THE INDUSTRIAL TRIBUNALS

CASE REF: 6766/17

CLAIMANT: **Mr WX**

RESPONDENT: **North West Regional College**

DECISION

The decision of the tribunal is that the claimant's claim is dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Ó Murray**

Members: **Mr N Jones**
Mr M McKeown

APPEARANCES:

The claimant was represented by Mr R Donaghy, Barrister-at-Law, instructed by Mr Quigley of Madden and Finucane Solicitors.

The respondent was represented by Mr G Grainger, Barrister-at-Law, instructed by Ms McAloon of Worthingtons Solicitors.

THE CLAIM

1. The claimant claimed unfair dismissal. The respondent's case was that the claimant was fairly dismissed for gross misconduct.

2. As this case involves allegations of a sexual offence we have, in accordance with Rule 49 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (NI) 2005 (as amended) omitted from this decision any identifying matter in relation to those affected by those allegations ie the claimant, the complainant and the witnesses who did not give evidence to us but are referred to in this decision. The register and hearing list will be similarly anonymised.

3. The parties will be given an opportunity to make any application for a variation of these orders or for further anonymization or redaction in order to comply with Rule 49. For this reason this decision is issued to the parties on 7 August 2019 but will be kept from the register for a period of 28 days from the date of issue that is until 4 September 2019 pending any such application. A Restricted Reporting Order (under Rule 50) will also issue with this decision for the same 28 day period pending any such applications ie it will expire on 4 September 2019 unless it is varied, extended or revoked.

THE ISSUES

4. The issues for the tribunal were as follows:-

   (i) Whether the claimant was unfairly dismissed for gross misconduct, whether the respondent believed that the claimant was guilty of the misconduct alleged and whether there were reasonable grounds to sustain that belief following a reasonable investigation;

   (ii) Whether the process and penalty were within the band of reasonable responses for a reasonable employer in the circumstances;

   (iii) Whether the decision to dismiss was fair or unfair in accordance with equity and the substantial merits of the case;

   (iv) At the outset of the hearing, the parties agreed that issues of pension loss compensation would be dealt with, if necessary, at a separate hearing. It was however agreed that issues relevant to contributory conduct were to be dealt with at this hearing as were ***Polkey*** issues.

   (v) The claimant claimed reinstatement or in the alternative compensation.

SOURCES OF EVIDENCE

5. The tribunal had the written statements and oral evidence from the witnesses listed below together with the documentary evidence in an agreed bundle which ran to over 700 pages. The parties stated that the bundle had been produced from a bundle of discovery amounting to 7,000 pages.

6. For the claimant the following gave evidence:

   (i) The claimant;

   (ii) Mr D a student;

   (iii) Mr A Donaghy a trade union representative.

7. For the respondent the following gave evidence:

   (i) Dr Laverty who led the investigation;

   (ii) Ms S Trainor who with Dr Laverty dealt with the investigation.

   (iii) Dr Kinnaird who compiled a report on the procedure adopted;

   (iv) Mr Finnegan of the sub-committee of the Board of Governors that dealt with the disciplinary hearing.

   (v) Mr Canavan of the Board of Governors being the body which took the decision to dismiss.

(vi) Mr Corrigan of the independent appeal panel which determined the appeal. Mr Corrigan did not provide a witness statement but spoke to the appeal panel's report.

THE LAW

8. The right not to be unfairly dismissed is enshrined in the Employment Rights (NI) Order 1996 (as amended) referred to in this decision as ERO. At Article 130 of ERO it is stipulated that it is for the employer to show the reason for the dismissal and that the reason falls within one of the fair reasons outlined at Article 130(2). One of the potentially fair reasons for dismissal, listed at Article 130(2)(b), relates to the conduct of the employee. If the tribunal finds that the employer has dismissed for a potentially fair reason, the tribunal must then go on to consider whether the dismissal was fair or unfair in accordance with Article 130(4) which states:

> *"(4) Where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason show 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".*

9. The task for the tribunal in a misconduct dismissal case is set out as follows in ***British Home Stores Ltd v Burchell 1980 ICR 303***:

> *"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the grounds of misconduct in question … entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case".*

10. The Northern Ireland Court of Appeal decision in the case of ***Rogan v the South Eastern Health and Social Care Trust 2009 NICA 47*** endorses the ***Burchell*** approach and outlines the task for the tribunal in a misconduct dismissal case. The test is whether dismissal was within the band of reasonable responses for a reasonable employer. The tribunal must not substitute its own view for that of the employer but must assess whether the employer's act in dismissing the employee fell outside the band of reasonable responses for a reasonable employer to adopt in the circumstances. This assessment applies to both procedure and penalty.

11. The case of ***Connolly v Western Health and Social Care Trust [2017]*** NICA states as regards dismissal for gross misconduct for a first offence:

> *"[22] The decision is whether or not a reasonable employer in the circumstances could dismiss bearing in mind 'equity and the substantial merits of the case'. I do not see how one can properly consider the equity and fairness of the decision without considering whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct. How does one test the reasonableness or otherwise of the employer's decision to dismiss without comparing that decision with the alternative decisions? In the context of dismissal the alternative is non dismissal i.e. some lesser sanction such as a final written warning.*
>
> *[23] The authority for the Tribunal's statement given in Harvey, Industrial Relations at paragraph [975] is the decision of the Court of Appeal in England in British Leyland UK Limited v Swift [1981] IRLR 91. Lord Denning MR said the following at p. 93:*
>
> > *"The first question that arises is whether the Industrial Tribunal applied the wrong test. We have had considerable argument about it. They said:*
> >
> > > *'… A reasonable employer would in our opinion, have considered that a lesser penalty was appropriate'.*
> >
> > *I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him."*
> >
> > *Ackner LJ and Griffiths LJ, as they then were, gave concurring ex tempore judgments. None of those say that a lesser penalty was not a consideration that was relevant for the Tribunal to take into account. They were stating that the overall test was. I think it important to bear this in mind. Harvey also cites in support Gair v Bevan Harris Limited [1983] IRLR 368. The judgment of the Lord Justice Clerk does indeed cite and follow the decision in British Leyland but it does not exclude consideration of a lesser sanction as a relevant consideration".*

12. The **Connolly** decision confirms that the task of the tribunal is not to substitute its view for the employer's. The tribunal must decide in a gross misconduct case whether dismissal was an appropriate sanction particularly where an employee is

summarily dismissed for a first offence. The tribunal must look at whether the actions of the employer with regard to process and penalty were within the band of reasonable responses for a reasonable employer in the circumstances. The tribunal must then determine whether the dismissal was fair or unfair in accordance with equity and the substantial merits of the case. As part of this assessment the tribunal must look at whether a lesser sanction was appropriate in the circumstances.

13. Rule 49 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (NI) 2005 (as amended) states:

> "*49. In any proceedings involving allegations of the commission of a sexual offence the tribunal, the chairman or the Secretary shall omit from the Register, or delete from the Register or any decision, document or record of the proceedings, which is available to the public, any identifying matter which is likely to lead members of the public to identify any person affected by or making such an allegation."*

14. For the respondent Mr Grainger provided written submissions supplemented by oral submissions. In oral submissions Mr Grainger referred to the authorities cited in Harvey in Division DI: at paragraphs 974, 975.03. 992, 1011, 1015, 1016-1034, 1040, 1482.01, 1486, 1519, 1534-1535, 1550, 1554, 1566, 1582, 2556, 2710, 2721-2724, 2747-2748. He also referred to the case of ***Royal Mail v Jhuti [2018] IRLR 2(CA).***

15. For the claimant Mr Donaghy provided written submissions supplemented by oral submissions. In addition to the authorities referred to in his written submissions he referred to the case of ***Sheil v Stena Line Irish Sea Ferries Ltd [2014] NICA 66.***

FINDINGS OF FACT AND CONCLUSIONS

16. The tribunal considered all the evidence presented to it both oral and documentary together with the written and oral statements of the parties and the written and oral submissions of the representatives. The tribunal found the following facts proved on a balance of probabilities and reached the following conclusions having applied the legal principles to the facts found.

17. Given that the tribunal heard extensive evidence over a 10-day hearing, it is most important to note that this decision does not record all the competing evidence but records the principal findings of fact drawn from an analysis of all the evidence to which the tribunal was referred.

18. The claimant was employed by the respondent from 23 August 1999 until 7 August 2017. The parties agreed that this was the effective date of termination. At the time of the claimant's dismissal he held a managerial post. At the time relevant to the events in this case the claimant was a lecturer based at a campus of the respondent college.

19. The two key incidents (referred to below as the corridor incident and the "it takes two" incident) which ultimately led to the claimant being sacked for gross misconduct occurred on 15 and 16 March 2016 on an Erasmus trip in Europe. The claimant was on a trip alongside two colleagues accompanying a number of

students on behalf of the college at an event held in conjunction with a university in that country.

The Corridor Incident

20. The first key incident took place in the early hours of the morning of 15 March 2016 in the second floor corridor of the hotel in which the staff and student group was staying.

21. The incident in the hotel corridor involved Mr WX and his colleague Ms A and was not witnessed by anyone. Both sides alleged that there was an encounter involving lewd and offensive language and behaviour and unwanted conduct of a sexual nature, but each blamed the other for it. The encounter took place at approximately 2.45 am in the corridor of the second floor of the hotel outside Ms A's room. The claimant's room was on the first floor of that hotel.

22. Ms A's account was as follows:

> *"At approximately 2.40 am we left the lobby. The men were staying on the first floor, which could only be accessed via some stairs, while [E] and I were staying on the second floor that was accessible using the lift.*
>
> *The men headed off in the direction of the stairs and [E] and I headed towards the lift. When the lift doors opened [E] and I went inside and just before the doors closed [WX] made his way quickly from the bottom of the stairs and entered the lift. I immediately said to him 'I think you'll find that you are in the wrong place'. He just laughed.*
>
> *The lift journey only took a matter of seconds. When the lift doors opened and we stepped out onto the second floor [WX] said he wanted to speak to me so [E] went on to her room. I asked [WX] what he wanted to talk about and he said he wanted to come into my room to talk to me. I told him that there was no way that that was going to happen and began walking towards my room. He followed and was persistent in his requests to come into my room to talk while I was insistent that this wasn't going to happen. The exchange was pretty light hearted at this stage. I didn't want to embarrass him as I thought that by the time I would reach my room door he would accept that he wasn't coming in and leave. By the time I had reached my room, which was at the end of a short corridor, he was still asking to come in. I said no and told him that he was married and I was with [F]. He said that no one would know if I let him in but I told him that I would know and that he was definitely not coming in.*
>
> *[WX] then began to put his arms around me, telling me that I was sexy and to wise up. I was moving away from him (and therefore away from the door) and by this stage I was standing at the very end of the corridor. He still had his arms around me, pulling me into him, and I had my hands on his chest trying to hold him off and keep some space between us. He began saying vulgar stuff like 'you love cock, I know you do, tell me you love it'. I was telling him that he had the wrong girl. As I tried to wriggle free from him I had turned around but he still had his arms around me but now he was touching my intimate areas at the front. I broke free from him. He gestured as if he*

was going to open his trousers saying he would show me. I told him he better not. He could see that I was becoming more annoyed so he started laughing, trying to make it more light-hearted again and saying that he was only joking.

He began asking to come in again. He was telling me to wise up that nothing was going to happen. He was saying stuff like 'look I just want to lie beside you, put my arms around you and talk to you'. I told him that there was no chance, that I wasn't 16 and I wouldn't believe that.

His demeanour changed again, his tone was very aggressive. He was in my space again and had his face very close to mine and he was saying 'you love cock don't you'. I kept saying I didn't, that he had the wrong girl, and he was saying 'you do, you do, tell me you do, I know you do'. I was saying I didn't and my tone was very angry and getting angrier. As the exchange was turning into more of an argument he moved away from me, reached for the top of his trousers (trying to open them) and said he would show me. I was saying to him 'I'm warning you [WX] you better not, I'm warning you now that's the last thing you want to do'. I was trying not to look but I was pointing at him at the same time.

By this stage I was visibly upset and annoyed. His demeanour changed again. He said he was only joking. I told him he wasn't. He was almost pleading at this point saying I should let him come into my room, that he just wanted to talk to me, that nothing would happen. I told him I didn't believe him and was repeating 'my answer is no'. He was becoming frustrated so he grabbed my arm and was saying 'you're not listening to me, you're not listening to me'. I was saying 'no you're not listening to me… my answer is no, this is not going to happen'. I became aware that he was hurting my arm. I told him to get off me, that he was hurting me and managed to get it free.

In my attempts to get away from him we were now up near the lift again. I was frustrated and annoyed. I told him I wanted him to get in the lift and go and that I wanted to go to my room, open the door and for him not to be there. I started walking down the corridor towards my room. I waved my card in front of the lock. As I opened the door he pushed into the room. We were both almost sandwiched in the doorway and he instantly had his arms around me and I was trying to hold him off with my hands and was telling him to get out. I was so frightened at this point. I thought he was going to drag me on into the room and I was terrified. My tone with him was angry and I was very direct in telling him to get out. He wouldn't go and just started laughing again saying nothing would happen, that he just wanted to lie beside me and talk. He took another step into the room. I told him this wasn't going to happen and warned him that if he took one more step in I was out of there. He did take another step inwards and I managed to get out of the room. I was standing outside of the room – standing with my back against the opposite wall looking at him in my room. I told him if he didn't come out I was going downstairs. He was saying that I should wise up and I was telling him that it wasn't going to happen. I told him that I was serious about going downstairs and began to move. He came out of the room but he was angrier. As I got back in the room he was standing at the doorway. I tried to get the door closed but it was heavy and seemed to close very

slowly. I thought he was going to push back in past me at any moment and drag me inside. I thought the door was never going to shut. Just before it closed he looked at me and said angrily 'its your loss'."

23. Mr [WX's] account as recorded in the papers was as follows:

> *"Got into lift to go to room.*
>
> *Mentioned to [Ms A] about her drinking, this infuriated her, telling me to 'fuck off'.*
>
> *Getting out of the lift I believe she was trying to manipulate me into a situation where at that point I realised I needed to get away. She demonstrated that she was annoyed and asked me where I was going. Realising I was getting off-sides she appeared to change tactic, stating*
>
> > *"I fancy you and I know you fancy me and that if we go into my (her) room that we will be shagging and I (she) don't give a fuck about your wife and don't give a fuck about your children, that at the end of the day it's all about me, and that's all I (she) care/s about".*
>
> *I told her that I didn't fancy her, had no interest in her whatsoever and again told her she was drunk. She got very annoyed telling me to "fuck off and mind your own fucking business".*
>
> *Then I retired to my room."*

24. The claimant also made the following counter allegations to the investigators:

(1) That Ms A had arrived drunk and dishevelled for the bus in Londonderry and was in no fit state to go on the trip from that point;

(2) That the claimant had expressed to his wife before embarking on the trip his reluctance about going on it due to his concerns about Ms A's behaviour and drinking and that Ms A had been "grooming" him prior to the trip;

(3) That Ms A and the trip leader Mr B had neglected their duties generally on the trip due and were drinking;

(4) That a report of drug taking by a student had been made but not reported.

"It Takes Two" Encounter

25. The second key incident in this case took place in the hotel lobby in the early evening of 16 March 2016. It was common case between Mr WX and Ms A that there was a fraught encounter between them in the hotel lobby in the early evening of 16 March 2016 and that Mr B had overheard some of it.

26. Ms A's account included a statement that in that encounter she was very upset, she said she had told Mr B about the previous night, and in response Mr WX had said: "Just so you know it takes two" and was thus trying to put the blame on her for the

incident that had happened during the night. Mr B stated that Ms A was very upset and that he overheard the claimant saying "it takes two" to her.

27. The respondent's case in tribunal was that the claimant denied saying these words repeatedly during the internal processes and only belatedly gave an alternative account of the words. The claimant's account of this was that Ms A reacted abusively to him and stated that she said she would tell Mr B and the claimant's reaction to that was: "What about the state of you I must too". At no stage thereafter did the claimant complain to Mr B.

28. The respondent's managers found it significant that neither the claimant nor his representative challenged the account of the words, given by Ms A and Mr B during the disciplinary hearing and that a written account by the claimant of the words had only been proffered late in the process after he had received the statement of Mr B which supported Ms A's account of the words.

Evidence of Complaint

29. The evidence gathered in the internal processes showed the following:

(i) That Ms A and Mr B stated that Ms A complained to Mr B after the incident ie later in the morning of 15 March 2016.

(ii) That Ms A had sent several texts (one of which stated: "[WX] is a nightmare") and tried to make phone calls in a short period soon after the first incident (ie around 3.00 am) and this included trying to contact a colleague back in Londonderry.

(iii) That Ms C (the then line manager of Ms A) received a detailed report of the allegation from Ms A on 6 April 2016 when Ms A returned to work after the Easter holidays. The context was that Ms A was asking if she could be excused working at the campus where the claimant was based. Ms C's evidence to the Investigating Managers was that Ms A gave a detailed account to her, that she tried to persuade Ms A to report the matter, and that Ms A was extremely upset and had spoken in confidence to her so that she felt she could not do anything about it without Ms A's authority.

(iv) That a complaint was made by Ms A on 19 May 2016 to Kate Duffy Head of HR as Ms A had by that point learnt that the claimant had gained promotion which meant that she would have a lot more dealings with him because he would become her manager. (The claimant agreed in tribunal that his promotion would have meant that he and Ms A would have had more contact with each other.)

(v) That the claimant had neither mentioned nor complained about the alleged behaviour of Ms A in the incident on 15 March 2016.

(vi) That no mention had been made by the claimant (until he was involved in the disciplinary process) of the alleged report to him by a student of drug-taking by another student on the trip.

30. The claimant's case throughout the disciplinary process was that Ms A's complaint was made as part of a conspiracy by Ms A and her friend Mr B to thwart his promotion and that they thus fabricated the account of what allegedly happened on the trip.

31. On the claimant's case complicit in this conspiracy must have been Ms C as her account to the managers was that she had been told the details of the incident on 6 April 2016 by Ms A in the context of her wanting to avoid future contact with him. This complaint to Ms C was made before the advertisement for the post for which the claimant was successful. The claimant gave no reason for Ms C being involved in such a conspiracy.

The Claimant's Case

32. The claimant's case was that there were several matters which were ignored by the investigating and disciplinary teams or were not followed up sufficiently and that these, along with procedural flaws, amounted to defects that rendered the decision to dismiss unfair. We set out below under sub-headings the key aspects of the claimant's case.

Ms A's Character

33. From the outset the claimant raised issues about Ms A's character essentially making the case that these issues meant that she was not worthy of belief. The issues raised were as follows:

(i) "Partying"

This related to some thumbnail photographs which showed her with others wearing St Patrick's Day hats within days of the alleged incidents. The assumption made by the claimant, and the point made by him in the disciplinary process and in tribunal, was that the photographs showed that she was "partying" two days after the alleged incident and that this was inconsistent with there having been an incident as described by her. The photographs were essentially discounted as irrelevant in the disciplinary process.

(ii) The carryout issue

The first point made was that Ms A should be regarded as a liar because she brought a carry out of rum into the hotel bar and when challenged about this in the disciplinary process she lied about the reason in that she said that the hotel did not serve anything but beer. In this regard the claimant provided photographs which he said showed the hotel bar with optics visible. The second point made was that Ms A was dishonest because in bringing a carry out into the hotel bar she thus deprived the hotel of revenue. This carryout point was regarded in the disciplinary process as irrelevant to the key issues.

(iii) The "Serial Accuser" issue

This related to the fact that Ms A had previously complained about the behaviour of another male member of staff. The PSNI were involved in that

complaint and ultimately the male member of staff pleaded guilty to a criminal offence and received a suspended sentence. This was raised by the claimant as relevant firstly, to the accusation generally in that she was a "serial accuser" and, secondly, in relation to the point that Ms A did not complain to the police either on the trip or when she got home and/or she did not complain earlier.

(iv) Ms A's drinking

The allegation was that Ms A was drinking excessively; was a drinker; and that she and Mr B were "on a jolly" drinking and partying throughout the trip. None of the witnesses supported this picture which was presented by the claimant.

(v) Neglect of duties.

The allegation was that Ms A neglected her duties in general firstly, on the trip because of her alleged partying, and secondly, in relation to a female student on the bus in Londonderry because she got off early leaving that student in the company of the claimant. On the latter point there was more than one member of staff left on the bus and there was also the bus driver.

Alleged Inconsistencies

34. The claimant's case was that there were inconsistencies between the accounts given by Ms A and Mr B which were not probed enough or at all.

Drug-taking report

35. The claimant raised an issue about a report of alleged drug-taking by a student on the trip which was made to him by a student whilst they were on the trip. The claimant did not raise this issue until he was under investigation. His case was that the investigation and the disciplinary process did not question on this in a probing enough way. In addition he alleged that the set-up in the disciplinary investigation process with the interviewing of students was not conducive to them telling anything about this alleged incident because they were not told in advance the reason for the interview and they therefore thought that they might have been in trouble.

36. The investigation did pursue this point with the relevant students identified by the claimant all of whom denied the allegations of drug-taking. Evidence was given in tribunal by one of the students Mr D whose testimony was entirely different to that given by him to the investigators. That evidence was not before the relevant managers in the investigation and we therefore discount it as irrelevant to this case as we reject the suggestion that there was a problem with the way Mr D and the other students were questioned by the investigators.

37. The point made by the claimant seemed to be that this showed that Mr B was not worthy of belief; that Dr Laverty was not interested in following up points made by the claimant; and that his investigation generally was inadequate. We reject the claimant's point that this allegation was not probed adequately as we agree that it was irrelevant to the key allegations against the claimant particularly when the claimant did not report this matter to anyone whether on the trip or on his return.

38. The evidence of Dr Laverty in tribunal was that he accepted that, in hindsight, he could have followed up further on the drug-taking allegation. We find that the drug-taking allegation was irrelevant to the allegations against the claimant as we have assessed the totality of the investigation and disciplinary process in relation to the central allegation. We do not find that this evidence in tribunal by Dr Laverty amounts to an admission that his investigation was flawed.

Collusion

39. The claimant alleged "collusion" between Mr B and Ms A during the disciplinary process because a document records that Ms A said during the second investigation interview: "I knew the question you would be asking". The height of the point made by the claimant's side on this was that Mr B had been questioned just before the claimant and the claimant suspected that Ms A had been told by him exactly what she would be asked. In addition the claimant's side referred to the two versions of this document in the final version of which the words are recorded as: "I knew the questions he was asking". We reject this point as set out below.

Perceived Bias

40. The claimant alleged that Dr Laverty was not probing enough when questioning anyone. The allegation was that Dr Laverty could be perceived as biased given a comment he made to Ms A at the end of one of her interviews (see paragraph 42 below). The submission in this regard was that the test for the tribunal in assessing his investigation, and indeed the case as a whole, was to assess how an informed reasonable bystander would have regarded the investigation. We reject the submission that this is the test we must apply as set out below.

The Kinnaird review.

41. Mr Kinnaird was tasked to investigate allegations of procedural defects raised by the claimant during the disciplinary process namely that he had been "lured" into an investigation without informing him of the nature of the allegation; that "innocent until proven guilty" had not been applied to him; and that inaccurate notes had been provided.

42. One matter particularly relied upon by the claimant in tribunal was in relation to a comment made by Dr Laverty to Ms A that someone would be "unlikely to fabricate a story". Mr Kinnaird's report states on this matter:

> *"I did note that at the end of the first interview with Ms A Mr Laverty responded to a query from Ms A relating to what would happen if she wasn't believed to which Mr Laverty responded that 'It's unlikely that someone would fabricate a story'. This was an inappropriate response from Mr Laverty however it was at the end of a very difficult and emotional interview and Mr Laverty indicated that at the time he was trying to be supportive in those circumstances and he was very clear of his role in the gathering of the facts related to the issue under investigation and the evidence contained in the investigation file clearly supports this view.*

43. The claimant's allegation was that the comment showed that Dr Laverty was "conditioned" by Ms A and this "infected" the process in that he did not follow up on matters, did not probe enough and accepted the accounts given by Ms A and Mr B without following up sufficiently the claimant's allegation about the report of drug taking. We reject that characterisation of the investigation having scrutinised what actually happened during the investigation.

Procedural Defects

44. The following breaches of the respondent's procedure were raised by the claimant before us;

    (i) That the disciplinary panel was incorrectly constituted in that Mr Finnegan and the Principal should not have been on the committee under the Articles of Government.

    (ii) Mr Finnegan was on the Committee (ie the disciplinary panel) and was thus more senior to the Board of Governors decision-makers which included Mr Canavan.

    (iii) A further point in relation to suspension was raised for the first time in submissions and as it had not featured in the questioning of witnesses we have discounted that matter.

45. Further alleged defects were firstly, that a stage was omitted in that the matter was not referred to a senior level to resolve a "conflict of opinion" before initiating any disciplinary process, and secondly, that all statements were not sent to the appeal panel.

Chronology and disciplinary process

46. The investigation team conducted interviews with the witnesses and produced a report recommending that the disciplinary procedure be invoked as the claimant had a case to answer.

47. A charge letter containing 5 charges was sent to the claimant on 26 September 2016 and he was notified that any penalty could include dismissal. The charges were set out as follows:

> *"The disciplinary charges relate to gross misconduct and are as follows:*
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> *You acted inappropriately and unprofessionally towards [Ms A], a colleague, during a College approved Erasmus trip to Portugal in that you:*
>
> *1 engaged in unwanted physical conduct of a sexual nature;*
>
> *2 used explicit, offensive and obscene language of a sexual nature;*
>
> *3 behaved in an inappropriate, degrading and hostile manner, exerting intimidating pressure on [A] when attempting to gain access to her room;*

4 exerted unwanted and inappropriate physical contact and caused bruising to [A's] arm;

5 failed to show remorse after this incident and making unsubstantiated and false allegations about responsibility for the incident, eg apportioning blame toward [A] by telling her "it takes two";.

48. A committee headed by Mr Finnegan (referred to in this decision as the disciplinary panel) was established by the Board of Governors to conduct the disciplinary process. That panel considered the investigation report and held disciplinary hearings on 3 days namely, 23 January 2017, 30 January 2017 and 8 February 2017. The panel followed up on points made by the claimant; during the hearings the claimant and Ms A and Mr B were questioned by the panel; and the latter two individuals were cross-examined by the claimant's Trade Union representative.

49. The panel produced a report which upheld 4 of the 5 disciplinary charges and recommended that the claimant be dismissed for gross misconduct as it found that each charge individually and collectively amounted to gross misconduct. Charge 4 was rejected as the photographic evidence provided was determined to be inconclusive.

50. Mr Finnegan then presented the report to the Board of Governors and left the meeting whilst the Board discussed whether to follow the recommendation of the panel and whether to impose the penalty of dismissal. As part of that consideration the Board addressed the issue of consistency by looking at previous similar offences and their outcome. The Board of Governors decided to dismiss the claimant and notified him of that decision by letter of 3 Mach 2017 informing him of his right of appeal against that decision.

51. The claimant exercised his right of appeal to an Independent Appeal Panel convened by the LRA. There was an appeal hearing on 29 June 2017 and the outcome was that the appeal was unsuccessful.

This Tribunal's Conclusions

52. We find that central to this case are the following three issues:

(i) The two accounts of the incident both of which amount to allegations of sexual misconduct;

(ii) The account of the "it takes two" encounter; and

(iii) Any evidence of complaint by Ms A or the claimant.

53. Key points for the Finnegan report were as follows:

(i) Despite the claimant's account of misgivings about Ms A "grooming" him in advance of the trip, being drunk on the bus in Londonderry, the claimant's wife's warning to the claimant in advance of the trip, the claimant nevertheless at 2.30 am went up to the second floor (after they had been in the bar for the evening) and decided at that point to confront Ms A about her

drinking. On his account she reacted adversely by cursing at him and yet then changed to sexually proposition him. The claimant knew where his room was (which was on the first floor) and the panel was not satisfied with his explanation for using the lift to the second floor.

(ii) There was no complaint by the claimant following the incident to Mr B or anyone else if his account were true. In contrast Ms A texted others in the hours after the incident (ie in the middle of the night) including a fellow member of staff and told Mr B the next day. In addition she told Ms C when she returned to Londonderry.

(iii) Mr B supported Ms A's account in relation to the report the next morning and in relation to the comment "it takes two" which happened the next evening of 16 March in the hotel lobby. He also corroborated that Ms A had a very strong reaction to the comment and this was particularly important to the disciplinary panel because they accepted that Ms A reasonably interpreted it as an attempt to blame her.

(iv) The disciplinary panel found it particularly noteworthy that the claimant did not proffer an alternative wording until he became aware that Mr B said in his statement that he had heard the words "it takes two". The panel also found the claimant's alternative wording ("What about the state of you I must too") to be implausible and the claimant's late account of the words reflected adversely on his veracity.

54. We find it reasonable for the respondent in the form of the disciplinary panel and for the Board of Governors to reach and accept these conclusions.

55. We find that there were reasonable ground for the managers to believe Ms A's account rather than the claimant's and they had ample grounds to doubt the claimant's account. We find that it was reasonable for them in these circumstances to regard the other issues raised by the claimant as peripheral or irrelevant to those central allegations. The fact that they believed Ms A's account on reasonable grounds is the background to the assessment of the other matters and it was reasonable of them in this circumstances to take this approach and to regard them as ancillary or irrelevant.

56. Our conclusions on the other matters raised by the claimant in the internal processes and at tribunal are set out below.

The thumbnail photos issue

57. This related to the photographs showing alleged "partying". We find that it was reasonable for the panel to take the view that they were not qualified to assess how someone would react two days after such an encounter, that the photos were not evidence of drunkenness and were irrelevant to the central allegations. We agree with that assessment and do not fault the panel for refusing the claimant's request for full-size copies to be provided and considered.

The drinking allegation.

58. The allegation by the claimant was that Ms A was in a drunk and dishevelled state by the time she arrived at the bus in Londonderry and that she was in no fit state to go on the trip at all. The investigators followed this up in a reasonable way by asking the bus driver and the students open questions in relation to this. The bus driver's evidence was particularly important because it gave no support at all to the account given by the claimant

59. In tribunal there was a line of questioning of some of the witnesses which related to the bus driver's evidence to the effect that despite him denying repeatedly that Ms A was drunk or that she looked like she had been drinking, the bus driver's description of her as "bubbly" should have been interpreted as her having been drunk as outlined by the claimant. We find that it was reasonable of managers to accept the bus driver's specific account that in his view she was not drunk.

60. This clearly adversely affected the credibility of the claimant as the bus driver's evidence was wholly at odds with the claimant's account and no motive was proffered by the claimant for the bus driver contributing to any conspiracy against him. The only point made by the claimant's side in tribunal was that the bus driver did not know the reason for the interview and the implication was that he was thus somehow affected by this in giving his evidence to the panel. We reject the contention that this was a conclusion that the panel should have reached. It was reasonable for the panel to take the evidence of the bus driver and to weigh it in the balance when considering whom to believe about the incident on the trip.

"Serial accuser"

61. Mr Grainger's submission in tribunal (which we accept) was that the claimant's tack from the start of the disciplinary process was to discredit the character of Ms A by saying that she was bad at her job generally; that she was a drinker generally; that she was extremely drunk on the bus; that she was a "serial accuser"; and by making an insinuation that she and Mr B had an inappropriately close relationship.

62. The issue of Ms A being a "serial accuser" was pursued in the internal processes and was also pursued in cross-examination in tribunal. When clarification was requested by the Employment Judge the claimant's counsel stated that this referred to the fact that Ms A had once before complained about the behaviour of a male colleague and this had resulted in a PSNI investigation. The colleague then pleaded guilty to a criminal charge and he received a suspended sentence. That member of staff resigned from his employment before he could be disciplined.

63. In submissions Mr Donaghy stated in relation to the "serial accuser" point made by the claimant, that the previous incident was relevant to the issue of Ms A's familiarity with a complaint to the respondent and the police and should have been taken into account in assessing her credibility in relation to the alleged delay in complaint and the reasons for the complaint and her credibility generally.

64. We found it most surprising that the claimant and his representative repeatedly used that phrase in relation to Ms A in the internal processes and continued to do so in these proceedings. At this point we wish to record that we also found it very surprising indeed that the following appeared in the written submission of counsel

for the claimant when referring to points made on behalf of the claimant in relation to Ms A's character:

"The complainant can be characterised from the above matters as a cheating lying party girl who was prepared to desert her post and her duties".

Conspiracy issue

65. The claimant's point was that Ms A wanted to complain about the claimant as part of a plot with Mr B to ensure that the claimant did not get promotion so that the way was clear for Mr B to get it. We find that it was reasonable for that contention to be rejected for the following principal reasons:

    (i) Ms A complained to Ms C but Ms C kept it to herself at Ms A's request. Whether or not Ms C was wrong to do this is irrelevant to the issue of the fact of complaint on a particular date. That date was significant because it pre-dated the promotion competition. Managers had reasonable grounds for believing Ms C on this and were right to regard this as important evidence. The primary importance of this encounter was therefore in relation to: the fact and detail of the complaint; the complainant's evident distress as recounted by Ms C; and the fact that the context was that Ms A was asking not to be in contact with the claimant. Whether or not the level of contact actually changed thereafter was not the key point. This latter point appeared to be the matter in respect of which the claimant's side belatedly in tribunal wanted to use timetable documents.

    (ii) There was no allegation by the claimant that Ms C was part of the conspiracy to keep the claimant from promotion nor was any motive proffered for her to lie. It was reasonable of the panel to accept the evidence of Ms C and to regard it as important.

    (iii) The complaint to Ms C pre-dated the outcome of the promotion competitions ie the claimant and Mr B both applied for the two available posts. Ms A complained before she knew that Mr B had not been successful in the competition for one of the posts and before she knew that the claimant had gained promotion to one of the posts. That motivation for the alleged conspiracy (namely a desire to clear the way for Mr B to gain promotion) was therefore absent as, at that point, she did not know that Mr B had not obtained an equivalent promotion to the one the claimant had obtained. The disciplinary panel looked carefully at the chronology and reasonably rejected the claimant's contention that this was the reason for Ms A and Mr B allegedly conspiring to raise a spurious complaint against him.

66. In summary, we find that the investigators and the disciplinary panel were entitled to reach the conclusion, from all the evidence, that Ms A had complained the day after the incident following texts during the night alluding to the claimant as "a nightmare"; that she had complained in detail to Ms C when she got back to work and that she had complained in detail to Ms Duffy on 19 May 2016 after she learned of Mr WX's promotion.

Ms Duffy and collusion issues

67. Ms Duffy (head of HR) was accused of being one of those who was negatively disposed towards the claimant. Ms Duffy had coached the claimant on his interview techniques and therefore helped him to gain promotion so that points away from any motivation to have him dismissed on spurious grounds.

68. The claimant accused her of "driving and controlling" the process to ensure that he was sacked. His basis for this was:

    (1) There was a report unconnected to the events in this case, (referred to as the McConnell report) which found in general "micromanaging" by HR;

    (2) That she helped to draft reports and provided training and advice to the panel and the Board of Governors;

    (3) That some documents in preparation for the tribunal were produced late or not at all; and,

    (4) That the order of documents to do with interviews was to mask the fact that Mr B was interviewed before Ms A and that Mr B therefore must have given Ms A information about the questions she would be asked.

69. We reject the claimant's point about the timing of the production of documents for the tribunal hearing and we reject his point that we should draw an adverse inference against the respondent from the production of documents for the tribunal.

70. We find the McConnell report to be irrelevant particularly against the background of Ms Duffy actively helping the claimant to gain his promotion.

71. There were two versions of Ms A's interview in the documentation. Emphasis has been added to the following extracts to highlight the phrase in issue.

    (1) This extract is from the document in the agreed bundle:

    "S Traynor - To make it as easy as possible for you we will be speaking to you as few times as possible but we need to make sure we have the information.

    [A] – Yes it is entirely ok. I knew the questions he was asking.

    S Traynor – What questions?

    [A] – The one about the lift insinuating that it was in some way me."

    (2) The second version of this document was shared with the claimant, was provided on discovery and was produced by the claimant's side during the hearing. The relevant parts state as follows:

    "S Traynor - To make it as easy as possible for you we will be speaking to you as few times as possible but we need to make sure we have the information.

[A] – Yes it is entirely ok. I knew the questions you would be asking.

S Traynor – What questions?

[A] – The one about the lift insinuating that it was in some way me."

72. The claimant had been given that document during the internal processes. It was not in the bundle for the tribunal but that was an agreed bundle and it was up to the claimant to put it in the bundle if he wanted it to be before the tribunal. We do not find anything untoward in the fact that it was not in the trial bundle in the context of the number of documents and the fact that it had been shared on discovery.

73. We also reject the contention that this document indicated collusion between Mr B and Ms A. We do not find the words highlighted to connote anything sinister.

74. Mr B was interviewed before Ms A but the record of his interview was placed after the record of her interview in the bundle of documents. The claimant's counsel invited us to draw an adverse inference from this and to find that this supported the claimant's point that Ms Duffy was engineering the process to ensure dismissal. We reject that submission and find that the point made about the order of interviews is fanciful given that the date and time was on each of the interviews.

75. No motive was proffered by the claimant for Ms Duffy allegedly determinedly engineering his demise save the assumption that the claimant in raising the issue about alleged drug-taking would lead her to do so because of the reputation of the college.

76. In summary we find there is simply no basis for the accusations levelled at Ms Duffy. On our assessment of all the documents and of Ms Duffy's contact with managers and the Board of Governors, she acted in line with her role as head of HR in providing training and advice on procedure, especially when the allegations were so serious for both the claimant and the complainant. We specifically reject the submission that an inaccurate response by Ms Duffy to an Information Commissioner's Office request following the claimant's subject access request after his dismissal should lead us to regard her evidence in this case as untrue.

Procedural allegations

77. There is an unusual procedure at play in this case and this was agreed by the parties and by the Independent Appeal Panel. The procedures are however agreed procedures which apply across the sector to all further education colleges having been agreed with Trade Union side. Ms Duffy gave evidence that legal advice had previously been obtained on which of the two procedures to follow if there was an issue and we find that there therefore was a legitimate basis for the approach adopted. The procedure used was actually to the benefit of the claimant in that it allowed for an appeal to an independent appeal panel convened by the LRA. The Trade Union representative agreed in evidence that under the procedure used, the disciplinary panel was correctly constituted.

78. We find that the claimant was under no illusions that he was facing a disciplinary process and possibly dismissal given the seriousness of the charges. We reject the claimant's point that the procedures required that a "conflict of opinion" had to be resolved at a further hearing before a separate disciplinary process (that might lead to dismissal) could commence.

79. We accept the evidence of Dr Laverty that he met with the claimant and his Trade Union representative on 13 September 2016 to inform him of the outcome of the investigation, to give oral feedback and to go through extracts from the report. We accept that the following paragraph was read by him from that report to the claimant and his Trade Union representative:

> *"Due to the serious nature of the allegations we recommend that a disciplinary hearing is held in accordance with the Dismissal and Suspension Procedure for Full Time Teachers in Institutions of Further Education to resolve the conflict of opinion, to determine an outcome, and in accordance with procedures to determine the nature of disciplinary action."*

80. The evidence of managers was clear that from the outset the allegations were so serious that they were liable to be dealt with under the dismissal procedure. We find that this was a reasonable approach on their part. In this regard the claimant accepted in the internal process and in evidence to the tribunal that, if the allegations against him had been true, they would have been extremely serious and would have amounted to gross misconduct.

81. In summary we do not fault managers for moving to the procedure which was used. We find no breach of that procedure in this case and in particular we find that there was no flaw in the composition of the disciplinary panel.

82. It was not alleged that there was any failure to follow the SDP and we therefore find that there was compliance with the SDP.

The investigation and disciplinary process conclusions

83. We find that the claimant was given sufficient notice of the investigation meeting, was sent the relevant policy document, was told in advance that it was in relation to a complaint by Ms A about an incident on the trip and it involved harassment. We reject the contention that the claimant did not know enough about what he had to face at that stage particularly as he went into the meeting prepared with a lengthy written statement which included allegations about Ms A's character and why he believed he was being falsely accused about an incident in the hotel on the trip on the relevant date.

84. We find that the investigation was comprehensive and produced a reasoned report which reached a reasonable conclusion and recommendation based on the evidence and in accordance with procedure.

"Perceived Bias"

85. The claimant's point was that Dr Laverty's comment to Ms A at the end of her interview (see paragraph 42 above) could be perceived as biased and thus showed that the investigation was flawed.

86. The test for perceived bias relates primarily to the actions of judicial officeholders. That test does not supplant the band of reasonable responses test which has been outlined in a long line of authorities reaching back to the ***Burchell*** case. The ***Burchell*** test has been approved by the Northern Ireland Court of Appeal repeatedly. The issue raised about this comment is one element in our assessment of whether the investigation was within the band of reasonable responses of a reasonable employer and in relation to our assessment of equity and the merits of the case as a whole.

87. The submission in this regard appeared be that Dr Laverty was unconsciously motivated to do a cursory investigation and to accept Ms A's and Mr B's accounts at face value. What we have looked at is that comment in the context of all the evidence and have assessed the process and the investigation to see if there is any evidence of a cursory investigation or a pre-determination. We reject the contention that the investigation was less than thorough and we reject any suggestion that the outcome was pre-determined because it was "moulded" by the comment made by Mr Laverty.

88. In our experience no investigation or disciplinary process is flawless and the question for us is whether any flaw meant that the process overall was rendered unfair. We fully accept Mr Donaghy's submission that the more serious the charges and the effects on the employee then the more scrutiny must be brought to bear in the investigation and the disciplinary process. We also accept Mr Grainger's submission which is that the authorities also exhort us to stand back and look at the whole process bringing our collective experience to bear and bearing in mind that what is at issue is not a police investigation.

89. We agree with Dr Kinnaird's conclusion that the comment by Dr Laverty was inappropriate. We do not however find any evidence of predetermination nor of a lack of rigour in his investigation. Dr Laverty's conclusion that there was a case to answer was a reasonable one following a reasonable investigation. Dr Laverty was not a decision-maker in relation to the penalty of dismissal. We also find that Mr Finnegan and the disciplinary panel, to a reasonable extent, followed up on the relevant points made by the claimant.

90. In summary, the investigators and the disciplinary panel were faced with very serious allegations made by the complainant and serious counter-allegation made by the claimant in response. In our estimation this was a rigorous investigation and disciplinary process that rightly concentrated on key matters and was not diverted into looking at irrelevant or ancillary matters.

91. We found Mr Finnegan to be particularly impressive as a witness who, with the disciplinary panel, carefully considered and weighed up the evidence and reached reasoned conclusions. He and his panel rightly focussed on the central allegations and rightly concluded that other issues raised by the claimant were ancillary or peripheral. We find that it was reasonable for him and the panel to conclude that the matters of character and consistency raised by the claimant were either not relevant or did not outweigh their reasoned conclusions on the key issues and their assessment of Ms A, Mr B and the claimant's accounts in the context of all of the witnesses' evidence. We also find that it was reasonable for the panel to form an adverse view of the claimant's veracity as they had ample reason to do so.

Occupational Health Point

92. The disciplinary hearing took place over three days with lengthy breaks in between. We reject the suggestion that there was not enough account taken of the claimant's medical condition in the running of the disciplinary process. For example, the claimant was offered a break and rejected it because he wanted to get on with the hearing. It was for the claimant and his Trade Union representative to raise any issues related to the claimant's health, if there were any, during the disciplinary hearings. It was not for the employer to insist on any further occupational health referral in the absence of any issues being raised.

93. The fact that it took three days and the content of the documents show that this was a full in-depth hearing where Ms A and Mr B were cross-examined by the claimant's representative and the claimant gave oral testimony. The disciplinary panel also questioned all three individuals who gave evidence before them. We find that the claimant and his representative had a full opportunity to put the claimant's case and to challenge the evidence of those witnesses.

Penalty

94. The claimant's point on the penalty was that Ms Duffy "corralled" the decision makers into sacking him by leading them to believe that their only option was dismissal. Having assessed all the evidence we reject that contention.

95. We accept that the consideration of an appropriate penalty by Mr Finnegan and his panel as outlined in his statement was reasonable:

> *"The panel considered the nature of the incident, the college's duty of care to students and staff and the lack of remorse shown by [Mr WX].*
>
> *As the upheld charges constituted Gross Misconduct individually and collectively and taking into account the lack of acceptance by [Mr WX] that the Gross Misconduct had occurred, the lack of mitigating factors presented by [Mr WX] and our duty of care to students and staff, the committee considered that dismissal was the only appropriate sanction in this case, notwithstanding [Mr WX's] clean disciplinary record over 18 years."*

96. We find from the documents and from the evidence of Mr Canavan that the issue of penalty was very carefully considered by the Board of Governors and they too considered the claimant's eighteen years' clear service.

97. They addressed the issue of consistency by looking at four instances of similar offences involving other employees two of which ended with dismissal and two with resignations. There was nothing untoward in that information being given about similar previous offences; indeed they would have been remiss if they had not looked at the treatment of any previous similar cases.

98. In oral submissions on the tenth and final day of hearing Mr Donaghy for the first time raised an issue as to whether or not a reference in the McConnell report to gross misconduct should have been followed up. This was not a feature in this case and we therefore discount it. There was absolutely no evidence before us that

there were other instances of similar allegations resulting in any penalty other than dismissal.

99. The ultimate decision on dismissal was taken by the Board of Governors on the recommendation of the panel headed by Mr Finnegan. We find from the evidence that the Board of Governors questioned the panel in depth in relation to their disciplinary hearings and their conclusions. It is also clear to us that the Board of Governors reached their decision to dismiss after careful deliberation and that it weighed heavily upon them that the claimant had such a long clear record. This was not a rubber-stamping exercise and we find that due consideration was given to whether or not dismissal was an appropriate sanction. We accept that it was reasonable for the decision-makers to bear in mind their duty of care going forward to staff and students in deciding on the penalty given the gravity of the charges found against the claimant.

Appeal

100. The appeal panel was an independent panel and the authorities make clear that it is not necessary for the appeal to be a re-hearing. We find that this was a rigorous review by an independent body. The claimant and his representative could have submitted any further documents if they had wished to and, in any event, any documents which the claimant in tribunal stated were missing, were quoted extensively in the documents put before the appeal panel. The claimant and his representative had a full opportunity to put their case. We reject the claimant's case that the independent panel decision was flawed as copy statements were not before them. We find that the appeal panel reached a reasonable conclusion on the evidence before it.

Summary

101. We find that the decision-makers believed that the claimant was guilty of the charges and we find that they had reasonable grounds to sustain that belief following a reasonable investigation. The investigation, disciplinary and appeal processes were within the band of reasonable responses for a reasonable employer in the circumstances and we find that the extent of the process matched the seriousness of the allegations. There were no material breaches of the relevant procedures and there was compliance with the SDP.

102. We find that it was reasonable for the Board of Governors to conclude that, as they had decided that the charges were well-founded, dismissal was a reasonable penalty despite the claimant's long service and clear record.

103. We find that the investigation was within the band of reasonable responses as was the disciplinary process. The penalty of dismissal was also within the band of reasonable responses. Given that the managers reasonably formed the view that the claimant was guilty of the allegations, those actions clearly fell well within the scope of gross misconduct. Given the very serious nature of the allegations the decision to dismiss was not unfair.

104. Having reached these conclusions after a careful analysis of the evidence presented to us we find that dismissal was the appropriate sanction in accordance with equity and the substantial merits of the case. The relevant managers were

faced with serious allegations by both sides and they therefore conducted a thorough and focussed investigation and disciplinary process. They had ample evidence to support Ms A's account and had ample grounds to doubt the claimant's account and his veracity. They reasonably discounted the claimant's counter-allegations and evidence as having little or no relevance or weight. Given the gravity of the charges found against the claimant and the respondent's duty of care to staff and students the penalty of dismissal was appropriate.

105. The claimant's claim is therefore dismissed in its entirety.

Extent of evidence in tribunal

106. Mr Donaghy submitted that, as we had not heard evidence from Mr B and Mr A about the events on the trip, we could not assess what actually happened in the incidents on the trip and we therefore could not decide on the fairness or unfairness of the dismissal in the absence of that evidence. We reject that argument. The ***Rogan*** case makes clear what the role of the tribunal is in a misconduct dismissal case. The ***Connolly*** case makes clear what the role of the tribunal is in assessing the process and penalty.

107. Mr Donaghy relied specifically on the following paragraph in the ***Shiel*** case:

> *"31. As we have already noted earlier in this case the Tribunal did not consider it appropriate to determine what actually occurred on 2 November 2012. However, it seems to us that such a determination was likely to be significant in reaching a conclusion as to whether the relevant belief was genuinely held by the appellant and, if so, whether it was reasonable in the circumstances."*

108. We find that the comments at paragraph 31 in ***Shiel*** are couched in qualified terms and that the decision as a whole follows the ***Rogan*** approach which endorses the ***Burchell*** test in misconduct dismissal cases. We do not interpret the ***Sheil*** decision as requiring us to reach a conclusion on what actually happened in the disputed incident on the trip in order for us to determine whether the claimant was unfairly dismissed.

Case Management

109. We wish to record several aspects of this case in relation to the running of the case some of which unfortunately resulted in delay during the hearing and in the hearing of this case thus being elongated. The hearing was originally listed for five days but in the event took almost ten days of hearing.

110. Despite there having been five CMDs on 9 February 2018, 21 March 2018, 14 May 2018, 23 July 2018 and 4 October 2018, the claimant sought to add extensively to his statement at the outset of the hearing. Time was expended in clarifying the scope of any proposed additional evidence and any reason for the belated application. Ultimately this application was not pursued.

111. It was common case that there were 7,000 documents in this case. This was distilled by the parties into a 700 page bundle. There was late production in the

hearing by the claimant's side of further discovery to be added to the trial bundle at various points during the hearing.

112. The procedure the claimant's side adopted in obtaining a witness statement from the Trade Union representative was that he was asked to prepare a statement without having sight of any documents. The witness sent that statement to the claimant's solicitor and it was forwarded to the respondent's representative without it being perused by the claimant's legal advisers. The result was that the Trade Union representative's statement did not deal with all the matters which the claimant's side wanted his evidence to deal with. The claimant's counsel therefore requested permission during the hearing to conduct examination-in-chief of that witness. This was granted in view of the evident gaps in his witness statement particularly in relation to the specific procedural issues, and this meant that the time allotted to that witness's evidence was extended. This was something which could, and should, have been dealt with before the hearing in one of the CMDs, by way of an extension to the time limit for that statement, by way of a supplementary statement or indeed by way of the statement being prepared with sight of the documents in the first place.

113. At several points during the hearing the claimant's side protested vigorously that certain documents had only just been provided to them when in fact it transpired that they had been provided in advance of the hearing upon discovery but were not in the agreed bundle. This unfortunately resulted in delay whilst those objections were considered and the correct position established.

114. The estimated timescale for cross-examination of the respondent's witnesses which was given by Mr Donaghy at the outset was exceeded with most witnesses (to ensure that key points were covered) despite the Employment Judge giving time warnings and exhorting Mr Donaghy to concentrate on the main issues in the case rather than by spending disproportionate time on ancillary matters.

115. Late in the hearing copy timetables were produced by the respondent. The claimant had requested these during the Case Management process and they had not been provided on grounds of relevance. At no point did the claimant's side request a specific Order for Discovery for these documents. During the hearing they were requested again and Mr Grainger offered to provide them.

116. The point which the claimant's side wanted to make in relation to those documents was that the timetables for a certain period showed that the claimant and Ms A worked in the same building and were scheduled to have classes which took place in the same corridor. It was the claimant's point therefore that it was not the case that Ms A avoided the claimant in that period. The claimant's side did not put this point to any of the relevant witnesses and when they finally pressed for the documents to be produced, the last remaining witness of the respondent (Ms Duffy) had no knowledge of any timetabling issues and could not therefore give relevant evidence on this point. For this reason the claimant's counsel was stopped from questioning Ms Duffy any further on the timetable documents because she had made it clear that she could give no evidence on that point.

117. In written submissions Mr Donaghy referred to this issue and enclosed an email chain which had not been put before the tribunal in evidence. The timetable point was, at best, of tangential relevance to this case and for this reason belated

introduction of this documentation was of no relevance (in the context of all the evidence presented to us over a 10 day hearing in 4 parts) to the issues we had to determine.

118. It was made clear by the Employment Judge to both counsel in advance of the submissions hearing that the submissions would be strictly timetabled and that they should prepare their submissions accordingly to finish within the time allotted. Unfortunately Mr Donaghy had to be stopped at the end of his allotted period as he had run out of time.

119. Mr Donaghy in written submissions quoted in inverted commas his solicitor's note of some of the evidence of some of the witnesses in order to support the points he wished to make. We have looked at the totality of the evidence of all the witnesses in this case. In particular, we note that the account given of Mr Kinnaird's evidence is misleading and selective and is inaccurate in several important respects. Similarly the account given of Ms Traynor's evidence and Mr Canavan's evidence is selective and is contrary to the import of their evidence as a whole. This was regrettable and required the tribunal to check the audio recording as well as its own notes, in order to take account of the accurate and complete evidence of each of the witnesses on the points highlighted.

Employment Judge:

Date and place of hearing: **8-12 October 2018, 3, 5, 7 December 2018, 25 January 2019, and 5 March 2019 at Belfast.**

Date decision recorded in register and issued to parties: