EMPLOYMENT TRIBUNALS

Claimant: **Mrs Victoria Scott**

Respondent: **(1) Chigwell School**
(2) Mr Howard Ebden

Heard at: **London East Employment Tribunal**

On: **27, 28, 29 January 2021; 2 and 3 February 2021**

Before: **Employment Judge Russell**

Members: **Mr P Quinn**
Mr L O'Callaghan

Representation
Claimant: **Mr M Islam-Choudhury (Counsel)**
1st Respondent: **Mr V Harris (Counsel)**
2nd Respondent: **In Person**

JUDGMENT having been sent to the parties on 4 February 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. By a claim form presented on 3 September 2018, the Claimant brings claims of detriment for making a protected disclosure, harassment and victimisation. The Respondents resist all claims. Following the Judgment of Employment Judge Moor at a Preliminary Hearing on 31 January and 1 February 2019, the Claimant is to be regarded as a worker for the purposes of the Employment Rights Act 1996 and as an employee for the purposes of the Equality Act 2010.

2. The Tribunal heard evidence from the Claimant on her own behalf. For the Respondents, we heard evidence from Mr Ebden, Mr Punt and Mrs Tilbrook. There was an agreed bundle and we read those documents to which we were taken in evidence.

3. There was an agreed list of issues which was modified slightly at the final hearing. The Claimant withdrew the alleged detriment of unjustifiably refusing her return from compassionate leave and resume teaching in the summer term, and added a detriment of constructive termination of her worker contract. The Claimant confirmed that the words complained about are limited to "how do I tell her she needs to be more of a cock tease". The Respondents accepted that the Claimant made protected disclosures on 15 and 21

March 2018 and that these also amounted to protected acts. The updated list of issues was included in the bundle.

Findings of Fact

4. The First Respondent is a co-educational independent school with day and boarding pupils from ages 4 to 18. The Headmaster is Mr Michael Punt and the Director of Music is Mr Ebden, the Second Respondent. The music department comprises 32 staff, including visiting music teachers who provide specialist teaching to pupils who pay separately for those lessons.

5. The Claimant trained as a professional singer at the Royal Academy of Music. From April 2014, the Claimant worked in the First Respondent's music department with Mr Ebden as her Line Manager. In addition to providing singing lessons to students, the Claimant took the boys choir and set up and took a musical theatre group.

6. Prior to March 2018, the Claimant and Mr Ebden enjoyed a positive working relationship with the level of informality one might expect of close colleagues, but which did not include sexual banter.

7. The Claimant's three children were pupils at the school at various times, as were the children of Mr Ebden.

8. In the course of these proceedings, the Claimant has included in her evidence a number of complaints about the alleged conduct of Mr Ebden on a school choir trip to Spain in 2013, a second school choir trip to Spain in 2015 and once during a lesson at the school. These incidents are not part of the issues to be determined by this Tribunal but are said by the Claimant to demonstrate a pattern of behaviour by Mr Ebden from which inferences may be drawn when deciding the agreed issues in the case.

9. The 2013 alleged conduct occurred before the Claimant began to work at the school. It was not raised with the school or with Mr Ebden. It occurred about five years before the conduct which gives rise to this case and does not concern an inappropriate comment to a student. The school, its governors and the Local Authority Designated Officer investigated the allegations when raised by Mr Scott, the Claimant's husband, and found them to be unsubstantiated.

10. The 2015 alleged conduct on the Spain trip was said to have taken place in public, by the swimming pool. The Claimant has adduced no evidence from anybody else present at the time to support her allegations. In the bundle there are a number of statements from other people present at the time who categorically deny the account that the Claimant now gives. There are no witnesses to the 2015 classroom incident as the others present were children and it would not be appropriate to have interviewed them given their age and the three-year time gap between the conduct and the Claimant's first complaint.

11. On balance, we find that the conduct on those three previous occasions did not take place as the Claimant has alleged in this hearing. Far from drawing an inference in support of the Claimant's case, the Tribunal considers that the late raising of such complaints serves to undermine her credibility as it appears to us that these serious

allegations were made with the sole intent of bolstering the principal case and without a proper evidential basis.

12. The Claimant and her husband were active members of the school community, offering praise and financial support for music department activities. Emails in the Tribunal bundle show direct contact between Mr Scott and both Mr Punt and Mr Ebden over many years. The emails deal with issues relevant to Mr Scott in his capacity as a parent but also in connection with his wife's teaching activities. The emails are relevant to the issues in this case as they demonstrate that neither Mr Punt nor Mr Ebden would find it unusual to correspond with Mr Scott directly on matters which directly concerned the Claimant's work for the school.

13. The Claimant taught student A who, at the relevant time, was a week or so short of her seventeenth birthday. On Tuesday 13 March 2018, pupil A and the Claimant were preparing the Habanera, a piece from the opera Carmen, for entry into a music competition. It is agreed that the role of Carmen is flirtatious, sensual and sexually provocative. In the competition, the student would be marked both for her technical singing performance and for her dramatic performance, in essence her acting ability in conveying the character of Carmen through the piece.

14. The Claimant had a query about the permitted length of pieces for the competition and so she and the student went to see Mr Ebden in the largest music room. The student sang the Habanera in front of the Claimant and Mr Ebden. Mr Ebden believed that the dramatic performance was not as strong as it could be from such a capable pupil. Both the Claimant and Mr Ebden offered comments designed to coach the pupil to improve the dramatic performance of her role. The Claimant told the pupil that she needed to be more flirtatious. On balance, we accept that the Claimant did not say that the student needed to be "sexier", but nevertheless the Claimant phrased her comment in a way which referred to the student (in her performance) and not the role in the abstract. This is consistent with Mr Punt's note of his conversation with the student on 28 March 2018 where she said that both the Claimant and Mr Ebden had told her that she needed to be flirtier.

15. It is in this context that Mr Ebden made the comments which are an issue in this case. The Claimant's case is that Mr Ebden said, "**it is a good job I am gay**"; a comment which Mr Ebden strongly denies. The Claimant says that Mr Ebden then approached the Claimant and said, "**how do I tell her she needs to be more of a cock tease**". In other words, that Mr Ebden did not make the comment directly to the student but was instead asking the Claimant for advice as to how he could convey to the student the part of her dramatic performance which at that point was lacking.

16. There is a dispute about whether or not Mr Ebden said that the pupil needed to be more of a "cock tease" (according to the Claimant) or whether he said that it was the role which needed to be (according to Mr Ebden). The Tribunal see no significance in the dispute in the context in which the comment was made; even if expressed by reference to "her" rather than "the role", it was in the context of the dramatic performance of a role in a competition piece and the Claimant had similarly elided the two in her earlier comment that the student needed to be more flirtatious. In this context, the references to the student and the performance were synonymous.

17. Mr Islam-Choudhury accepted in submission that the first comment is not relied upon as a free-standing allegation of sexual harassment, but as part of the factual matrix

and context of the second, objectionable comment. The Tribunal considers that it does not need to make a finding of fact as to whether that first comment was made as the context of the second comment is clear for the reasons we have given: it was a discussion between music professionals about how to improve the student's dramatic performance of a piece which required a sensual and even sexually provocative delivery. Nevertheless, as all agree, Mr Ebden's use of the word "cock tease" was ill-chosen and unacceptable. Mr Ebden accepts that it was a breach of the Code of Conduct expected of staff.

18. After the comments were made by Mr Ebden, the session came to an end. Mr Ebden believed that the student had not heard his comment; the Claimant did not know whether she had or not. The Tribunal finds that Mr Ebden did not intend to shock or offend the Claimant with his comment. Nevertheless, and although primarily concerned about the effect of the comment on the student, the Tribunal find that the Claimant was also personally shocked and offended by the language used by Mr Ebden which she considered inappropriate in a school and workplace. The Claimant did not raise any complaint that day with Mr Ebden, Mr Punt or Mrs Tilbrook, the school's designated safeguarding lead. Mr Ebden did not self-report his comment because at that stage, he was not aware that it had caused any offence.

19. The following day on 14 March 2018, the Claimant's husband, Mr Scott, contacted the school and spoke to Mrs Tilbrook. A contemporaneous handwritten note of the key points of the discussion was made by Mrs Tilbrook. Three possible complaints arise out of Mr Ebden's comment the previous day: first, a possible safeguarding issue in respect of student A; second, a possible complaint about conduct in the workplace by a member of staff; and third, a possible complaint by a parent about the conduct of a teacher. The Tribunal find on an objective interpretation of the evidence before us that Mr Scott was purporting to complain about Mr Ebden's conduct to the Claimant in her capacity as a member of staff**.**

20. It was not for Mr Scott to insinuate himself into the process, apparently at this stage without the authority of the Claimant. The school should have told Mr Scott that if the Claimant wished to make a complaint, she should do so herself and that it was not for her husband to purport to speak for her. However, it did not do so. The Tribunal find that this was due to the previous pattern of Mr Scott's correspondence with the school which had blurred the boundaries in the parent/ staff/school relationship.

21. On either the 14 or 15 March 2018 (nothing turns on the dispute as to the date), Mrs Tilbrook bumped into the Claimant on the way into the staff room coming from the playground. This was not a meeting and no note was taken, although it would have been better for Mrs Tilbrook to have made some contemporaneous record of what was said. On balance, the Tribunal finds that it was Mrs Tilbrook who approached the Claimant to clarify the situation in light of Mr Scott's complaint. It was not the Claimant who approached Mrs Tilbrook to make a complaint in her capacity as a member of staff. The Tribunal considers this relevant because there has been much criticism by Mr Islam-Choudhury in cross-examination and his submissions about the Respondent's investigation and handling of the complaint, yet it is significant that at this early stage it was not the Claimant proactively raising her complaint. Instead, we find that it was Mrs Tilbrook who was seeking to further the investigation and so asked the Claimant more about the incident.

22. The Claimant told Mrs Tilbrook what had been said by Mr Ebden and that she thought that it was a safeguarding issue. It was agreed that the Claimant would speak to the student concerned to find out what she had heard. The Tribunal considers this consistent with the Claimant raising safeguarding concerns rather than a complaint about Mr Ebden's conduct towards her as a teacher. The Respondent concedes that this is a protected disclosure and a protected act.

23. The school has a safeguarding policy, a copy of which is contained within the bundle. The relevant part of the definition of safeguarding is "**ensuring that children grow up in circumstances consistent with the provision of safe and effective care**". The policy states that well-kept records are essential to good child protection practice. At Appendix 4 is a form for members of staff to complete and pass to the designated safeguarding lead to record any concerns. The Tribunal considers it clear from the content of Appendix 4 that the expectation is that the member of staff raising the concern who should complete the form, not the designated safeguarding lead. The Claimant did not do complete an Appendix 4 form, Mrs Tilbrook did not tell her to do so and there is no evidence as to whether or not the Claimant was aware of the policy.

24. On the evening of the 18 March 2018, the Claimant contacted Mrs Tilbrook and asked for a meeting. Mrs Tilbrook agreed to meet her the following day. Mrs Tilbrook took brief handwritten notes at the meeting. The notes do not record the exact words said to have been spoken by the Claimant and Mr Ebden during the exchange, only the essence of the conversation. The Claimant repeated what Mr Ebden had said and Mrs Tilbrook told her that she did not consider it a safeguarding issue. Mrs Tilbrook explained in evidence that this was because the student was not at risk as the comment was made in a singing lesson in the context that the performance of a piece from Carmen.

25. In her role as designated safeguarding lead, it was a matter of professional judgment for Mrs Tilbrook to decide whether or not there was a potential safeguarding issue. Mrs Tilbrook's assessment was subsequently agreed by the Local Authority Designated Officer. Having regard to the definition of safeguarding in the policy, the Tribunal finds that it was an objectively reasonable judgment for Mrs Tilbrook to reach. We do not accept that her decision not to follow a formal safeguarding procedure is a matter from which we can safely draw any negative inference. It is because Mrs Tilbrook did not think that this was a safeguarding issue that she did not ask the Claimant to complete an Appendix 4 form. Mrs Tilbrook did however tell the Claimant that if she wished to make a complaint, she should talk to Mr Punt, the headmaster. Following the meeting with the Claimant on 19 March 2018, Mrs Tilbrook telephoned the Local Authority Designated Officer, but they were not able to speak that day.

26. The Claimant expressed concern about working with Mr Ebden whom she said could be vindictive against either her or her children who were still pupils at the school. The Claimant did not ask for Mr Ebden to be suspended. However, the Tribunal does not consider that it is the responsibility of an employee to raise the possibility of suspension, and therefore draws no inference from her failure to do so. The responsibility for considering suspension in such a scenario is that of the employer. On balance, the Tribunal finds that neither Mrs Tilbrook nor Mr Punt considered whether suspension was appropriate. This was not for any improper reason rather, that it simply did not appear to them necessary in the circumstances. Even if other employers may have considered suspension, the Tribunal accepts that failure of the First Respondent to suspend Mr

Ebden was not an attempt to put the Claimant back in her place or to intimidate her so as to avoid further complaints. The Tribunal rejects the Claimant's case in this regard.

27. It is clear from contemporaneous emails that on 19 March 2018 there was a conversation between Mr Punt and Mr Scott, the Claimant's husband, about the language used by Mr Ebden in front of the Claimant. Later that day, Mr Scott emailed Mr Punt and Mr Gower requesting a meeting to address his concern "**to ensure a professional working environment for Victoria and a safe environment for my and other children**". Mr Scott sent a second email saying that he wished to discuss these matters further with Mr Punt. Given that the Claimant had that morning met Mrs Tilbrook and been advised to speak to Mr Punt if she wished to complain, the Tribunal finds it objectively reasonable for Mr Punt to infer that Mr Scott was speaking at least in part on behalf of his wife. This is consistent with the meeting which was ultimately arranged for 21 March 2018, being a joint meeting attended by both Mr and Mrs Scott.

28. Also on 19 March 2018, Mr Scott emailed Mr Ebden directly in connection with a forthcoming music department trip. In his email, he informed Mr Ebden that the Claimant had told him about the remark made on 13 March 2018 and that he felt that Mr Ebden should apologise to the Claimant. Again, the Tribunal finds that Mr Scott was directly intervening in the employment aspect of the complaint in relation to the Claimant. This was the first time that Mr Ebden became aware that the Claimant had been upset by his comment.

29. Mr Ebden telephoned the Claimant that day. There is a dispute of evidence as to what was said. The Claimant's evidence is that it was a completely hollow conversation in which Mr Ebden did not seem to recognise how inappropriate his behaviour had been. Mr Ebden by contrast says that he apologised profusely to the Claimant. On balance, the Tribunal prefers the evidence of Mr Ebden as it is consistent with the content of a contemporaneous email from Mr Scott to Mr Punt in which Mr Scott refers to a profuse apology from Mr Ebden and expresses the belief that the matter may be closed. This information could only have come from the Claimant at the time, indeed she accepted in cross-examination that she did not think that it could have been from anybody else. As Mr Scott's previous emails had expressly referred to his concern being twofold, namely the Claimant's position in the workplace and the children's position as students at the school, the Tribunal finds that it was reasonable for the school to consider that the dispute had apparently been resolved satisfactorily with an apology.

30. Despite the apparent resolution of the complaint by an apology, on 21 March 2018 Mr Scott repeated his desire for a meeting. A meeting was held the same day, attended by the Claimant, Mr Scott, Mr Punt and Mrs Tilbrook. Mr Punt took handwritten notes which were subsequently typed up and included a subsequently produced summary comprising a series of short entries by date. The Tribunal accepts that this summary was contemporaneously created by Mr Punt as a running record and that its contents are reliable and accurate.

31. The notes of the meeting on 21 March 2018 describe the Claimant detailing the incident which had happened on 13 March 2018 and that she had told her husband about it. The notes record that Mr Scott then produced a long list of alleged previous misconduct by Mr Ebden dating back to 2013 and including the two Spain trips about which we heard evidence which, it appears to the Tribunal, are of limited if any relevance to the incident about which the complaint was made. Mr Punt confirmed that the school

did not regard Mr Ebden's conduct as a safeguarding issue and that it would be dealt with in accordance with its own procedures. The Claimant became upset and left the meeting saying to her husband, "**Peter, this is your meeting**". Mr Punt agreed that he would call the Claimant separately, which he later did, reassuring her that there would be an investigation into what had happened.

32. At paragraph 24 of her witness statement, the Claimant says that she and her husband were concerned that the school were not treating the incident with appropriate seriousness. That evidence stands in sharp contrast with the content of an email sent by Mr Scott on 26 March 2018 in which he stated:

> **"Thank you for meeting with me and Victoria last week to discuss Howard's behaviour at [student A]'s singing lesson. This was very helpful to me as I thought you took our concerns seriously, although I must apologise for being too serious – you may have gathered that I was upset on Victoria's behalf.**
>
> **We very much appreciate that at the meeting Victoria also felt valued as a teacher at the school – as you know, she looks after ensembles in addition to the singing students and feels very much a part of school life."**

33. In paragraph 24, the Claimant expresses a collective and agreed view formed by herself and Mr Scott. Even though its content is inconsistent, Mr Scott's email also gives the impression that he and the Claimant were acting collectively about joint concerns. Further, in his express reference to the Claimant's feelings following the meeting, implies that he was speaking on her behalf and with her authority.

34. On 27 March 2018 Mr Punt spoke to the Local Authority Designated Officer. The delay between the initial contact 20 March 2018 and this conversation was because both were busy and it took some time before both were available. As noted in his contemporaneous note and uncontradicted by any other evidence, the LADO confirmed that she was happy for the First Respondent to deal with matters as a conduct issue rather than a safeguarding concern. On the same day, Mr Scott told Mr Punt that the Claimant would value a meeting with Mr Ebden to "clear the air". Once again, Mr Scott held himself out to the school as speaking on her behalf and with her authority.

35. On 28 March 2018, Mr Punt interviewed student A. Mrs Tilbrook was also present. Student A told them that both the Claimant and Mr Ebden had said that she needed to be more flirty, that she understood Mr Ebden to be referring to the role when he said that it needed to be more of a "cock tease", and that she had thought nothing further about it. The notes confirm that it was Mrs Tilbrook who had contacted the pupil's mother once aware of the allegation. Such contact is inconsistent with the Claimant's case that the school was trying to "brush it under the carpet".

36. On 3 April 2018, Mr Punt wrote to Mr and Mrs Scott informing them that Mrs Tilbrook did not regard the incident as a safeguarding issue because of student A's age and that the LADO had asked the school to deal with it through internal procedures. The fact that the letter was sent to the Claimant and her husband jointly is consistent with Mr Punt's genuine contemporaneous belief that they were raising their concerns jointly and with an agreed view.

37. The school has a disciplinary policy, its purpose is stated to be corrective rather than punitive. The policy identifies different types of misconduct including disruptive behaviour. It states that some conduct may be regarded as gross misconduct warranting summary dismissal, for example, sexual misconduct at work and serious acts of discrimination.

38. Mr Punt wrote to Mr Ebden on 19 April 2018 recording an agreement that the inappropriate expression to a colleague in the presence of a sixth form student should not have been used, recording the apology offered by Mr Ebden, stating that it should not happen again but that no further action would be taken. The letter does not state that it is a disciplinary sanction. The Tribunal finds on balance that there was no formal disciplinary process undertaken and the matter was handled informally.

39. The disciplinary policy recognises that, in some situations, conduct may be dealt with informally outside of the procedure. The Tribunal accepts Mr Punt's evidence that due to the nature of the comment which was not directed at the student, the fact that it was made in the context of coaching for improved performance of a sexually provocative role, Mr Ebden's acknowledgement of the inappropriate nature of his conduct and his profuse apology to the Claimant, he concluded no further action was required on the specific facts of this case. Mr Punt decided to deal with the matter by way of the simple letter dated 19 April 2018 entirely due to his assessment of the circumstances of the conduct and not in any way whatsoever because he sought to avoid adequate investigation of the Claimant's complaints.

40. The LADO was informed about the investigation and the letter to Mr Ebden. She confirmed that she was happy that the matter had been dealt with. There is no evidence to support the Claimant's case that the LADO had been led to believe that there would be a formal disciplinary process.

41. The Claimant was not told the outcome of any internal disciplinary action taken against Mr Ebden. This is not a detriment identified in the issues and the Tribunal accepts that it would not have been appropriate for the school to have told her in all of the circumstances, including the absence of any formal grievance from the Claimant.

42. The Claimant requested compassionate leave for the summer term due to the poor health of her father. The request was agreed and the school arranged for a cover teacher to provide singing instruction to the Claimant's usual students. The Claimant was told of the reallocation of her students on 26 April 2018 and replied that this was fine by her. Sadly, the Claimant's father died sooner than had been expected, and on 30 April 2018, she informed Mr Punt and Mr Ebden that she would be prepared to return to work, both teaching singing and taking the choir and musical theatre groups. Mr Punt agreed that she could return to work with the choir and musical theatre group but pointed out to the Claimant that the cover teacher had made arrangements for the entirety of the summer term, this included changing their commitments at other schools. The Claimant replied to say that she understood. She also requested a meeting to discuss recent events with Mr Ebden.

43. In February 2018, the Claimant had discussed a possible PGCE course with Mr Punt and asked whether he would provide a reference for her. On or about 26 April 2018, Mr Punt provided a reference in terms which were very positive. The Tribunal does not accept the Claimant's case that this was an attempt to encourage her to leave in light of

her complaints about Mr Ebden, rather we find that it was a genuine reflection of the high regard that Mr Punt had for the Claimant and her teaching. The Tribunal regards the fact that the confirmation of the reference was sent to Mr Scott is consistent with our finding that Mr Scott had a habit of communicating with the school about matters concerning his wife and her professional position and that the school saw nothing unusual in dealing with him directly.

44. On 30 April 2018, the Claimant directly contacted the family of one student and offered to resume teaching, if that was what they wanted. The teaching would take place at the Claimant's home. The parent forwarded the email to Mr Ebden, who in turn sent it to Mr Punt with the message "**for your information, but [student] now feels compromised**". The Claimant's case is that this is an email from which the Tribunal can infer that Mr Ebden and Mr Punt regarded her activity as poaching students and led to the criticism which she says was levelled at her in the meeting on 9 May 2018. The Respondent disagrees.

45. Having regard to the contemporaneous emails from the student and her family, the Tribunal finds that it is clear that the student felt that she had divided loyalties. She did not want to upset the Claimant but had decided that it was better that she continued to be taught at school. It is in this context that Mr Ebden referred to the student "feeling compromised" and there was no criticism of the Claimant or suggestion (explicit or implicit) that she had done anything wrong. The Tribunal declines to infer from the email that either Mr Ebden or Mr Punt believed that the Claimant was poaching students. Such an inference is not logical in circumstances where it had always been agreed that the Claimant would return to teaching those students the following term (consistent with Mr Ebden's subsequent email to the Claimant on 4 May 2018).

46. In April 2018, the Claimant expressed concern to Mr Punt about the prospect of returning to work with Mr Ebden. On 1 May 2018, she told Mr Punt that she wanted to have a meeting to discuss recent events with Mr Ebden. Mr Punt's PA replied, proposing a meeting a 4:30pm on 9 May 2018. There was no suggestion that Mr Ebden would be present at the meeting. Separately, Mr Ebden had expressed to Mr Punt a desire to have a meeting to discuss cover arrangements in light of the recent emails about the Claimant resuming her teaching.

47. In the meantime, Mr Ebden contacted the Claimant with regard to practical arrangements concerning her return to work, stating that they were delighted for her to return. He concluded his email "**see you on Wednesday**"; to which the Claimant replied, "**that's great, I will be in Wednesday next week**". The Wednesday referred to was 9 May 2018. Seen in context, the Tribunal does not find that this was an indication that Mr Ebden would be present at the Claimant's meeting with Mr Punt, instead it is a clear reference to the Claimant and Mr Ebden seeing each other in the course of their ordinary working duties. Nor, however, does it suggest that there was an outstanding issue which had not been satisfactorily resolved by Mr Ebden's earlier profuse apology.

48. At 3.49pm on 9 May 2018, the teacher covering the Claimant's students that term emailed Mr Ebden and Mr Punt stating that one of the students had informed her/him that they would be taught by the Claimant that term. The cover teacher describes feeling rather upset and refers to the huge inconvenience of reorganising their teaching days at another school; if they had known that they were getting reduced work, they would not have accepted.

49. On 9 May 2018, the Claimant attended the meeting to find Mr Punt and Mr Ebden already in the room. The Claimant had not expected Mr Ebden to be there but she did not object to his presence at the outset of the meeting. In evidence, the Claimant referred to an email in which she said that her husband had expressly told the school that Mr Ebden should not be in attendance at the meeting. This email was not in the bundle and was not produced by the Claimant or those representing her during the hearing. The Tribunal considers it significant that the Claimant seeks to rely upon her husband's actions and communication with the school on this point whilst seeking to distance herself from the content of his emails where they undermined her case.

50. The meeting lasted about 20 minutes and, as the Claimant says in her witness statement, "**initially it was okay**". However, the Claimant's case is that as the meeting progressed Mr Punt spoke to her in an aggressive and patronising tone, which she likened to being told off for poaching students. Her evidence is that Mr Punt completely refused to acknowledge her concerns about Mr Ebden, told her that he could not tell her what steps taken had been against Mr Ebden and, finally, that Mr Ebden made a comment during the meeting that "**it was just two words, just two seconds**" which she believed minimised the seriousness of his conduct. The Claimant regarded this comment as the last straw. (although it is not identified as such in the pleaded case or agreed List of Issues). The Claimant describes becoming very upset and Mr Ebden was asked to leave the meeting. The Claimant expressed an intention to resign.

51. Mr Ebden's evidence was that he believed that the meeting was intended to discuss the arrangements for the Claimant's return to work and which pupils she would teach. He accepts that during the meeting he did say that it had been "**a two second incident**" but that this was in the context of trying to explain his belief that they had shared a good working relationship over many years of collaboration. He denies that it was an attempt to minimise his conduct on 13 March 2018 which he had and still does accept was inappropriate. Mr Punt and Mr Ebden deny that there was any reference in the meeting to poaching students; indeed, both say that such a comment would make no sense as it was not a matter for concern given that the intention was always that the Claimant would return to teaching the students in the following term. Mr Punt began to discuss the existing cover arrangements for teaching her students and told the Claimant that it was not fair to make changes to other teachers' plans. Mr Punt denies speaking aggressively but accepts that the Claimant became upset to the point of being "**almost hysterical**" whereupon he asked Mr Ebden to leave. The Claimant said that she intended to resign and Mr Punt tried to calm her and allow her some time to consider her position.

52. It is clear from all accounts that the meeting did not go well. On balance, the Tribunal finds that the Claimant did not object to Mr Ebden's presence or raise any concern before the meeting started. It was when teaching arrangements were discussed that she began to get upset to the point of becoming almost hysterical. The Tribunal finds that the Claimant perceived this as criticism of her conduct when in fact Mr Punt was simply trying to be fair to both her and the cover teacher. The issue needed to be addressed in light of the cover teacher's email sent less than an hour earlier. There was no accusation of poaching students, the Claimant was not told off nor did Mr Punt speak to her in an aggressive or patronising tone.

53. As for the presence of Mr Ebden, we find that it was not deliberate or an attempt to ambush, intimidate or oppress the Claimant. Consistent with the contemporaneous emails, we find that the parties were simply at cross purposes. The Claimant's emails

were not clear about the nature of her ongoing complaint about Mr Ebden. Indeed, some of her emails (including those directly to Mr Ebden) were friendly in tone and suggested the continuation of a reasonable and professional working relationship. There was no indication which could objectively lead Mr Punt to believe that there was an ongoing problem of such significance that Mr Ebden's very presence at the meeting would cause the Claimant distress. The Tribunal finds that Mr Punt genuinely did not anticipate that the Claimant would react as negatively as she did to the presence of Mr Ebden at that meeting in light of the earlier meeting on 21 March 2018 and Mr Ebden's apology.

54. On 11 May 2018, the Claimant sent an email confirming her resignation. The reasons given are that she was upset because she believed herself to have been accused of poaching students and that Mr Ebden's "two second mistake" comment minimised his conduct and trivialised her distress. Finally, the Claimant refers to information said to have been obtained from former school friends of her eldest son in connection with broader allegations of impropriety by Mr Ebden. The Claimant said that if Mr Ebden were to leave the school at a future date, she would be happy to return. This latter statement is consistent with certain parts of the cross-examination of the Respondent's witnesses. The Tribunal infers that by this date, the Claimant's position was clear insofar as she sought the dismissal of Mr Ebden.

55. On 15 May 2018, the school accepted the Claimant's resignation. It did not try to change her mind but thanked her for her contribution. The Tribunal does not draw any adverse inference from this; Mr Punt did not accept the Claimant's resignation when first given at the meeting on 9 May 2018 but had given her some time to consider her position. Having done so, the Claimant decided that she still wished to resign in terms which made clear her position that she could only work at the school if Mr Ebden was no longer there.

56. Following the termination of the Claimant's employment, Mr Scott has made a number of further complaints about Mr Ebden to a range of external bodies. Each complaint has been investigated by the appropriate body and each has been found not to be substantiated. The contents of those complaints are not within the scope of this hearing and the Tribunal do not consider it necessary or appropriate to embark upon a further consideration of the very extensive further complaints made by Mr Scott.

Law

57. It is not in dispute in this case that the Claimant made protected disclosures on 15 and 21 March 2018. Section 47B of the Employment Rights Act 1996 provides that a worker has the right not to suffer a detriment by any act or omission of the employer, or another worker of the employer, on the ground that the worker has made a protected disclosure.

58. By virtue of sections 47B(1B) and 47B(1C), an employer is vicariously liable for the acts and omissions of its worker, whether or not these were done with its knowledge or approval. The Respondents do not dispute that a claim can be brought against a co-worker in respect of dismissal and the Respondent does not rely upon the statutory defence.

59. In **Blackbay Ventures Ltd v Gahir** [2014] IRLR 416, the EAT gave helpful guidance as to the approach to be adopted by a Tribunal considering a protected disclosure claim. This emphasised the need not to adopt a rolled-up approach but to

consider each disclosure by date and content, identify the relevant information disclosed in each and the detriment (if any) which is caused thereby.

60. Liability under section 47B is established if the protected disclosure is a material cause of the detriment; its influence must be more than trivial but it need not be the sole cause or even main cause, **NHS Manchester v Fecitt** [2011] EWCA Civ 1190.

61. Section 48(2) provides that the burden is on the employer to show the ground on which any act or deliberate failure to act was done.

62. Harassment is defined in section 26 of the Equality Act 2010 as follows:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of -**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **(2) A also harasses B if—**
>
> **(a)A engages in unwanted conduct of a sexual nature, and**
> **(b)the conduct has the purpose or effect referred to in subsection (1)(b).**
>
> **…**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect."**

63. In **Richmond Pharmacology v Dhaliwal** UKEAT/0458/08/CEA, the EAT provided guidance to the effect that an Employment Tribunal deciding harassment claims should consider in turn: (i) the alleged conduct, (ii) whether it was unwanted, (iii) its purpose or effect and (iv) whether it related to a protected characteristic. As to effect in particular, at paragraph 15, the EAT made clear the importance of the element of reasonableness, having regard to all of the relevant circumstances, including context and in appropriate cases whether the conduct was intended to have that effect. At paragraph 22, Underhill LJ (then President), held that:

> **"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."**

64. The importance of context was repeated in **Weeks v Newham College of Further Education** UKEAT/0630/11. In that case, the Tribunal was entitled to find that a cartoon which it described as being offensive, disgusting and unacceptable was nevertheless not an act of harassment. The Tribunal had regard to the Judgment of Langstaff LJ (then President), at paragraphs 20 and 21. In particular, a decision of fact in a harassment case must be sensitive to all the circumstances and context is all-important. As he went on to hold (and as relied upon by Mr Harris):

> **"An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant."**

65. In **Pemberton v Inwood** [2018] EWCA Civ 564, Underhill LJ revisited **Dhaliwal** in light of the introduction of s.26 and the difference in language to the predecessor harassment legislative provisions. Underhill LJ made clear that in considering whether conduct had the proscribed effect, the Tribunal must consider both the subjective perception of the complainant and whether it was objectively reasonable for that conduct to be regarded as having that effect taking into account all other circumstances.

66. In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.

67. In considering whether the burden of proof has shifted, the Tribunal should not adopt an overly mechanistic approach but rather consider whether discrimination can properly and fairly be inferred from the evidence, **Laing v Manchester City Council** [2006] IRLR 748. A Tribunal will be setting an impermissibly high hurdle, however, if it asks if discrimination is the only inference which could be drawn from the facts, **Pnaiser v NHS England and Coventry City Council** [2016] IRLR 170, EAT.

68. Section 27 of the Equality Act 2010 prohibits victimisation. The Claimant does not need to show a comparator but she must prove that she did a protected act and that she was subjected to a detriment because she had done that protected act. As with direct discrimination, it is not necessary for the Claimant to show conscious motivation, it is sufficient that the protected characteristic or protected act had a significant influence on the outcome.

Conclusions

Harassment

69. It is not in dispute in this case that Mr Ebden's conduct on 13 March 2018 was unwanted. Nor is there any dispute about the words used by Mr Ebden. The Tribunal has concluded that the phrase "**cock tease**" is clearly and expressly of a sexual nature.

Moreover, the full comment made by Mr Ebden was made in the context of a performance in which a female character is behaving in a sexually provocative manner to a male character. On balance, we conclude that the conduct was also related to the protected characteristic of sex on the facts of this case.

70. The key dispute between the parties is whether or not the conduct had the proscribed purpose or effect. The Tribunal had particular regard to the wording of section 26 and the guidance given in **Dhaliwal** and **Pemberton,** which requires us to have regard to the Claimant's subjective interpretation and whether it is objectively reasonable for the conduct to have that effect in all of the circumstances of the case.

71. The Tribunal has found as a fact that Mr Ebden did not intend to cause the relevant and so the issue is one of effect.

72. As recognised by Underhill LJ in **Dhaliwal,** not every adverse comment or conduct related to a protected characteristic (or of a sexual nature) will constitute the violation of a person's dignity, particularly where it is a trivial or transitory comment in circumstances where it should have been clear that any offence was unintended. The Tribunal considers that the same applies when considering whether an intimidating, hostile, degrading, humiliating or offensive environment has been created. Not every unfortunate phrase will necessarily lead to the imposition of legal liability. Similarly, the Tribunal must consider the words used by Mr Ebden in their context and may have regard to the frequency of use of such words and whether they were targeted at the Claimant. In doing so, the Tribunal reminds itself that a single act may or non-targeted conduct may both amount to harassment if they have the required subjective effect which is objectively reasonable.

73. The Tribunal has found that the Claimant was shocked at the time by the comment made by Mr Ebden, even if she was particularly concerned about the effect upon the female student. In our view, the following are also relevant circumstances to be taken into account. Mr Ebden's comment was about the student's dramatic performance of the role of Carmen in the piece being sung. The student's performance in an external competition would be marked and assessed and the important acting component required improvement to obtain the best possible mark. The particular role of Carmen required a sexually provocative and flirtatious dramatic interpretation. Before Mr Ebden's comment, the Claimant had told the student that she needed to be more flirtatious.

74. Mr Ebden's "cock tease" comment was inappropriate but it did not come out of thin air and must be seen in its context. He and the Claimant were coaching the student to be more flirtatious in a piece which the student, who was almost 17 years old, had chosen to perform in the competition. The comment was directed at neither the student nor the Claimant but the performance and was made in a large music room with others present. In all of the circumstances of this case, whilst the remark was not merely trivial it was transitory and made in a context where it should have been clear to the Claimant that offence was not intended. Certainly, the student herself did not take offence. Whilst the choice of words of Mr Ebden was undoubtedly coarser than those chosen by the Claimant, the sentiment conveyed by both was the same.

75. The Tribunal is mindful that language and conduct which was historically seen as acceptable in the workplace is no longer so. Female employees should not be expected to put up with sexually explicit or offensive language in the workplace. In reaching our conclusion in this case, the Tribunal is not in any sense suggesting that the use of the

phrase “cock tease” is to be tolerated or taken lightly. In most cases, such an overtly sexual comment is very likely to amount to harassment. However, on the particular facts of this case, taken in context it was not objectively reasonable for Mr Ebden’s words to have had the proscribed effect. For that reason, whilst the Tribunal accepts that the subjective effect required in section 26 was created, we conclude that it was not objectively reasonable for the conduct of Mr Ebden to have that effect on the Claimant.

76. Whilst most of the focus of the evidence and submissions were on the comment made by Mr Ebden, the Claimant also relies upon other conduct which she says amounts to harassment related to sex. These are: failing to take steps to ensure a safe place of work for the Claimant by suspending Mr Ebden, failing adequately to investigate her complaint, ambushing her in the meeting on 9 May 2018, accusing her of poaching students and conduct which cumulatively considered forced her to resign.

77. For the reasons set out in our findings of fact, the Tribunal has not accepted that there was a failure adequately to investigate the Claimant’s complaint or that either Mr Punt or Mr Ebden accused her of poaching students.

78. Nor has the Tribunal accepted that the Claimant was ambushed at the meeting on 9 May 2018. The presence of Mr Ebden was unwanted conduct even if the Claimant did not ask him to leave. As the meeting progressed the Claimant became increasingly distressed by Mr Ebden’s presence and when Mr Punt realised, he asked Mr Ebden to leave. The latter did so immediately. Mr Ebden’s presence was not a deliberate attempt to intimidate the Claimant; it arose from a misunderstanding as to the purpose of the meeting. As the Tribunal has found, there was no indication in the contemporaneous correspondence that the presence of Mr Ebden would cause the Claimant distress and Mr Punt genuinely did not anticipate her reaction. There is no evidence from which the Tribunal could find that this was in any sense whatsoever related to sex or was conduct of a sexual nature. Moreover, in the circumstances, the Tribunal do not consider that it would be objectively reasonable for such an innocent error to have the proscribed purpose or effect.

79. It is correct that Mr Ebden was not suspended. The Tribunal has found that the Claimant did not ask that he be suspended and neither Mr Punt nor Mrs Tilbrook considered whether suspension was appropriate. As set out in paragraph 26 above, this was not for any improper reason but because it did not appear necessary to them in the circumstances. We have rejected the Claimant’s case that it was an attempt to put her in her place or intimidate her. It had nothing whatsoever to do with her sex and was not conduct of a sexual nature.

80. As the conduct relied upon as causing the resignation has not been found to be related to sex or an act of harassment, it follows that the Claimant’s resignation caused by it was not an act of harassment. For all of these reasons, the claim of harassment related to sex and/or harassment because of conduct of a sexual nature fails and is dismissed.

Public Interest Disclosure and Victimisation

81. It is not in dispute that the Claimant’s complaints on 15 March 2018 and 21 March 2018 were both protected disclosures and protected acts. The issue in both the s.47B ERA claim and the s.27 EqA claim is whether the Claimant was subjected to a detriment as a result. The detriments relied upon are the same as above, namely: failing to take

steps to ensure a safe place of work for the Claimant by suspending Mr Ebden, failing adequately to investigate her complaint, ambushing her in the meeting on 9 May 2018, accusing her of poaching students and conduct which cumulatively considered forced her to resign.

82. In essence, the Claimant's case has been that there were significant and wholesale failures by the First Respondent in the procedures adopted in the handling of her complaints. Mr Islam-Choudhury explored in some detail and with some skill the many procedural failings perceived to exist by the Claimant. He asks that the Tribunal draws as a result an inference that the Respondents were seeking to brush the inappropriate conduct of Mr Ebden under the carpet, put the Claimant in her place and prevent her from taking further her complaints. In a case which is put on the basis of a deliberate and concerted course of conduct, Mr Islam-Choudhury fairly accepted in submission that if the Tribunal was satisfied that the Respondents had dealt with the complaint appropriately, then the Claimant's case would fail.

83. The Tribunal refers to our findings of fact and is satisfied that the Respondents did deal with the Claimant's complaint appropriately. The decision not to treat the complaint as a formal safeguarding issue was a matter of judgment genuinely exercised by Mrs Tilbrook for reasons entirely unconnected with the protected disclosures/protected acts. The decision she reached was objectively reasonable and entirely depended on her assessment of the nature and seriousness of Mr Ebden's conduct; it was not a deliberate or concerted decision to subject the Claimant to a detriment or to treat her unfavourably.

84. Whilst the Respondent did not consider suspending Mr Ebden, we have found again that there were genuine reasons entirely unrelated to the protected disclosures/protected acts for this. We do not agree that the First Respondent has failed adequately to investigate the complaints. Quite the opposite, the Tribunal considers that there was a significant and detailed investigation which involved interviewing the Claimant, speaking with Mr Scott, contacting the student's mother, interviewing the student, speaking with Mr Ebden and involving the local authority designated officer at appropriate stages in the process.

85. Although the decision not to take formal disciplinary action against Mr Ebden is not identified in the list of issues as a detriment in either the s.47B or s.27 claims, it is an omission from which the Claimant invites us to draw an inference that the incident on 13 March 2018 was not properly investigated, she was not provided a safe place of work and generally that the Respondents deliberately sought to downplay the seriousness of Mr Ebden's conduct and to put her in her place. It is not necessary for the Tribunal to make a finding as to whether or not Mr Punt's decision to handle the matter informally was correct, nor to make a finding as to whether Mr Ebden's comment amounted to a "minor fault" or a "major fault" within the disciplinary procedure. The question for the Tribunal is whether or not it is a fact from which we could safely draw the suggested inference and/or whether it was part of a failure adequately to investigate. If so, whether it was in any material way because of a protected disclosure or a protected act.

86. Informal action against Mr Ebden is not what the Claimant now says that she wanted, and it may be that another employer would have decided to follow a formal disciplinary procedure, but the Tribunal does not consider that this is sufficient to permit us safely to draw any adverse inference. There was no failure adequately to investigate for reasons we have given. Moreover, there is no evidence from which we could or would

conclude that the failure to take formal disciplinary action was in any material way caused by a protected act or protected disclosure. For the reasons already given, the Tribunal has accepted that Mr Punt decided to deal with the issues raised informally for legitimate reasons. The disciplinary policy permitted informal action in appropriate circumstances and Mr Punt genuinely decided that the circumstances of the comment made by Mr Ebden, his acknowledgement of fault and apology were such that no formal action was required. It was not in any way whatsoever because he sought to avoid adequate investigation of the Claimant's complaints.

87. Insofar as it is suggested that the LADO should have been involved the day after Mr Scott's initial complaint, the Tribunal does not agree. It was appropriate to await the meeting with the Claimant on 19 March 2018 in order to obtain a full and first-hand account of the conduct from the Claimant and not to rely on the second-hand account of her husband. Contact with the LADO was attempted immediately thereafter. In short, the Tribunal does not accept the characterisation of the case as set out by the Claimant and declines to draw the adverse inference urged upon us by Mr Islam-Choudhury. That is not to say that there were not things which could have been done better (for example, a verbatim note of what was alleged to have been said when first raised by the Claimant) but this is not an unfair dismissal claim and it falls far short of material from which we could safely draw an inference or reject the Respondents' evidence.

88. For these reasons, the Tribunal does not accept as a fact that the Claimant was subjected to the detriments relied upon at paragraphs 5(b), (c), (d) and (f), paragraphs 6(a), (b), 18(b), (c), (d), (f), (g), (h) or (j) of the List of Issues. Insofar as Mr Ebden was not suspended, we repeat our conclusions set out above. Namely, that whilst it is correct that Mr Ebden was not suspended, the Claimant did not ask for it and neither Mr Punt nor Mrs Tilbrook considered whether suspension was appropriate. This was not for any improper reason but because it did not appear necessary to them in the circumstances. We have rejected the Claimant's case that it was an attempt to put her in her place or intimidate her. Even if the failure to suspend were a detriment (and the Tribunal considers that it was not), the Respondents have discharged the burden of showing that it was not in any sense whatsoever because of a protected disclosure or protected act.

89. As the matters relied upon as conduct amounting to a constructive termination of the worker contract have not been found to be acts of protected disclosure detriment or victimisation, the claim does not succeed.

General comments and Overview

90. In deciding the case, the Tribunal reminded ourselves that the claim is brought by the Claimant, an independent and professional woman, about events occurring in her work place. It is not a claim brought by Mr Scott, her husband, and care must be taken when assessing the evidence insofar as it related to his communication with the school purportedly on her behalf. A husband is not automatically to be taken as speaking for or with the authority of his wife in relation to her employment. The Tribunal considered whether or not Mr Punt, Mr Ebden and Mrs Tilbrook should have ignored the repeated the interventions of Mr Scott and whether this Tribunal should do likewise and decide the case purely on the basis of the Claimant's contemporaneous communication.

91. On balance, however, the Tribunal decided that it was appropriate to have regard to Mr Scott's correspondence in connection with this issue. This was due to the extent of

Mr Scott's intervention over a period of time both before and after the complaint was made, the repeated occasions on which he explicitly purported to be acting on behalf of the Claimant and with her apparent authority. It was Mr Scott who first raised a complaint about the conduct of Mr Ebden and there was the joint meeting on 21 March 2018. In the circumstances, the Tribunal does not consider that it can fairly disregard Mr Scott's involvement in this internal process, both in his capacity as a parent and when purporting to speak for his wife.

92. The school will no doubt wish to reflect with hindsight upon the appropriateness of communication directly with Mr Scott (the spouse of a member of staff) on such matters. However, for the reasons given, we are satisfied that on the unusual facts of this case the Respondents genuinely, and for good reason, believed that Mr Scott was speaking on behalf of and with the authority of the Claimant. The content of some of Mr Scott's contemporaneous emails have undermined the credibility of the Claimant's evidence in material respects and it would not be in the interests of justice to disregard that evidence.

93. The Tribunal found Mr Ebden to be a credible and reliable witness, measured and dignified in circumstances which were hard for him; not least the significant number of observers at the hearing, the nature of the allegations and the Claimant's decision to advance her case by bringing up allegations dating back to 2013 and 2015 with the apparent primary purpose of establishing some pattern of behaviour argument which is simply non-existent. Mr Ebden has consistently and genuinely accepted that his comments were inappropriate. He has not, as the Claimant has repeatedly alleged, attempted to downplay those comments.

94. As for Mr Punt and Mrs Tilbrook, each candidly accepted throughout the hearing that there had been a breach of the Code of Conduct by Mr Ebden, that this was not acceptable and that Mr Ebden needed to lead by example. The decision to deal with matters informally and not to regard this as a safeguarding issue does not mean that the school did not take the conduct seriously, simply that within the context of this case, it was sufficient to deal with the matter informally as a conduct issue. The Tribunal rejects any submission that this is the same as brushing things under the carpet or conducting only "cosy chats" as the Claimant describes them. Our conclusion is consistent with the fact that the Local Authority Designated Officer was kept informed throughout the process and was also content with the school's handling of the complaints.

95. For all of these reasons, the Claimant's claims fail and are dismissed. The Tribunal would like to express our gratitude to the care and the skill shown by Mr Harris and Mr Islam Choudhury in the presentation of a case which has clearly had some emotion attached to it.

Employment Judge Russell
Date: 12 May 2021