EMPLOYMENT TRIBUNALS

Claimant: Mr M R Curry

Respondent: Grimsby Institute Group

Heard at: Nottingham **On:** 13 and 14 June 2018

Before: Employment Judge Legard (sitting alone)

Representation
Claimant: In Person
Respondent: Ms Barry of Counsel

JUDGMENT having been sent to the parties on 16 July 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Issues

1.1 By a Claim Form dated 16 November 2017, the Claimant brings a complaint alleging that he was dismissed because he had made a protected disclosure and accordingly that his dismissal was automatically unfair pursuant to s.103A of the Employment Rights Act 1996. The Claimant lacks sufficient continuous service in order to bring a complaint for ordinary unfair dismissal. The sole issue before me to determine, therefore, was the reason, or principal reason, for his dismissal.

2. Evidence

2.1 I heard evidence from the Claimant and from Mr Campbell, who was the decision maker in this case. Both were cross-examined. The Claimant represented himself and he did so with commendable ability and objectivity. The Respondent was represented by Ms Barry of Counsel. I was referred to a number of documents within an agreed bundle comprising approximately 260 pages. Overall, and perhaps somewhat unusually in cases of this nature, I found both witnesses to have given credible testimony. As matter turned out there were precious few areas of factual dispute between the parties. The key difference lay in the parties' respective positions as to the true cause for dismissal.

3. Findings of fact

3.1 The following findings are based on the balance of probability having regard to the totality of the evidence. The Respondent is one of England's largest suppliers of further and higher education; has sites based in Skegness, Scarborough and Grimsby and employs approximately 1200 people. It has a dedicated HR resource.

3.2 The Claimant has a background in embryology, natural and animal sciences. He was previously Senior Lecturer of Natural Science at the University of Lincoln.

3.3 In 2013/2014, he decided to embark on a new direction and trained to be a teacher, obtaining his PGCE from Hull University in 2014. Following a brief period with the Magnus Church of England Academy, he was appointed to the role of Programme Leader by the Respondent teaching Maths (both GCSE and functional skills) to students who were taking vocational or work related courses (such as hairdressing, catering and so forth). These students were generally those who had previously failed within a standard schooling environment to attain GCSE Maths to the required or minimum C grade level. As I understand it, such students are required by law to continue their Maths education alongside their vocational course (the same applies to those who failed English at GCSE level.)

3.4 The Claimant worked at the Nuns Corner site in Grimsby. Although titled a Programme Leader, he was effectively a newly qualified teacher ('NQT') working alongside other maths teachers and reporting to a Curriculum Manager. It is common ground that during the relatively short period of the Claimant's employment with the Respondent, there was a high turnover of staff and specifically curriculum managers in this case.

3.5 Each curriculum was organised into Faculties and each Faculty headed by an Associate Principal. At the material time, the relevant Associate Principal was John Nutt. Mr Nutt subsequently left the Respondent's employ.

3.6 It further appears to be common ground that teachers are faced with a

number of motivational and disciplinary challenges within their respective classrooms by students attending the Institute and particularly from those who are effectively forced to undertake Maths and English tuition as a condition of being able to pursue their vocational course. These are, of course, the same students who struggle to grasp the fundamentals of Maths or English, hence their failures at GCSE. It is important to emphasise, however, that there are a good many students who are motivated and eager to attain a pass grade or better.

3.7 The Respondent has a fairly comprehensive capability policy and procedure with clearly defined stages as well as action and intervention points. The Respondent concedes that, in the Claimant's case, it failed to adhere to those policies and procedures, specifically at the point of dismissal and maintains that this was in part because of the Claimant's lack of continuous service and therefore lack of employment protection. Furthermore the Respondent maintains that it needed to make staffing decisions quickly and in time for a new academic year.

3.8 Each teacher, programme leader or tutor undergoes periodic observations which are known as "Observation of Teaching Learning and Assessment", or OTLAs. These are either informal and supportive or they are formal. Formal observations form part of the Respondent's appraisal process. Areas within those OTLAs identified as strengths are marked with an 'S' and weakness generally as 'AFIs' (areas for improvement). There are different grades. Grade 3 equates to 'requiring improvement.' Grade 4 means unsatisfactory.

3.9 The overall purpose of these OTLAs is to identify strengths and weaknesses in an individual's teaching methods and delivery in order that advice, training and, if appropriate, support measures can be put in place so that the quality of teaching improves and the learner's experience is enhanced. Ultimately that improvement should be reflected in improved attainment at GCSE level and all functional skills exams.

3.10 Relatively early on in his probationary period, the Claimant had a supportive OTLA from Mr Toker (who was his then Curriculum Manager). This was a relatively neutral assessment although a few concerns were raised, such as (a) no explicit support and development of English skills; (b) wider quality and diversity issues not been explicitly supported and (c) consolidation should be more comprehensive and include all learners. The OTLA was followed by some feedback. I agree with the Claimant that there was nothing particularly significant in that appraisal and, although I have not been provided with any appraisal or OTLA forms for other members of staff, it would be surprising if any appraisal did not identify at least some weaknesses or AFIs. After all, one of the principal purposes of an OTLA is to identify those very areas, especially for newly qualified teachers, which require improvement and no teacher, certainly not an NQT, is likely to be perfect.

3.11 The Claimant underwent a formal observation from a Mrs Collins (Quality Manager) on 3 December 2015. On this occasion, whilst there are some areas of strength identified, Mrs Collins did raise a number of worrying

AFIs. These included:

- "*Learners complete tasks as directed, however, most demonstrated lack of enthusiasm"*
- *"Insufficient stretch and challenge for this learner"*
- *"No links to employability or life skills are made and learners still do not appreciate why they are doing this"*
- *Session tends to be tutor led and a lack of variety of teaching and learning"*

3.12 Overall, the picture painted by Mrs Collins's was concerning and the Claimant's grade was marked as "*requires improvement*". The Claimant says that grading was given deliberately because Mrs Collins felt that he would benefit from a lower grading so as to be provided with the benefit of extra coaching. I find that dubious and there was no evidence to suggest that this grading was given for any ulterior purpose. The grade simply reflected what Mrs Collins had observed.

3.13 In February the following year, there was a supportive observation by Mrs Marriott. By any standards, this was an extremely poor observation. There were a long list of AFIs, which included the Claimant not being adequately prepared for the lesson and a "*high level of lack of ownership of learning in the session*". Overall the lesson itself was described as having no stretch or challenge and "*uninspiring*".

3.14 On 17 March 2016, there was a formal re-observation conducted by Ms

Tsui-Lau. Notwithstanding the earlier observation and comments and weaknesses identified by Mrs Collins and Mrs Marriott, the quality of the Claimant's teaching as appraised by Ms Tsui-Lau left a great deal to be desired. Once again, a lack of student interaction was noted. There was significant classroom disruption; learners were described as being "*switched off*"; the lesson described as 'uninspiring' and the Claimant lacking in his ability to challenge behaviour issues. Ms Tsui-Lau went on to say this:

"*The session is very teacher led and focuses on going through the exam paper. The session is quite slow paced and lacks interaction as some learners as disengaged and folding arms with legs up on the chair*"

She graded the Claimant as "*requiring improvement*".

3.15 By this stage, the Claimant had been in post for approximately 6 months so this lack of improvement (arguably a deterioration) was a matter of some concern. Notwithstanding the above, the Claimant passed his probationary period.

3.16 Mr Riles was now his Curriculum Manager. On account of his failure to demonstrate that the quality of his teaching was on an upwards trajectory, the Claimant was subjected to formal performance management process in accordance with the Respondent's policy. It is important to note that, at no point, was the Claimant's knowledge or understanding of Maths ever the subject of any criticism. Far from it, it is recognised that he has all the

relevant knowledge and he is a man of significant intellect. The Respondent's concerns all related to the Claimant's teaching ability and, specifically, his failure to motivate students and use effective teaching techniques to stretch students as well as ensure that the needs of students of differing abilities were met. There was also a recurring concern regarding his inability to maintain discipline in his classes. It was these shortcomings that lay at the heart of the Respondent's performance concerns.

3.17 A performance management meeting was held on 12 May 2016 and, by letter dated 24 May, the Claimant received a first written warning, to which there was no appeal. In between the meeting and the actual warning, a further re-observation had been carried out by Ms Tsui-Lau. A number of areas of weaknesses or AFIs were identified. Once again these included: (a) no opportunity for stretch and challenge; (b) low level disruption and (c) lessons being very much teacher led. The Claimant counteracts the latter criticism by saying that this particular observation was undertaken when teaching a revision class. Accordingly it was, or had every likelihood of being, "teacher led".

3.18 In the following academic year (2016/2017) he was observed by the then Vice Principal (Mr Nutt). The Claimant says that he was not provided with notes of these observations and does not recognise the description of him contained within the OTLAs provided by Mr Nutt. Given the detail contained therein (and I have read them with some care) I am prepared to accept, on balance, that these OTLAs did pertain to the Claimant. I note

that they bear his name and, in my Judgment, it would be a remarkable feat of imaginative engineering if they had been created for the sole purpose of these proceedings. They are to be found at pages 134 – 136 of the bundle. There are a number of parallels and/or common themes as between what Mr Nutt claims to have observed and the observations of Ms Tsui-Lau, Mrs Collins, Mrs Marriott and so forth. For example, in one such observation, Mr Nutt describes the Claimant's students as being disengaged; that the pace of the lesson was slow; there was a lack of differentiation and an absence of aims and/or visible objectives.

3.19 By now, Mr Riley had been replaced by Mr Blanchard. The Department was clearly in a state of freefall. The Claimant underwent a PDR (performance development review) in December 2016. As stated above, there are four given grades, grade 4 being the worst. The Claimant received a grade 4. The PDR form provides as follows:

"*Area is grade 4 and therefore cannot grade Mark's performance as anything above inadequate.*"

It is fair to say, however, that part of the reason that the Claimant received such a poor grade on this occasion was on account of the Department's overall failings (as opposed to the Claimant's individual shortcomings). Equally it is clear (and I accept the Respondent's evidence on this point) that the fact of the Claimant having received successive grade 3 scores together with a written warning contributed to his own personal grading. In any event a number of objectives were then set, the majority to be

completed or achieved by June 2017.

3.20 As a consequence, he was called forward to a further performance management review, once again in line with the Respondent's written policy. However, in part due to the fact that the Claimant argued that he had not been provided with a copy of Mr Nutt's assessments let alone any feedback (a point accepted by Mr Blanchard), a further OTLA was authorised in lieu of any further formal proceedings.

3.21 That took place on 16 February 2017. It was conducted by Claire Bramley. As the Claimant correctly points out this assessment was, by comparison to what had gone on before, relatively positive. Ms Bramley observed that late comers were well tackled; the session started promptly; there was good use of technology and the support for completion of starter tasks. However, there were still some negatives, namely low-level disruption and lack of stretch and challenge. Furthermore, as part of the ensuing action plan, Ms Bramley identified as being weak the Claimant's approach to differentiation. There remained, therefore, some recurring themes; particularly the level of low- level disruption which inevitably reflected negatively upon the Claimant's ability to exercise control and discipline within the classroom. The lack of stretch and challenge was equally concerning.

3.22 There were no further performance management proceedings taken against the Claimant and at the date of his dismissal he was not subject to formal capability proceedings.

3.23 Mr Campbell joined the Respondent in the first week of April 2017. He inherited from Mr Blanchard a Maths Department that was clearly failing; indeed one that had received grade 4 only a few months before his arrival. There was OFSTED scrutiny underway and Mr Campbell immediately sought feedback and observations about the Department from the outgoing Curriculum Manager, from senior staff and indeed the students themselves. Although there was no corroborative documented evidence, I nevertheless accept his evidence, namely that several teachers (including the Claimant) were identified as being weak points within the Department and consequently the root cause of the Department's overall failings. Specifically, the Claimant was highlighted to him as somebody for whom students had, or demonstrated, very little respect which is, of course, an essential ingredient for a successful teacher.

3.24 One of the first things to cross his desk was some email correspondence from Mrs Marriott dated 3 April 2017 in which she draws to his attention, and indeed to the Claimant's attention, the fact that two students were expressing concern and frustration about the behaviour of others in the Claimant's lessons.

3.25 On the following day, Mr Campbell decided to conduct his own observation of the Claimant's class. He witnessed for himself what he described as complete disrespect being shown to the Claimant by students. Such was Mr Campbell's frustration and disbelief that he abandoned his role of neutral observer and in his words "*called the class to order and read the*

riot act". According to the Claimant, the students however quickly returned to their wicked ways shortly after Mr Campbell's departure. The Claimant followed up this observation with an email addressed to Mr Campbell stating:

"*The behaviour you observed was fairly typical and 'there was very little if any difference in their attitude after you had left'.*"

However, he did act upon Mr Campbell's suggestion, namely that the particular group of girls who were the cause of the disruption were subsequently split up.

3.26 An issue arose during the course of evidence as to the quality of some personal profiles submitted by the Claimant but in my view they are of limited evidential value and played no part in the Claimant's dismissal. I say no more about them.

3.27 As stated above, the Claimant was engaged primarily in teaching Maths to GCSE level. However, another part of the Maths curriculum is the teaching of functional skills maths and the examination thereof. The Claimant did teach functional skills, albeit on a more ad hoc basis. Functional skills exams, unlike their GCSE counterpart, are often sat online. That is to say students, usually up to 20 at a time, enter a room in which the exam is held. There they have access to the exam paper on a computer screen which they complete electronically. Exams are independently and professionally invigilated; students can take exams at

any time and there is no limit to the number of retakes they can take.

3.28 It is common ground that the Respondent was failing short in terms of its target for achieving the pass mark in these exams. On or about 5 June 2017, Mr Nutt issued an instruction (and I find it was an instruction not a suggestion) for math tutors, including the Claimant, to accompany functional skills students into their exams in order to access their progress, identify weaknesses in order that they would be better able to prepare those same students in the event that a resit was required. For some unexplained reason, he also authorised the same tutors to take photographs. It has never been explained what or whom they should be photographing. Unfortunately, Mr Nutt was not called to give evidence and he appears to have left the Respondent's employment in July 2017 under something of a dark cloud.

3.29 The Claimant (rightly in my view) points to the fact that a tutor, notwithstanding the presence of an invigilator could, if accompanying students in this way, get a preview of exam questions which a number of their students would not have yet seen. That same tutor could therefore divulge the nature of those questions during a revision class, or to groups of students waiting to take the exam. The Claimant felt uncomfortable about that instruction. He elected to consult the relevant Regulations.

3.30 The functional skills exams were set and provided by NCFE (Northern Council for Further Education). NCFE provide a set of Regulations that dictate the conditions under which exams are to be taken. Amongst other

things, the Regulations say as follows:

"*If any of these Regulations are broken by learner, invigilator or other person then NCFE may declare the external assessment void."*

"Failure to comply with these Regulations may result in a Centre's approval status being temporarily or permanently removed and all learners being withdrawn from the qualification."

"No other person must be in the extern assessment room unless carrying out an invigilation role."

3.31 In passing, I note that in the bundle there are instructions also provided by the JCQ (Joint Council for Qualifications), an umbrella organisation and also an exam provider. In their own instructions at page 247, it says this:

"*Senior members of Centre staff, such as an Assistant Head Teacher, approved by the Head of Centre and who have not had overall responsibility for the candidate's preparation for the examination, may be present at the start of the examination."*

It is clear, however, that the role of those 'senior members' was restricted to assisting with identification of candidates and disciplinary matters. The instructions go on to say:

"*Under no circumstances may members of Centre Staff be present at the*

start of the examination and then sit and read the paper before leaving."

3.32 It is abundantly clear, in my judgment, that the exam providers make it plain that all tutors and/or teachers (absent those senior teachers expressly approved by the exam provider to perform restricted duties) must not enter the room whilst exams are in progress. This not only smacks of common sense but protects the validity of exams themselves, as well as the integrity of the students, the teachers and the providing institute alike. It is bewildering that Mr Nutt, and indeed other senior managers within the Respondent, failed to appreciate the potential ramifications that could flow from allowing tutors to accompany students into exams. Whatever his intentions may have been, Mr Nutt's instruction was not only in direct contravention of both JCQ and NCFE requirements and regulations, it was also an affront to common sense and a demonstration of an appalling lack of judgment.

3.33 On 12 June, Mr Campbell instructed the Claimant (amongst others) to do exactly that. The Claimant immediately brought the relevant NCFE text to his attention. I accept the Claimant's evidence that he did more than merely point to a section on a computer screen. The Claimant informed Mr Campbell that, in his view, Mr Nutt's instruction was contrary to the relevant Regulations and consequently placed himself, the institute and students at risk. Mr Campbell accepted the Claimant's interpretation and informed him not to enter the room as he had previously been instructed. It is telling that at no point did Mr Campbell remonstrate with the Claimant, question his interpretation or seek to challenge his point of view. Indeed,

he readily accepted the Claimant's point as being well made. He communicated that to other members of staff and to Mr Nutt.

3.34 I accept the Respondent's evidence that, following this intervention, no staff entered an exam room. The Claimant has failed to produce any evidence, even anecdotal evidence, of any member of staff entering such a room. That said he did draw to my attention a somewhat ambiguous email (p163) the subject header being "*Observation of functional skills exams*". I have heard competing evidence on this point and I am prepared to accept, albeit marginally, that this did not necessarily equate to an instruction to the Claimant, or indeed the other two members of staff, to enter the exam room itself. In any event, it is clear that the Claimant did not do so.

3.35 There is no evidence of the Claimant being treated with any hostility or even indifference as a result of bringing this information to Mr Campbell's knowledge.

3.36 On 30 June 2017 (now at the end of the academic year by which time exams were more or less complete and any OFSTED involvement over), Mr Campbell decided to take action in order to clear the decks. As a 'new broom' he was determined to make sweeping changes to the makeup of the Maths Department in advance of the next academic year. The Claimant was not the only person in his sights. Mr Campbell had spent much of May and June absent from work with a back condition but he had gathered sufficient evidence and ammunition in order to take decisive

action that he considered necessary in order to change the Maths Faculty's direction of travel.

3.37 When it came to the Claimant, Mr Campbell relied upon what he had been told by his predecessor (Mr Blanchard); what he had been told by students; what he himself had observed as well as, of course, the 'audit trail' referred to above. Mr Campbell did not consider it appropriate to subject the Claimant to further performance management. He deliberately waited until the end of the academic year before deciding to dismiss three of the five maths teachers in a failing Department; a Department that had been graded 4 a few months previously. Mr Campbell also dismissed two other Maths teachers, namely Messrs Spence and Matthews. Mr Spence, like the Claimant, had less than 2 years' service. He was dismissed without any procedure in a similar manner to the Claimant and he was paid notice. The evidence shows that both Mr Spence and the Claimant, quite understandably, were furious at their treatment and specifically the fact that no process had been followed. Mr Matthews, who had more than 2 years' service, was treated differently. He was 'compromised' on presumably confidential terms at or around the same time.

3.38 There is no evidence before me to suggest that either Mr Spence or Mr Matthews had raised concerns regarding a potential breach of exam regulations in the way the Claimant had done. The reason given at the time of his dismissal was 'performance' and specifically his lack of functional teaching skills as opposed to his knowledge of the subject. More specifically, it was his inadequate interaction with and management

of students within his class. I accept the Claimant's evidence that he did not say that his dismissal was, or might have been, an act of age discrimination.

3.39 Correspondence followed between the Claimant's lawyers and the Respondent's HR Department. I accept there is some inconsistency between the reasons given to him verbally and those set out in a letter authored by Ms Walmsley. However, in my view in the overall scheme of things, little turns upon that. In November 2017, shortly after the Claimant's claim form was received by the tribunal, the Respondent wrote to NCFE and reported the 'exam' breach referred to above. This was in part due to Mr Butler's intervention but that in itself would not have arisen but for the Claimant lodging his claim.

3.40 NCFE's response was somewhat enlightening. They decided not to take any action. They said as follows:

"*We really appreciate your transparency and are looking forward to working with you in the future.*"

It is clear in my view that their motivation for taking action against the Respondent was heavily moderated by the potential financial implications were they to lose an important customer. It is no part of the Tribunal's jurisdiction but I simply observe that the activities and/or breaches highlighted by the Claimant cry out for some form of independent arbitration as opposed to self regulation, assuming there is nothing already

in place.

3.42 As stated above, the Respondent concedes no process was followed and no appeal provided. They maintain they were entitled to do that because the Claimant lacked sufficient continuous service.

4. Relevant law

4.1 'Whistleblowing' is protected under PIDA if, but only if, it constitutes a 'protected disclosure' (ERA s.43B). A protected disclosure concerns a past, present or anticipated wrongdoing. Wrong doings covered by PIDA are crimes, miscarriages of justice, failure to comply with legal obligations, risks to health and safety, damage to the environment and the covering up of any of these (s.43B).

Information

4.2 The Act provides a broad definition of what amounts to a disclosure and 'any disclosure of information' will qualify (ERA 1996 s 43B(1)). There must still be a 'disclosure of information' as such and not simply 'allegations' about the wrongdoer (see Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38, EAT and Smith v London Metropolitan University [2011] IRLR 884, EAT). In the latter case, mere grievances about the claimant's workload were not held to be a 'disclosure'. Depending upon the facts, it may be possible to 'aggregate' more than one communication in order for them to be read together as constituting a protected disclosure – Norbrook Laboratories Ltd v Shaw [2014] ICR 546. The Court of Appeal has provided further recent guidance on what constitutes 'information' in Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436. The CA explained that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as "allegations." Grammatically, the word "information" had to be read with the qualifying phrase, "which tends

to show [etc]". There has to be sufficient factual content and specificity capable of tending to show one of the relevant matters in subsection (1). That was a matter for evaluative judgment by the ET in the light of all the facts.

Reasonable belief and public interest

4.3 In all cases, the worker making the disclosure must have a 'reasonable belief' that the disclosed information 'tends to show' the wrongdoing (s.43B(1)) and there is the added requirement that the disclosure be made 'in the public interest' – for which, read Underhill LJ's analysis (paragraph 37) in the case of Chesterton Global Ltd v Nurmohamed. The statutory test (for reasonable belief) is subjective - Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT.55. In all cases, the worker making the disclosure must have a reasonable belief that the disclosed information tends to show the wrongdoing and the test is whether the Claimant reasonably believed that the information tended to show that one of subparagraph (a) to (f) existed, not whether he or she reasonably believed that information to be true – see Dr Y-A Soh v Imperial College of Science, Technology and Medicine UKEAT/0350/14/DM. 'Public interest' carries a broad interpretation – see Chesterton Global Ltd & Anor v Nurmohamed & Anor [2017] EWCA Civ 979 and Underwood v Wincanton Plc UKEAT/0163/15/RN.

4.4 In Darnton-v-University of Surrey and in Babula-v-Waltham Forest College , it was confirmed that the worker making the disclosure does not have to be correct in the assertion he makes. His belief must be reasonable. In Babula, Wall LJ said:

"..a belief may be reasonably held and yet be wrong…. Provided his belief (which is inevitably subjective) is held by the Tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong – nor, (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence - is, in my

judgment, sufficient, of itself, to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute.

s.103A dismissal claims

4.5 The 'causation' test is different, of course, for a s.103A claim than that applied for a 'detriment' claim. The test for automatically unfair dismissal under section 103A of ERA 1996 is that the protected disclosure must be the sole or principal reason for the dismissal and it will be automatically unfair to dismiss an employee if the reason, or principal reason, for that dismissal is that they have made a protected disclosure. The proper approach to be adopted by tribunals in such cases where there opposing reasons for dismissal, was explained by the Court of Appeal in Kuzel v Roche Products Ltd [2008] ICR 799 CA. Although it is for the employer to prove that he dismissed the employee for a fair and admissible reason, it does not necessarily follow as a matter of law that if he fails to establish this, the tribunal must accept the alternative reason advanced by the employee. If the employee puts forward a positive case that he was dismissed for a different reason, he must produce some evidence supporting that case. I have also taken myself through the case of Eiger Securities LLP v Miss E Korshunova: UKEAT/0149/16/DM, specifically the paragraph referred to me by Ms Barry at paragraph 40 and also the very informative passages where Slade J deals with the difference between detriment claims (where a material factor test is in place) and dismissal claims, where of course it is the sole or principal reason, that falls to be determined.

4.6 In Kuzel-v-Roche Products Mummery L.J. explained thus:

57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. ..
58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable

inferences from primary facts established by the evidence or not contested in the evidence.
59. The ET must then decide what was the reason or principal reason for the dismissal

4.7 Some assistance can be gained from 'victimisation' cases. In Martin v Devonshires Solicitors the EAT, while agreeing with the test in Khan, went on to hold that 'there would in principle be cases where an employer had dismissed an employee in response to a protected act but could say that the reason for dismissal was not the act but some feature of it which could properly be treated as separable'. According to Underhill P: 'it would be extraordinary if these provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint'.

4.8 In Glasgow City Council –v- Zafar it was held that unreasonableness of treatment does not show the reason why something was decided, neither does incompetence see also Quereshi-v- London Borough of Newham. As Elias J said in Law Society –v- Bahl:

Employers often act unreasonably, as the volume of unfair dismissal cases demonstrates. Indeed, it is the human condition that we all at times act foolishly, inconsiderately, unsympathetically and selfishly and in other ways which we regret with hindsight. It is however a wholly unacceptable leap to conclude that whenever the victim of such conduct is black or a woman then it is legitimate to infer that our unreasonable treatment was because the person was black or a woman. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour. In order to establish unlawful discrimination, it is necessary to show that the particular employer's reason for acting was one of the proscribed grounds. Simply to say that the conduct was unreasonable tells us nothing about the grounds for acting in that way.

5. Submissions

5.1 I have heard oral submissions from both Ms Barry for the Respondent and from the Claimant. I do not propose to rehearse those within the context of this judgment. They were both extremely helpful. Both concentrated on the factual background to this case, although Ms Barry did spend some significant time in looking at the different component parts that make up a protected disclosure.

6. Conclusions

Did the Claimant make protected disclosure(s)?

6.1 I am satisfied that by informing Mr Campbell of a potential breach of the NCFE regulations, the Claimant made a disclosure of information that qualified for protection within the meaning of section 43B(1)(b). The Claimant disclosed information, namely that the instruction to enter an exam room was in breach of the regulations and placed the Respondent, the Claimant and students at risk in terms of both status, exam validation and so forth. This was far more than a mere allegation.

6.2 I am equally satisfied that the disclosure was made in the reasonable belief that it was (a) true and (b) in the public interest. Clearly (a) is satisfied. It must also be in the public interest to report a matter which could have had far reaching consequences that went way beyond the

reputation and status of the Claimant himself and could possibly have compromised the life chances of students. I have no hesitation in concluding that the NCFE regulations imposed a legal obligation upon the Respondent which it was obliged to conform or comply with.

Reason for dismissal

6.3 The Claimant, very properly and skilfully, adduced evidence which, absent a number of features which I will refer to in a moment, could have led me to conclude that the reason for his dismissal was because he had made a protected disclosure. In particular he points to the timing of his dismissal and specifically the fact that the disclosure was made on or around 12 June and his dismissal which took place only 2 weeks or so later on 30 June. He points to the fact that the recipient of that protected information and the decision maker were one and the same person. He further highlights the fact that his last formal observation, undertaken on 2 February 2017, was by relative standards a positive one, thereby undermining to some extent the Respondent's case that performance was the true reason.

6.4 However, and notwithstanding the above, on balance I am satisfied that the Respondent has discharged the burden of proving that the reason for the Claimant's dismissal was performance-related capability. I accepted Mr Campbell's oral testimony given under quite proper, albeit rigorous, cross-examination.

6.5 There is a clear audit trail demonstrating inadequate performance over a period of many months. Importantly, in my view, there were specific areas of weakness that cropped up time after time. These included lack of differentiation, lack of challenge and stretch and a failure of classroom management and discipline. In short, the Claimant all too readily lost control and respect of his students. He was, albeit in part, responsible for the decline and poor grading of the Department as a whole.

6.6 Mr Campbell, who only joined the Respondent in April, had no choice but to wait until the effective end of the academic year. His decision to take drastic, but effective, action, not only against the Claimant but two other failing members of staff, was taken at that time. He did so not because of any misguided exam attendance instruction, or indeed unlawful instruction, but because he wanted to turn a failing Department around. He was not concerned or angered by the fact of the disclosure. On the contrary, he welcomed it and ensured that no members of staff subsequently entered a room when an exam was taking place. He did not consider it would necessarily be in the Claimant's interests for him to go through protracted performance management process and, in any event on HR advice, he took the view that no such procedure was necessary in the case of an individual with less than two years' continuous service.

6.7 In all the circumstances, I find that the reason, or principal reason, for the Claimant's dismissal was performance related and was not because of him having made a protected disclosure. On that basis, I have no option but to dismiss the claim.

Employment Judge Legard

Date 19th October 2018

JUDGMENT SENT TO THE PARTIES ON

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