction is only just and equitable if the conduct of the claimant was culpable or blameworthy. The Court went on to say (*per* Brandon LJ at page 121F):

> **"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."**

Breach of Contract

177. The test of the band or range of reasonable responses which is central to the unfair dismissal issue is not applicable to the complaint of breach of contract in relation to notice pay. The issue for me to determine was whether the respondent had shown on the balance of probabilities on the evidence before me that the claimant was guilty of gross misconduct. It was for me to make my own decision on that, not to evaluate the reasonableness of the employer's decision.

Submissions

178. Both advocates had taken the trouble to prepare a written submission and reference should be made to those documents as appropriate. I also had the benefit of oral submissions.

Claimant's Oral Submission

179. On behalf of the claimant Ms Hodgetts submitted that the dismissal was unfair for ten reasons. They were (1) a lack of clarity as to what would amount to gross misconduct; (2) a failure to take into account the claimant's honest belief that he was acting appropriately; (3) the assumption that a finding of gross misconduct meant that dismissal must inevitably ensue; (4) the limited nature of the investigation, particularly in relation to Professor North's evidence and the time spent by the RAs; (5) insufficient investigation of Professor North's understanding of what the claimant was doing; (6) a failure to honour the assurance that it was accepted that the register of interests was not taken seriously; (7) a failure to consider at the dismissal stage whether trust and confidence had been undermined by the claimant's conduct; (8) denial to the claimant of a fair opportunity to state his case (including the question of whether witnesses would be called for cross examination); (9) an unreasonable approach to the relevance of the claimant's attitude to the appropriate sanction, and (10) a number of failings at the appeal stage which meant that it was not a fair appeal.

180. In addition Ms Hodgetts submitted that in the event that dismissal was found to be unfair the respondent had not provided sufficient evidence to enable the Tribunal to predict with any degree of certainty what would have happened had a fair approach been taken. She therefore resisted any suggestion that there should be a finding of a **Polkey** reduction in compensation (should that be the appropriate remedy) or a finding of contributory fault.

181. As to the breach of contract claim it was submitted that any written term in the contract had been varied or waived by Professor North, and that any lack of clarity as to the extent of such variation or waiver should be construed in favour of the claimant, and therefore there had been no repudiatory breach of contract.

Respondent's Oral Submission

182. On behalf of the respondent Miss Woodward carefully reviewed the relevant policies and emphasised the importance of the need to act in accordance with the standards of accountability, openness, honesty and leadership. She reminded me that the claimant had accepted in cross examination that the rationale for requiring disclosure of outside work earnings and disclosing outside work itself was reasonable, and that it amounted to common sense in any event.

183. She resisted the claimant's characterisation of the respondent's case as one of strict liability. By reason of the wording of the various policies and by reason of common sense, it was not necessary to spell out to the claimant that what he had been doing would be regarded as gross misconduct. The unfairness at which paragraph 23 of the ACAS Code was directed was where there was a risk an employee could not reasonably know that a one-off act might be gross misconduct, but that was not the case here. Given his status, seniority and experience, the claimant should reasonably have known that what he was doing rendered him liable to dismissal.

184. In the course of reviewing the factual position Miss Woodward highlighted that the figures for income from outside work over the relevant period were not the result

of consistent use but that in fact more than £123,000 had been generated in the final 12 month period. His use of university resource to service that work had increased too. My attention was also drawn to the fact that when the claimant completed the declaration of interest form in August 2011 he was in the middle of the Nivea work, in which respect the purchase order itself showed that he had accepted restrictions on other work and the publication of any research. Further, the claimant's awareness at the time of the potential misuse of resources was evident from his concerns about Professor Mayes using his PA to assist him in his paid editorial work (paragraph 138 of his witness statement).

185. Miss Woodward then reviewed in detail the work which the claimant had undertaken with particular focus on entries from March 2010 in the claimant's own table, and the Nivea and Kelkoo contracts. She submitted that the claimant was wrong to have assumed that everyone knew he was undertaking this type of work and using the RAs to do it because only media work had been discussed with Professor North not consultancy work. She suggested that the claimant had misrepresented the situation to Professor North in their email exchange at page 357. The claimant's assertion that any preparation for media work was covered by the exemption was not sustainable and not what had been understood by Professor North. It was suggested that the claimant had deliberately glossed over the real issue, which was the distinction between media work and private consultancy, and that there was no evidence of anyone else doing consultancy work without permission.

186. In summary Miss Woodward submitted that looking at the allegations as they were put in the dismissal letter, there had been a reasonable investigation and a fair procedure and there were reasonable grounds for the conclusion that the claimant was guilty of both matters. Further, taken together it was within the band of reasonable responses to characterise them as gross misconduct. The question of trust and confidence was inexorably bound up in any allegation of gross misconduct and did not need to be raised separately at the time. It was understandable that when challenged in the appeal the panel explained why they considered dismissal was the appropriate sanction; this did not amount to the introduction of a new reason for dismissal. The view that this was gross misconduct was a reasonable one even in the absence of dishonesty because the claimant had deliberately closed his mind to the possibility that he was outside procedures, and for an institutional employer with high standards requiring a high degree of openness that could reasonably be characterised as gross misconduct.

187. As to unfair dismissal remedy, Miss Woodward submitted that a **Polkey** reduction would be appropriate if dismissal were found to be unfair because of flaws in the investigation process, but not if my finding were that the claimant's actions could not reasonably be regarded as gross misconduct. In any event I was invited to make a finding of contributory fault in the event that the dismissal was unfair.

188. The breach of contract claim, it was submitted, should fail because gross misconduct had been established.

Discussion and Conclusions

189. I considered the unfair dismissal complaint first.

Preliminary Observations

190. Before considering the discrete elements of the **Burchell** test it was appropriate to note the following.

191. Firstly, **Burchell** was decided at a time when the burden lay on the respondent to show some elements of fairness. That burden was removed by primary legislation in 1980 and there is now no burden on either party in relation to section 98(4).

192. Secondly, it is of key importance in cases such as this to avoid substituting one's own view for that of the employer. The band of reasonable responses can in appropriate cases properly encompass both dismissal and a lesser disciplinary punishment.

193. Thirdly, the respondent in this case was an employer of significant size and resources and there was no suggestion that there were any resource issues affecting the scope of the investigation.

194. Fourthly, Miss Woodward was right to emphasise that the fairness of the dismissal has to be judged on the basis of the reason shown by the employer for that dismissal. I was satisfied that the dismissal letter at pages 752-753 was accurate in asserting that the claimant was dismissed for the following reasons:

(a) He undertook significant amounts of outside work in the form of private consultancy for which he failed to observe the provisions of the policy and which created a serious potential conflict of interest which he failed to declare in the register of interests; and

(b) In undertaking that private consultancy work he used a significant amount of the university's resources without any reimbursement to the university of the associated costs.

195. Against that background I considered first whether the respondent had carried out such investigation into the matter as was reasonable, and had followed a reasonably fair procedure. I then considered whether there were reasonable grounds for the conclusion that the claimant was guilty of misconduct on each of those allegations. Finally, I turned to whether it was within the band of reasonable responses to characterise any such misconduct as gross misconduct and then to determine that dismissal was the appropriate sanction.

Reasonable Investigation and Procedure

196. The allegations in this case were not of seriousness equivalent to those which arose in **A v B** or in **Roldan**. In the former the employee was a residential social worker who was alleged to have allowed a 14 year old girl who was a resident of a children's home to have stayed at his home. The effect of dismissal was to prevent

him being employed in that particular field (paragraph 28). The consequences of dismissal in **Roldan** were even more serious: the claimant was a Registered Nurse recruited from abroad whose work permit and right to remain in the UK were revoked because of dismissal. However, the dismissal of this claimant for gross misconduct would amount to a serious setback in his career. Whilst there might be no consequences equivalent to professional registration, it was evident that he would face significant difficulty in securing comparably prestigious employment as a professor in his professional field of psychology. To that extent it seemed to me that an employer of this kind acting reasonably would treat the matter with significant care.

Professor North

197. The claimant made a number of criticisms of the investigation in paragraph 12 of the written submission which were said to demonstrate a pattern of ignoring evidence that supported the claimant and failing to test or check evidence that might be counted against him. Particular reliance was placed upon the treatment of Professor North's input. The discussion with Professor North carried out by Mr Clarke in the course of his investigation of the financial position was recorded in notes at pages 56-59, but those notes were not put to Professor North for approval. Professor North did not agree that the notes were accurate in describing him as "astonished" at the amount of income generated by the claimant, nor did the handwritten notes reflect the comment in the typed notes at page 56 which ascribed to Professor North the view that the media work was to publicise university research. However, this was not at this stage a formal disciplinary investigation: it was a preliminary enquiry by Mr Clarke into the financial strand of the allegations made by Dr Montaldi. It was more concerning that Professor Grant had not obtained signed notes from his interview of Professor North, but it seemed to me that was simply a consequence of a decision that the management case against the claimant would not include Professor North's evidence. The interview notes from witnesses who were part of the management case were only signed in the run up to the disciplinary hearing, and I declined to infer that Professor Grant had decided at the time of the interviews in May to treat with more care those which were detrimental to the claimant.

198. In any event the claimant called Professor North to give evidence to the panel, and it is clear from the notes at pages 743-746 that the claimant and his representative had the opportunity to draw out of Professor North the information they considered relevant to the allegations. In terms of the investigation and procedure, therefore, the treatment of Professor North's input was not outside the band of reasonable responses.

199. Similarly it seemed to me to be for the claimant to evidence that there had been widespread knowledge of his activities as part of his defence of the allegations. He did in fact do this, providing copies of presentations, PDRs and the witness evidence of Professor North.

RA Time

200. More significant, I concluded, was the claimant's criticism of the way in which the evidence from the RAs was treated by the respondent. Professor Grant

interviewed Dr Cohen and Ms Sale and signed statements were provided to the claimant prior to the disciplinary hearing. He considered that their estimates of time spent on his outside work were seriously inaccurate and this resulted in the exchange of emails with Mrs Heaton in the days before the disciplinary hearing summarised in paragraphs 113-116 above. It was apparent to Mrs Heaton that the claimant wanted to cross examine those witnesses but equally she made it clear to him that that would be a matter for the panel. At the disciplinary hearing (page 734) Andrew Mullen said that the management side were not planning to call any witnesses but that some individuals were available to answer questions on their witness statements as required. The claimant did subsequently have his say on what those witnesses said and made clear that he disputed it: page 738. It was unfortunate that there was some confusion about whether that witness evidence was relied upon or not. Dr Walden did not make any point about this in his appeal letter of 21 November 2012 at page 755, but the claimant did make his concerns plain in his appendix to that appeal letter at pages 759-760.

201. The response to his appeal from the disciplinary panel said that the panel had accepted the claimant's position as to the time spent by RAs on his outside work. However, in her oral evidence to my Hearing Professor Gale took a different line, and said that the panel simply accepted that there was a difference between his estimate of time and that from the RAs themselves, but that neither estimate could be verified. She regarded the salient point as being that some RA time had been used and not declared. In cross examination she accepted that the extent of the misuse of resource would be relevant to sanction and yet it appeared her recollection was that the panel had not made any finding on the extent of that misuse.

202. There was a related point about whether the RAs had been happy to do the work or not. That was a matter untested in the live evidence before the disciplinary panel.

203. Had the panel made a decision accepting the time estimates from the RAs themselves, the failure to ensure clarity as to whether that evidence would be relied upon and whether it could be tested in cross examination would have taken the matter outside the band of reasonable responses. Looked at broadly, however, and notwithstanding what Professor Gale said in evidence to my Hearing in June 2014, it seemed to me that the claimant had been given the benefit of the doubt on this point. The panel did not proceed on the basis that his time estimates were incorrect. They proceeded either on the basis that his figures were accurate (the response to the grounds of appeal) or that it did not matter whether they were accurate or not (Professor Gale's oral evidence). Consequently this point went to sanction rather than being a flaw in the investigation or procedure.

Laura McGuire

204. The treatment of Laura McGuire's evidence was also not ideal: she was not asked to sign her statement and it later transpired (page 842) that she regarded the notes as inaccurate. However, even those unsigned notes recorded that she said that she had offered to help with the invoices, and that the work on the eye tracker results for the Nivea matter was done in her own time. Further, the claimant had seen these notes as an appendix to Professor Grant's report before the disciplinary

hearing and he had the opportunity to call evidence from Laura McGuire had he wished to do so. I therefore rejected the contention that this amounted to a significant flaw in the investigation or procedure.

Dr Rogers and the Register

205. Similarly the exchange in the disciplinary hearing which resulted in the claimant not calling Dr Rogers to give evidence about the lack of adherence to the register of interests was dealt with properly in a procedural sense. Councillor Khan asked the claimant to focus on the financial side of the case (page 746), and there was an acceptance both by management and by the panel that the arrangements for the register of interests were not implemented as they should have been (page 747). This gave the claimant the impression that the point had fallen away. Had that assurance been honoured there would have been no difficulty.

206. The panel, however, found against the claimant on this point because the dismissal letter at page 753 said:

> **"You accepted that you had failed to declare the work in the school's register of interests and whilst you put forward some mitigating arguments in this respect the panel concluded that the work should also have been declared in this document."**

207. The point had therefore not fallen away and it was outside the band of reasonable responses to give the claimant an assurance that they accepted that no-one used the system but then to find against him for not using it himself.

Dr Montaldi's Grievance

208. The claimant was also critical of the inclusion in the material for the disciplinary hearing of the aspects of the Montaldi grievance which related to the bullying and harassment allegations. He feared that his credibility on the RA time estimates might be adversely affected by those prejudicial matters. I concluded that it was within the band of reasonable responses to include that material in order to give some background as to how the financial issues had arisen. There was no evidence from which I could conclude that Professor Gale and her colleagues were affected by this material, and in any event it seemed to me for the reasons set out above that the decision to dismiss the claimant was not based on any conclusion incompatible with his estimates on RA time spent.

HR Predetermination

209. Finally, in relation to the investigation and disciplinary stage, I rejected the contention that HR had predetermined that the claimant should be dismissed and that this accounted for the flaws in the investigation. Save for the point about the register of interests, it seemed to me that the investigation and disciplinary hearing were conducted in a reasonable manner.

Appeal

210. As for the appeal, the first criticism made by the claimant was that the appeal panel did not have the original paperwork. On the unchallenged evidence of Dame Ion, the original files were available, although neither management nor the claimant

asked the appeal panel to consider them. That was a reasonable way to proceed. The claimant or his representative could have asked for that material to be considered if it was of importance to his appeal for the appeal panel to do so. The claimant's appeal submission was lengthy and detailed and it was within the band of reasonable responses to assume that it contained all the documents the claimant wished to draw to the appeal panel's attention.

211. The introduction of new evidence at the appeal stage was not something envisaged by the relevant Ordinance, save if there was good reason why the evidence was not available at the previous hearing (see paragraph 20 above). It was reasonable for Mrs Heaton to prepare her own witness statement addressing some of the points raised in the claimant's grounds of appeal, particularly those about delay and procedural matters. However, it was remiss of her not to address the claimant's point about the absence of any guidance to staff about what would amount to gross misconduct. That is a point to which I will return below. Her failure to address this point appears to have contributed to the failure of the appeal panel to deal with the matter in its outcome letter.

212. The decision to get more information from Dr Cohen and Ms Sale was most unsatisfactory. It was evidence which could have been before the disciplinary panel, firstly if those witnesses had been called for cross examination, or failing that because the comments made by the claimant and the questions he wanted to ask them were apparent in writing prior to the disciplinary hearing itself. It is right to say that he elaborated upon those comments in his appeal submission, which was the immediate prompt for further information to be obtained from those RAs, but introducing such evidence was a matter outside procedure. Dr Walden opened the appeal hearing (page 912) by objecting to those late statements being included but the hearing proceeded on the basis that they were part of the appeal hearing (page 921).

213. Even though it might be said that Dr Walden and the claimant could have pressed this point more strongly at the appeal and insisted on those matters being discounted, or sought an adjournment to enable the hearing to be reconvened with those witnesses available for cross examination, the way in which this matter was approached by the respondent fell outside the band of reasonable responses. It was not fair to introduce further material of this nature on the eve of the appeal hearing, contrary to the respondent's own policy, as the appeal was intended to be a review of the decision taken by the disciplinary panel.

214. In summary, therefore, the respondent fell outside the band of reasonable responses in the investigation and procedure in two respects: (1) the failure to honour in the dismissal letter the assurance about the register of interests given in the disciplinary hearing at page 747, and (2) the introduction of new evidence from the RAs at the appeal stage.

<u>Reasonable Grounds – Outside Work Allegation</u>

215. The next matter I considered was whether there were reasonable grounds for the conclusion that the claimant undertook significant amounts of outside work in the form of private consultancy for which he failed to observe the provisions of the

relevant policy and which created a serious potential conflict of interests which he failed to declare in the register of interests.

216. This issue turned simply upon whether it was within the band of reasonable responses to characterise some of the claimant's outside work as being private consultancy rather than within the scope of the exemptions in respect of media work.

217. It was unfortunate that there was some confusion in terminology about whether the allegation was a breach of the July 2011 combined policy, or of the two predecessor policies. However, it seemed to me that the central point was the same under both sets of documentation. In summary, the claimant regarded all his work as falling within clause 2.5 of the Policy on Outside Work which covered:

> **"Professional work involving academic scholarship."**

218. One of the examples of such work was

> **"public lecturing and broadcasting connected with the member of staff's professional field…offering ad hoc comment or opinion to inform media discussion in an area in which the member of staff has professional expertise."**

219. The claimant took a broad view of this exemption and considered that any media work relating to his professional area of psychology fell within this, even where it amounted to preparatory work and even if (Kelkoo) no actual media work resulted from the preparatory work.

220. In contrast, the respondent took the view that whilst much of what the claimant did externally did fall within that exemption, some of it plainly did not. The work for Nivea in particular was an example of private consultancy, and the way in which the purchase order was structured (pages 196-197) showed that the research and white paper stage was distinct from the media work.

221. The view taken by the respondent of the scope of the policy was in my judgment within the band of reasonable responses. It was a rational and coherent interpretation of the policies, and the respondent acted reasonably in rejecting the claimant's contention that any work which might be viewed as preparatory to a media appearance must fall within the type of work for which no approval was required.

222. Further, there were also reasonable grounds for concluding that the claimant was in breach of the policy even if approval was not required, because clause 2.5 required him to seek assistance and advice from the contracts team in the event of any contractual relationship with the outside body. Further, even if approval was not required, disclosure was. That was evident from clause 3.1 of the Policy on Outside Work which dealt with "probity" and which was quoted in paragraph 36 above. It referred to "full disclosure of work for outside bodies". It was reasonable to conclude that reference to some main items of media work in an annual PDR, or reference to such matters in a presentation to senior staff, did not meet the requirement for full disclosure of work for outside bodies.

223. The second limb of the first allegation, however, was that the private consultancy created a serious potential conflict of interests which the claimant failed to declare in the register of interests. In the disciplinary hearing the panel accepted

that the register of interests system was in place but "no-one uses it" (page 747). There were reasonable grounds for concluding that the claimant had not used it either. Read literally, the financial regulations (quoted in paragraph 46 above) required the employee to declare (presumably in the register) any personal interest that may result in private benefit. The claimant plainly received significant private benefit from some of his personal agreements with outside bodies (particularly Nivea) and there were reasonable grounds for concluding that these should have been declared in the register (notwithstanding the procedurally unfair way in which this issue was handled – see above).

Reasonable Grounds – Use of RA Resource

224. If there were reasonable grounds for concluding that some of the work fell within the private consultancy area rather than professional work involving academic scholarship, the conclusion that university resources (primarily but not solely RA time) should not have been used would also have been a reasonable one unless authority for the claimant to do so had been granted. In that connection, of course, the claimant relied upon his agreement with Professor Gordon when first appointed Head of School, and with Professor North thereafter.

225. The difficulty for the claimant on this point was that Professor North could reasonably be viewed by the respondent as failing to appreciate the distinction between media work and private consultancy because he was not fully aware of the claimant's activities. His approach could reasonably be viewed as predicated on the assumption that the media engagement and research were effectively indistinguishable because they were both inextricably connected and both of value to the university (page 297). As he put in his email at page 357, much of the media work in which the claimant was involved seemed to him to be in the context of research work. At the disciplinary hearing Professor North said that he did not know the details and scale of the outside work though he would expect that contracts were signed for media work. It was reasonable for the disciplinary panel to conclude that what Professor North had in mind when he authorised the use of an RA on media work was not the sort of separately identified and chargeable work required under the Nivea contract or some of the other examples.

226. Consequently it was within the band of reasonable responses to conclude that the claimant (even on his own estimate of RA time) had been using RAs to some extent on private consultancy work and that such use of university resource should have been declared.

227. The reasonableness of those conclusions on the charges was not undermined by any flaws in the appeal process. The claimant did not present any new information which would render those conclusions no longer reasonably held.

228. Accordingly I was satisfied that the conclusion that there had been misconduct on both disciplinary allegations was within the band of reasonable responses on the information before the disciplinary and appeal panels.

Sanction – was this Gross Misconduct?

229. The next question I considered was whether it was within the band of reasonable responses to characterise this as gross misconduct which might in principle result in summary dismissal. As the authorities summarised above demonstrate, the essence of gross misconduct is that it shows an intention (viewed objectively) on the part of the employee to disregard the essential terms of the contract.

230. It was accepted by the respondent in this case that there was no dishonesty on the part of the claimant in the sense that he knew that what he was doing was outside procedures. Rather, the respondent put its case on the basis either of recklessness (the claimant knowing that there was an issue about whether he might be outside procedures but deliberately not checking), or gross negligence (that his view that he was within procedures was so unreasonable that it could be characterised in that way).

231. The closest the claimant came to acknowledging this was in relation to the Kelkoo work, which involved research into where on the screen a person's eyes focus. He described it as "pilot research" which resulted in a short report. Kelkoo were not happy with it and in the end the claimant was paid £10,000 rather than the agreed £15,000. The report itself was never used and no media work resulted. In cross examination the claimant acknowledged that this matter had given him "pause to think in a way other matters didn't", but said that Tesco then asked him to advise on some online shopping issues which meant that the research was of some use. He accepted that he had justified it to himself in this way. However that exchange was of course not before the disciplinary panel and in my judgment there was no information on which the respondent could reasonably characterise the claimant as being reckless as opposed to acting entirely in good faith. There was nothing to suggest that anyone had drawn the claimant's attention to the problem before or to put him on notice that the way in which he operated with his outside work might be outside policies.

232. Further, it seemed to me that it was outside the band of reasonable responses to characterise his position as gross negligence such as to demonstrate an intention no longer to be bound by the terms of his contract. I regarded it as significant that there was no mention in the dismissal letter of a loss of trust and confidence in the claimant. This phrase appeared for the first time in the panel response to the appeal submission (which appeared to have been prepared by HR for Councillor Khan). Professor Gale could not recall in her evidence at my Hearing whether the phrase "loss of trust and confidence" had been used in the panel deliberations or, if had been used, who first used the phrase. She was clear, however, that the panel considered that the claimant "did not feel he had done anything that contradicted the regulations".

233. In the view of the panel the claimant believed he had done nothing wrong. It was within the band of reasonable responses to take a different view from the claimant and to conclude that he had breached the relevant policies; but was it within the band of reasonable responses to conclude that in doing so he showed that he no longer intended to be bound by them? I concluded not. The claimant held to an

interpretation of the relevant policies and put that case forward strongly in the disciplinary process. He was entitled to do that and to maintain that position on appeal against dismissal. If the respondent was going to attach significant weight to the question of whether he would behave in that way even once the disciplinary procedures were concluded and he had found to have been wrong, that question should have been put to him. It was not. Without such a clear discussion it was not within the band of reasonable responses to conclude in the first instance of disciplinary action against him that the claimant would carry on operating in the same way even once it was plain that to do so was disciplinary misconduct.

234. More broadly, there was no suggestion of dishonesty here and the only conclusion open to a reasonable employer on the information before it was that despite his seniority the claimant had made a genuine mistake as to the scope of the relevant policies - in particular the scope of the reference to media work in those parts of the policy on outside work that did not require formal approval. Further, the claimant had at no stage sought to conceal any of his activity; there were references in PDRs and presentations, and the fact he had not declared it was explicable by his mistaken interpretation, not by an intent to mislead.

235. I concluded that the reference to a loss of trust and confidence in the response to the appeal was essentially an interpolation by HR of a further justification for the decision to dismiss the claimant and did not reflect the actual reasoning of the panel.

236. It is convenient here to deal with the question about the lack of guidance to staff on what will constitute gross misconduct. I did not consider that to be a significant flaw in this case. It was unfortunate that no guidelines had been issued as envisaged by not only the ACAS Code of Practice but also the Terms of Ordinance XXIV (see paragraph 21 above), but it seemed to me unlikely that any such guidelines would have indicated that inadvertent breach of a policy would be liable to be characterised as gross misconduct, and on all the evidence before the respondent the breaches of policy by the claimant were inadvertent rather than deliberate or reckless. This would have been a much more significant issue had this been conduct of a kind which the respondent could reasonably have characterised as gross misconduct. In borderline cases the question of prior guidance can be important.

Reasonableness of Decision to Dismiss

237. Even if (contrary to my finding) the respondent had acted within the band of reasonable responses in characterising this as gross misconduct, it did not follow that dismissal was the appropriate sanction. There was a careful decision to be taken. Miss Woodward highlighted some “aggravating features” in paragraph 37 of the her written submission, which included the position held by the claimant (a senior academic and Head of School), the length of time over which the misconduct took place, the sums of money involved and a continued refusal to accept that his conduct was inappropriate. To be balanced against those factors (had gross misconduct been reasonably found) there would have been the claimant’s length of service, his clean disciplinary record (and, indeed, exemplary record as Head of School), the acknowledged fact that his extensive outside work had not impacted

adversely on his performance of his internal duties, and the substantial impact upon him of a gross misconduct dismissal.

238. However, I was satisfied that this balancing exercise was not carried out. The dismissal letter at page 753 considered mitigating factors in relation to the question of whether there had been gross misconduct, and was consistent with dismissal following automatically from such a finding. At the appeal stage the HR adviser Ms Graham was recorded at page 923 as saying to the appeal panel that in 20 years or more experience of HR, "gross misconduct leads to summary dismissal". In re-examination Dame Ion confirmed that in her experience dismissal follows a finding of gross misconduct, although in response to a question as to whether dismissal was the only option she said that a lesser penalty could be applied if the panel chose to do so. Her outcome letter of 28 February 2013 at pages 925-928 did say (point 6) that although each case was judged on the facts and its own merits, in previous cases of gross misconduct dismissal has followed.

239. Perhaps the most important factor which appears not to have been taken account of at this final stage was that the claimant was someone who had acted honestly throughout. Even had a finding of gross misconduct been a reasonable one, to have proceeded to dismissal without considering whether that was the right thing to do would have been unfair. (Of course, had that been the only basis on which the case was unfair a significant **Polkey** reduction would have been appropriate.)

Unfair Dismissal – Summary

240. In summary I found that this was an unfair dismissal because (a) the procedure was flawed in two respects, and (b) even though it was reasonable to conclude that there had been misconduct, it was outside the band of reasonable responses to characterise it as gross misconduct and dismiss the claimant for a first disciplinary offence.

Unfair Dismissal - Remedy

241. It followed from my judgment that it was outside the band of reasonable responses to characterise the claimant's conduct as gross misconduct that no reduction pursuant to **Polkey** was appropriate.

242. As for contributory fault, I considered whether the claimant's conduct in connection with his dismissal could be characterised as culpable or blameworthy in the **Nelson** sense. There is no requirement that the employee knows he is acting inappropriately before any finding can be made. Well-intentioned conduct can still be unreasonable and give rise to a finding of contributory fault. Further, the fact that he could reasonably be viewed by the respondent as having been guilty of misconduct meriting some form of disciplinary sanction (short of dismissal) was relevant but not determinative. On this issue I was deciding my own view of his conduct, not whether the respondent's view was a reasonable one.

243. I did not consider that the claimant acted in a culpable and blameworthy way in relation to the use of RA time. I did not hear any direct evidence from the RAs but I did from the claimant. I accepted his account as to the actual time spent by the RAs on his outside work, some of which was done in their own time. I noted

Professor North's evidence to the disciplinary hearing (page 746) that if the proportion of RA time spent on outside work was 13 days a year (about 5-10% of working time) that would be "equivocal and a tough call". The claimant's use of RAs for his outside work was not in my view culpable or blameworthy.

244. In relation to the failure to disclose (or even to seek advice on whether to disclose) some parts of the outside work, however, the position was different. My finding was that the claimant was acting honestly and in good faith throughout. However, even though he was entitled to rely on the Head of School Administration to some extent, as Head of School he should have thought more carefully about whether the wide scope of his outside activities might have taken him (or be perceived to have taken him) outside the exemption for media work. That was particularly the case for the Nivea and Kelkoo contracts. In my view he was wrong to regard those as covered by the media exemption, and he acted unreasonably in not even thinking that it was worth clarifying. To some extent the claimant accepted this himself in the appeal hearing (page 917). Had he raised it, it is likely that the extent and nature of his outside work would have become apparent and the matter put on a proper footing. He might still have faced some disciplinary proceedings but at least he would have been the one who had drawn the matter to management's attention, rather than it arising as part of the Montaldi allegations against him. In that sense he had caused or contributed to his dismissal by his conduct, and it is just and equitable to reduce compensation. If a basic award or compensatory award proves to be appropriate a reduction of 25% for contributory fault will be applied.

Breach of Contract

245. I concluded that the respondents had failed to show that the claimant was guilty of gross misconduct in a way which deprived him of his entitlement to notice upon termination. On the evidence before me the claimant had made a genuine mistake about the scope of the procedures, and he had genuinely thought that he did not need to disclose or account for media work and any other preparatory work related to it, no matter how tenuously, and to use RA time and other resources of the university in doing so. He was wrong about that, but he was not wrong in a way which showed that he had no intention to be bound by the terms of his contract. He is therefore entitled to his pay for the notice period.

Further Hearings

246. The appropriate case management orders to enable remedy to be addressed will be considered at a Preliminary Hearing on 8 September 2014 at 10am. Details have been supplied to the parties by letter.

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Employment Judge Franey

August 2014