EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs A Kovaci Myftari	**v**	The David Ross Education Trust

Heard at: Cambridge Employment Tribunal **On**: 12 & 13 September 2019

Before: Employment Judge Johnson

Members: Mrs J Schiebler & Mr R Eyre

Appearances
For the Claimant: In person (accompanied by friend Mrs J Simfield)
For the Respondent: Ms S Ismail (counsel)

JUDGMENT

1. The Claimant's complaint of unfair dismissal by reason of a protected disclosure contrary to section 103A of the Employment Rights Act 1996 is dismissed.

REASONS

Introduction

1. The Claimant represented herself at the hearing and the Respondent was represented by Ms Ismail of counsel.

2. The Claimant is Albanian by birth and the Tribunal understood that she speaks English as a second language. Although she spoke good English, the Claimant was asked whether she felt that she should have an interpreter present. She confirmed that she was happy to present her case without this assistance. It was stressed to the Claimant on several occasions that if she felt she needed a break at any time to collect her thoughts, this would be allowed.

3. Both parties were asked if there were any adjustments that would be required to support the witnesses present and they confirmed that none were needed.

4. The Claimant commenced her employment with the Kings Heath Primary School on 5 June 2017. The School is part of a Multi Academy Trust and staff are employed by The David Ross Education Trust. Accordingly, it is this Trust which is the Respondent in these proceedings. The Claimant was employed as a Teaching Assistant in the School's nursery. Her employment was terminated on 5 October 2017, although it was agreed that she would receive 4 weeks' pay in accordance with her contract of employment and her last working day would be 2 November 2017.

5. The Claimant presented her ET1 Claim Form to the Employment Tribunal on 20 January 2018, following a period of early conciliation from 7 December 2017 until 22 December 2017. The Claimant initially claimed both unfair dismissal and automatic unfair dismissal by reason of her making a protected disclosure to the Respondent. The Respondent presented a response resisting the claim on 29 March 2017.

6. The case was the subject of a Preliminary Hearing Case Management before Employment Judge Bloom at the Cambridge Employment Tribunal on 22 November 2018. At this hearing, the Claimant accepted that she did not have two years continuous service in order that she could bring a claim of 'ordinary dismissal' and this complaint was withdrawn. The complaint of automatic unfair dismissal as a result of making a protected disclosure to the Head Teacher at Kings Heath Primary School contrary to section 103A of the Employment Rights Act 1996 was retained.

The Issues

7. The Claimant argues that her dismissal was unfair because she was dismissed by reason (or by the principle reason) that she made a protected disclosure to Head Teacher of the School on 5 October 2017. If this is the case, her dismissal will be automatically unfair and she will succeed with her claim

8. The Respondent accepts that the Claimant made a relevant protected disclosure as defined by section 43A of the Employment Rights Act 1996 to the Head Teacher. However, it argues that the disclosure was made by the Claimant and three other work colleagues in the form of a written statement at the request of the Head Teacher. The Head Teacher will say that she was aware of a potential safeguarding issue and asked those members of staff who worked with the child in question to all produce a statement.

9. What the Respondent seeks to argue is that the Claimant was not dismissed for the sole or principal reason of this protected disclosure, but because of performance issues relating to her probationary period following a period of supervision. They further submit that the Claimant's colleagues who also made the protected disclosures were not dismissed.

10. The Claimant submits that she was treated differently because her being subject to a probationary period made it easier for the Respondent to dismiss her by reason of her protected disclosure. She said that her colleagues who also provided statements to the Head Teacher were long serving employees and more difficult to dismiss. She also disputes she was given enough time to improve during her probation and the fact that she was dismissed on the same day as she gave the Head Teacher her letter, means that the two events must have been connected.

The hearing

11. The Tribunal heard oral evidence from the Claimant.

12. For the Respondent, the Tribunal heard oral evidence from Kim Duff who is the Head Teacher of the School and also Richard Widdison, who is the Respondent's Head of Human Resources.

13. A bundle of evidence had been provided and it was understood that it was agreed by the parties. The Claimant provided a plastic wallet containing additional documents which had not been disclosed to the Respondent at the beginning of the hearing and also a document entitled 'Submission for Arjana Kovaci Myftari'. As the documents appeared to relate to remedy, it was explained that the Tribunal would not hear an application for their disclosure until and unless it became relevant to do so. It was also explained that the Submissions document could be used by the Claimant as part of her final submissions and with her agreement, it was included by the Tribunal as part of the documents to be considered when making their decision.

14. All witnesses were asked questions by way of cross examination, with some occasional further questions from the Tribunal. As the Claimant was unrepresented and had English as a second language, she was given the opportunity to take a blank sheet of paper and pen with her when she gave evidence. This was to allow her to make notes during cross examination in case she wished to make observations during her final submissions. Ms Ismail for the Respondent did not object to this course of action.

Findings of Fact

15. The Claimant was appointed as a Teaching Assistant in the nursery at Kings Heath Primary Academy on 5 June 2017. A contract of employment was provided by the Respondent and the Claimant signed her acceptance of the appointment and of the terms and conditions of service set out in the contract of employment on 18 May 2017.

16. Her letter of appointment set out her hours of work as being 8.15am to 4pm and that she was subject to a probationary period of six months.

17. At the beginning of the Claimant's employment with the School, the Head Teacher Mrs Duff identified a issues relating to smoking on the School premises and also poor timekeeping in the mornings. Mrs Duff acknowledged

that the smoking issue was not a significant matter, but the Tribunal finds that the time keeping concerns were an ongoing issue and were raised in the Support Plan produced during her probation period.

18. The School's system of monitoring the Claimant's probation period involved Probationary Period Review meetings which took place at one month following the commencement of employment and a further review at three months. A standard form was used and it recorded criteria such as an employee's attitude to work, general performance, attendance and punctuality and areas for development/improvement.

19. Although the Tribunal felt that the Probationary Period Review Form could have been simpler to understand, that a variety of performance issues remained outstanding during the Claimant's probation period. These were being managed through an Informal Support Plan as identified in the hearing bundle.

20. It was noted that the Claimant sought to argue that she passed her Learning Observation which took place on 5 October 2017. While the form produced during the Learning Observation did not specify whether there was a pass or a fail, both the Claimant and Mrs Duff gave evidence as to comments contained within the form. From this evidence it was clear to us that a significant performance issue remained, in that the Claimant did not engage with the children in her class. It was reasonable that the School would expect all its Teaching Assistants to engage fully.

21. The Claimant argued that she was not provided with the opportunity to improve her performance due to the timescales provided the School. The Tribunal considered the Probationary Period Review Form and noted that the Claimant's first assessment took place shortly after she commenced employment on 4 July 2017. This assessment was actually delayed until this date to the Claimant having a two week authorised absence.

22. The Form identified specific performance issues and steps that the Claimant was expected to take. The Informal Support Plan was also introduced at this stage to assist the Claimant to develop her professional practice. Under these circumstances, the Claimant was given adequate time in which to improve her performance before she was dismissed.

23. The Claimant had throughout the proceedings given the impression that she made a protected disclosure to Mrs Duff on 5 October 2017 relating to a safeguarding matter. It is recognised that this was a protected disclosure and indeed this is accepted by the Respondent. However, having heard evidence from both the Claimant and Mrs Duff during the hearing and having considered the relevant documents within the bundle, it is clear that the disclosure was made at the request of the Head Teacher. Mrs Duff was already aware of the safeguarding matter and as Safeguarding Lead recognised that she needed to investigate this further. As a consequence,

she requested not only the Claimant, but her three work colleagues in the nursery to provide statements relating to this matter.

24. On 5 October 2017, the Claimant provided the statement to Mrs Duff and then had her classroom observation. Following the observation, the Claimant was told to see Mrs Duff in her office. During this meeting Mrs Duff informed the Claimant that she had failed her probationary period and was given a letter confirming her dismissal with immediate effect. Although this was the case, it was confirmed in this letter that she would receive 4 weeks pay in accordance with her contract of employment and her last working day would be 2 November 2017. She was also made aware that she had a right of appeal.

25. The Claimant did give notice of her intention to appeal in a letter dated 11 October 2017. This letter argued that the decision of the School that she had failed her probationary period was too severe. She supported her appeal with five specific reasons [cut and paste].

26. The Claimant alluded to the protected disclosure in her letter however, she did not argue this was one of the reasons for her dismissal and appeared to be arguing that this instead was an example of good performance on her part.

27. The Respondent acknowledged the Claimant's Notice of Appeal by letter on 24 October 2017.

28. The Respondent sent a letter dated 1 November 2017 which invited the Claimant to an Appeal Meeting at the School on 9 November 2017. The Tribunal accept that relatively little notice was given to the Claimant of this meeting. She did receive letter on 3 November 2017 and completed the confirmation of attendance form accompanying the letter and we accept that this was returned to the Respondent.

29. Mr Widdison confirmed in his evidence that had the Claimant requested additional time and for the Appeal Meeting to be postponed to a later date, this would have been granted. The Tribunal accept that this was the case, but that the Claimant did not seek additional time.

30. The Appeal Meeting took place on 9 November 2017. The Claimant was unaccompanied and chaired by Rebecca Steed who was employed by the Respondent as a Regional Director and did not work at the School.

31. The note of the Appeal Meeting was included in the hearing bundle and the Tribunal accepted that the Claimant was given a full opportunity to present her appeal. The process was outlined by Ms Steed to those present and Mrs Duff responded to the appeal on behalf of the School.

32. Ms Steed did not give her decision at the Meeting on 9 November 2017. A letter from the Respondent confirming the outcome of the Appeal and that the decision to uphold the Claimant's dismissal was not sent until 22 December 2017. Mr Widdison gave evidence to confirm that there was a delay and he apologised for the time it had taken to send it.

33. The Early Conciliation Certificate was sent by Acas to the Claimant and Respondent on 22 December 2017.

The Law

1. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is a qualifying disclosure which is made by a worker in accordance with any sections of 43C to 43H.

2. Section 43B provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following: (a) that a criminal offence has been committed, is being committed or is likely to be committed (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (c) that a miscarriage of justice has occurred, is occurring, or likely to occur (d) that the health or safety of any individual has been, is being or is likely to be endangered (e) that the environment has been, is being, or is likely to be damaged (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

3. As the Respondent has admitted that a protected disclosure has taken place, it is not necessary for the Tribunal to consider whether a qualifying disclosure has taken place. However, it would appear that the disclosure relates to either section 43B(1)(a), a criminal offence etc'; or, (d), health and safety etc'.

4. Section 43C provides, amongst other things, that a qualifying disclosure is made if the worker makes the disclosure to his employer.

5. Section 103A provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one the principal reason) for the dismissal is that the employee made a protected disclosure. The causation test is not legal but factual. A Tribunal should ask why the alleged discriminator acted as he/she did, consciously or unconsciously; see West Yorkshire Police v Khan 2001 ICR 1065 HL. That was a race discrimination case but it was cited with approval on this point in a section 103A case in Trustees of Mama East Africa Women's Group v Dobson EAT 0219-20/05. In that case the Employment Appeal Tribunal stated that it would be contrary to the purpose of the whistleblowing legislation if an employer could put forward an explanation for the dismissal which was not the disclosure itself but something intimately connected with it in order to avoid liability. The cases of Orr v Milton Keynes Council [2011] EWCA Civ 62 and Royal Mail Group Ltd v Jhuti [2017] EWCA Civ 1632 stand as authority for the proposition that an organisation's motivation in relation to the reason for the dismissal is to be taken as that of the person deputed to carry out the employer's functions.

6. In Kuzel v Roche Products Ltd [2008] IRLR 530 the Court of Appeal held that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, such as making protected disclosures, he must adduce some evidence supporting the positive case. That does not

mean that the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason. Having heard evidence from both sides relating to the reason for dismissal, it will be for the Tribunal 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. The Tribunal must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the Tribunal that the reason was what he asserted it was, it is open to the Tribunal to find that the reason was what the employee asserted it was. This is not to say that the Tribunal must find that if the reason was not that asserted by the employer then it must be that asserted by the employee. It may be open for the Tribunal to find that the true reason for dismissal was not that advanced by either side. It is for the employer to show the reason for the dismissal; an employer who dismisses an employee has a reason for doing so. He knows what it is. He must prove what it is.

7. Section 48(2) provides that on such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done. In London Borough of Harrow v Knight [2003] IRLR 140 the Employment Appeal Tribunal stated that the ground on which an employer acted in victimisation cases requires an analysis of the mental processes (conscious or unconscious) which cause him to act. Merely to show that "but for" the disclosure the act or omission would not have occurred is not enough. In Fecitt v NHS Manchester [2011] IRLR 111 the Employment Appeal Tribunal held that once less favourable treatment amounting to a detriment has been shown to have occurred following a protected act, the employer has to show the ground on which any act or any deliberate failure to act was done and that the protected act played no more than a trivial part in the application of the detriment. The employer is required to prove on the balance of probabilities that the treatment was in no sense whatever on the ground of the protected act.

8. In Fecitt the Employment Appeal Tribunal that an employer may be vicariously liable for acts of victimisation by employees under the whistleblowing legislation. In such cases, the Tribunal must make appropriate findings on the following questions: (1) whether there were acts of employees that were meted out to the Claimant by reason of him having done protected acts; (2) if so, the Tribunal must determine the nature of the acts and identify the unwanted treatment; (3) whether the unwanted treatment amounted to a detriment; and (4) if so, whether the acts complained of were so closely connected with the employment of those responsible as to make the employer vicariously liable.

9. Ms Ismail also submitted that the case of Igen v Wong & others 2005 ICR 931 CA was relevant. Although this case related to discrimination law, the Employment Appeal Tribunal in Fecitt held that the standard identified in Igen

applied, namely that to avoid liability, the employer has to show that the detrimental treatment was 'in no sense whatsoever' on the ground of the protected disclosure.

Discussion and Analysis

34. As this case involved a relatively short period of employment and related to a single disclosure, it is not necessary to provide an unduly detailed discussion of the Tribunal's decision in this case.

35. There is no dispute that the disclosure made by the Claimant to the Head Teacher was a protected disclosure within the meaning of section 43A of the Employment Rights Act 1996. The Tribunal therefore only has to determine whether the disclosure was the sole or primary cause of her dismissal.

36. The Claimant provided the statement which constituted the protected disclosure on the morning of 5 October 2017. She was given notice of her dismissal during the afternoon of 5 October 2017.

37. However, on the morning of 5 October 2017 the Claimant was also subject to a classroom observation.

38. While the Tribunal understands why the Claimant made a connection between the protected disclosure and her dismissal, we preferred the Respondent's case. It was clear having heard the parties' witness evidence and having considered the related documentation, the Claimant was subject to a probationary period which was properly supervised by line managers at the School. There was clear evidence of poor performance on the part of the Claimant during her probationary period.

39. We were satisfied that the School's managers at a relatively early stage gave the Claimant opportunities to improve her performance and provided a Support Plan to assist her. We found Mrs Duff's evidence to be credible and find that the reason why the decision was made to dismiss the Claimant on 5 October 2017 was because of continual failures in performance. The outcome of her classroom observation that morning demonstrated to the Respondent that despite a sustained period of support, she would not be able to reach the level of competence required to carry out her job effectively.

40. There is no suggestion that the protected disclosure was not properly investigated by the Head Teacher and indeed, it was made by the Claimant and her colleagues at her request. There would have been no merit in dismissing the Claimant and was no evidence was given to the Tribunal of the Claimant's colleagues were subjected to any detriments for making the same disclosure.

41. The Tribunal also noted that once the Claimant had properly been given notice of her dismissal, she was offered the right of appeal, which she exercised. We recognised that the Claimant's letter of appeal dated 11

October 2017 identified failing her probation period as being the reason for her dismissal. Indeed, she then identified five reasons as to why in her view, it was too severe and all of these were connected to performance. The Claimant did refer to her protected disclosure in this letter, but did not seek to argue that this was why she was dismissal. The appeal hearing focused on the reasons relating to her performance and the Claimant did not seek to argue that she was dismissed because of the protected disclosure.

42. Although the Tribunal noted that the Claimant was unhappy with the length of notice given by the Respondent for the appeal hearing, we are satisfied that she was given enough notice and that if she had required additional time, this would have been allowed by the Respondent. The Claimant did not ask for any additional time.

43. As a consequence, we are not satisfied that the protected disclosure was the sole or primary reason for the dismissal.

<u>Conclusion</u>

44. For the reasons given above, the unanimous conclusion of the tribunal is the Claimant was not dismissed for any reason connected with the protected disclosure and her claim is dismissed.

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Employment Judge Johnson

Date: 4 December 2019

Sent to the parties on: 2 January 2020

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For the Tribunal Office