EMPLOYMENT TRIBUNALS

Claimant: **Mr D Howard**

Respondents: **The Governing Body of Kilmorie School (R1)**
London Borough of Lewisham (R2)

Heard at: **via CVP** **On: 1/3/2021 to 8/3/2021**

Before: **Employment Judge Wright**
Mr M Marenda
Ms K Omer

Representation:
Claimant: **In person**

Respondents: **Ms M Tether - counsel**

LIABILITY JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimant's claims the detriment of dismissal for making a protected disclosure contrary to s.103A under part X of the Employment Rights Act 1996 (ERA) and of unfair dismissal contrary to s. 94 ERA fail and are dismissed.

REASONS

1. Oral reasons were provided on 8/3/2021 and the claimant requested written reasons in accordance with Rule 62 (3) after they were provided. Accordingly, these reasons have been provided.

2. By a claim form presented on 8/5/2019, the claimant brings claims of unfair dismissal and dismissal as a result of making protected disclosures.

3. The second respondent (R2) was the claimant's employer and he worked as a Teaching Assistant from 11/11/2010 until he was dismissed on 17/1/2019 by the first respondent (R1). R1 is a community primary school, maintained by R2.

4. The claim was case managed at a preliminary hearing on 6/11/2019 at which the issues were identified. In short, the claimant's claim is that he made three protected disclosures, orally in a meeting on 20/7/2017 to Ms Johnson (Deputy Head Teacher) and Ms Glasheen (Assistant Head Teacher at the time). He says that as a result of those disclosures, he was subjected to the detriment of dismissal.

5. For the respondent the Tribunal heard evidence from:

   Elizabeth Stone – Head Teacher September 2011 – August 2020;

   Sally Kelly – Chair of Governors September 2014 – July 2018

   Kate Glasheen – Assistant Head Teacher at the time

   Maria Johnson – Deputy Head Teacher

   Daisy Moon – Assistant Head Teacher

   Diane Parkhouse – Business Manager

   Anita Gibbons – Chair of Governors who conducted the disciplinary hearing

6. The claimant gave evidence on his own behalf. He also produced a witness statement for his Teaching Assistant colleague Debbie Pinnock'Moore which consisted of 10-lines and three paragraphs. The claimant did not call Ms Pinnock'Moore to give evidence.

7. The Tribunal had before it a bundle of 1016 pages and a separate bundle of nine-pages.

8. A preliminary matter was addressed on the first day of the hearing in respect of recordings the claimant had included in his list of documents, but which were not disclosed to the respondent until shortly before the hearing. After hearing from both sides, the Tribunal declined to allow the claimant to rely upon those documents. Apart from one recording, for

which there was a transcript in the bundle, it was not clear how the recordings would assist the claimant, as they post-dated the 20/7/2017. They were not referred to in the claimant's witness statement. The claimant said he obtained the recordings when someone posted a USB stick through his door in September 2018. He gave the USB stick to a friend for safekeeping (on the one-hand, the claimant said he kept copies as in November 2017 the police had taken his devices and 'wiped' them, but on the other, he said he had lost contact with his friend and so could not access the USB stick until he reconnected with his friend in early 2021) and that caused a delay in him accessing the recordings. That aside, the claimant knew of the existence of and the content of the recordings, but he did not refer to them in his witness statement – his evidence in chief.

9. The evidence concluded on day five of the hearing and the Tribunal then heard closing submissions. Ms Tether supplemented her oral submission with written submissions.

Chronology – key events

10. Pupils from Year 4 had visited a local Mosque on 21/3/2017 and 22/3/2017. The visit resulted in some negative stories in the national press during the Easter holidays.

11. Ofsted inspectors were due to visit R1 on 22/3/2017- 23/3/2017. On the 22/3/2017 an email was sent to the Ofsted inspector from a person claiming to be a teacher at R1 (page 83-84). Further emails were sent to the staff on 27/4/2017.

12. On 19/7/2017 an anonymous email was sent to the staff containing a link to an audio file on YouTube containing covert recordings. A discussion between the claimant and colleagues followed as a result of this and that culminated with a meeting with Ms Johnson and in part with Ms Glasheen on 20/7/2017. This was the day before the last day of term.

13. The 5/9/2017 was an Inset day before the pupils returned to school on 6/9/2017. On the 5/9/2017 the claimant purchased a SIM card. The telephone number of that SIM card was used to send an anonymous text message to parents, which included a link to the audio files. The police were involved and they investigated.

14. The police traced the purchase of the SIM card and produced a CCTV image of the purchaser of the card. Ms Stone identified the purchased as the claimant. The claimant was arrested on 9/10/2017 and suspended on 10/9/2017. The process was protracted for various reasons, it culminated

however, with a disciplinary meeting on 17/1/2019 with the claimant being informed of his summary dismissal on 21/1/2019.

15. The issues are:

Unfair dismissal

a) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct.

b) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondents in all respects act within the so-called 'band of reasonable responses'?

c) The respondents said that in the ET1 claim form the claimant referred to policies and procedures not being followed. Accordingly, the claimant set out his position.

d) He said that the Whistleblowing Policy was not followed once he made a disclosure on 20/7/2017. He said once he was suspended, in breach of the procedure, that was not kept confidential. He said that as the allegations against him referred to the SLT[1], that the conduct of the proceedings could not be impartial as it would be members of the SLT who would be responsible for carrying them out. He complained of delay (although the respondents noted that the claimant was unwell for long periods of time). The claimant said the respondents did not stick to deadlines or ignored them, causing further delay. He complained that he never agreed to the disciplinary meeting going ahead convened with only two Governors (contrary to the respondents' policy). Finally, he complained that he was told steps would be taken to investigate his disclosures and that never happened.

Remedy for unfair dismissal

e) …

Public interest disclosure (PID)

f) Did the claimant make one or more protected disclosures (ERA sections 43B as set out below. The claimant relies on

[1] Senior Leadership Team (SLT)

subsection(s) (b), (d) and (f) of section 43B(1). The respondents defend the claim on the following basis in particular the respondents deny: the claimant made the statements he claims he made; denies any comments made were the reason for the claimant's dismissal; there was a disclosure of information; the claimant had a reasonable belief the information was in the public interest; and deny any disclosure was made in good faith.

g) *What was the principal reason the claimant was dismissed and was it that he had made a protected disclosure?*

h) *Did the respondents subject the claimant to any detriments, as set out below? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law.*

i) *If so was this done on the ground that he made one or more protected disclosures?*

j) *The alleged disclosures the claimant relies on are as follows:*

The initial disclosure to the Deputy Head Teacher (DH) and Assistant Head Teacher (AH) orally during a meeting on 20/7/2017.

More specifically, the claimant says that when he heard the recordings posted on YouTube he 'married things up' to what he had suspected and witnessed; and he wanted to bring this to their attention (the DH and AH). He said two teachers had told him that the Y4 trip to the Mosque should not have gone ahead due to the presence of a known radical preacher. The trip was in early April 2017. Another teacher (Hannah) had told the claimant that her partner's father worked for MI5 and that the trip should not have gone ahead due to safeguarding issues and that she (Hannah) had brought this to the attention of the Head Teacher (HT) and AT, but that they had said the trip would go ahead anyway. The claimant says this is a breach of s.43B (1) (b) in respect of the children's safeguarding, (d) their health and safety (also by means of their safeguarding) and (f) in that matters had been 'covered up' in that a Governor (Sally Kelly) had made a statement to say that safeguarding and risk assessments were in place, when that was incorrect. He said the HT had said to make sure that Sally Kelly did not find out about this [although it is not clear if the claimant says that is what the HT said on the recordings].

The second matter the claimant says he mentioned at the meeting and which he says amounts to a protected disclosure he says was malpractice in the way the children's levels were fixed. The claimant gave an example of what he says this meant. If a Y4 child was graded as level 4 in literacy or level 3 in maths, the school would inflate it to be level 5 or level 4. He says he spoke generally about the attainment grades and mentioned one specific child (identified as Child) of whom he knew personally and whom he knew had had his levels increased to help with his SATS. He says it is a breach of s. 43B (1)(b) ERA and that the obligation was not to misrepresent the attainment levels of children for the purposes of Ofsted and for league tables.

In response, the respondent said that the Ofsted visited in March 2017 and the school was rated as outstanding. Ofsted did receive some information but that resulted in no investigation.

The next protected disclosure which the claimant says he made at the meeting was to do to with a breach of the Equality Act 2010 (EQA). It is noted that the claimant is not pursuing a claim that he has suffered from unlawful discrimination under the EQA. He says there was no diversity in the SLT and that everyone in it was European and female. The claimant says that he brought to the attention of the SLT. He also referenced the SLT speaking negatively about people of a certain race. He said that there was a reference to Leanne who was referred to as the 'black one from the [employment] agency' to 'keep the numbers up'. He believed the SLT were discriminating and not following proper procedures. The claimant said there was also positive discrimination and that a member of staff was hired because of their race (Caribbean and Chinese) [it is not clear and the claimant will need to clarify whether this allegation of 'positive discrimination' was made at the meeting on 20/7/2017].

16. The detriment the claimant relies upon is his dismissal on 17/1/2019.

Findings of Fact

17. The Case Management Order produced following the preliminary hearing on 6/11/2019 identified the issues. It is noted that the record of events in

November 2019 was more proximate in time to the events in July 2017 and subsequently.

18. The claimant claims he made three protected disclosures on 20/7/2017 to Ms Johnson and that Ms Glasheen was present for some of the time. The respondents deny any such disclosures were made on 20/7/2017.

19. The claimant said that when he made his statements, he also referred to:

'whistleblowing outside of the school if nothing was done about it'.

20. The Tribunal finds that against this background, it is inconceivable that there would be no reaction or response from two members of the SLT if the claimant made the statements which he now claims he did.

21. The Mosque allegation was only referred to at the preliminary hearing. It did not feature in the ET1 or the claimant's witness statement. The respondent denies there was any mention of the Mosque visit during this conversation.

22. There was therefore no direct evidence from the claimant in respect of the Mosque allegation.

23. Furthermore, the claimant did not make any further reference (other than at the preliminary hearing) to his claim two teachers had told him the trip should not have gone ahead. Similarly, there was no further mention of the teacher Hannah, who's partner's father worked for MI5, who the claimant said had told Ms Stone the trip should not go ahead. The claimant made no further reference to the claim that Ms Kelly had made a statement to say safeguarding and risk assessments were in place, when that was incorrect. These serious allegations made at the preliminary hearing were not follow-up and there was a lack of consistency.

24. The claimant accepted nothing untoward happened during the visit, which he supervised/attended. There was no attempt to radicalise any child and the claimant quite rightly responded if there had been, he would have intervened. He also agreed there was no complaint at the time.

25. A senior HMI from Ofsted investigated the trip and was satisfied the correct procedures had been followed.

26. In view of the lack of evidence from the claimant, the Tribunal finds he did not mention the visit to the Mosque during the conversation on 20/7/2017 and as such there was no disclosure.

27. The second allegation related to altering grade and malpractice in respect of SATs. All the claimant said in this regard in his witness statement was:

> *'I went on to make a protected disclosure about the usual malpractices all of in that meeting were privy to, i.e. the fabrication of the children's attainment levels, the cheating on SATs etc. and this now all being exposed to the outside entities.'*

28. The Tribunal finds that if the claimant had made such a disclosure, had in effect 'outed' himself as a whistle-blower during that meeting and if he believed that the SLT was corrupt and was covering up wrongdoing; it is inconceivable that he would then take no further action.

29. The claimant referred to repeating his allegations to Governors Ms Kelly and Mr Jones on 21/7/2017, however, he did not seek to rely upon those, on his case, further disclosures.

30. The claimant had said that he had attempted to contact R2's Head of Law who is R2's whistleblowing officer, the Head of Law – Monitoring Officer Kath Nicholson. The claimant said he had been unable to speak with her and did not write to her as he did not have her email address and he did not want to reveal his identity before he spoke to her. His TU Representative who was supporting the claimant said he had also tried to contact her. It should be noted Ms Nicholson's two email addresses and her contact telephone number is provided in the Whistleblowing Policy.

31. The Tribunal finds it incredible that the claimant was unable to contact Ms Nicolson or that she did not return his calls. If however, that was the case, the claimant claims that he made three protected disclosures in a meeting with two members of the SLT on 20/7/2017, yet he did not email Ms Nicholson; once he had on his case, made disclosures to R1. If the claimant believed he had made protected disclosures ***and*** members of R2 were corrupt, it is unlikely that he would not have taken any further steps to protect himself.

32. An allegation of cheating is extremely serious and in the absence of any corruption by the SLT (it is not accepted there was any corruption), it is implausible that such an allegation would be ignored and not addressed. Whether or not it was a protected disclosure.

33. The Tribunal finds the claimant did not make this statement or any form of disclosure of this nature on 20/7/2021.

34. The third disclosure relates to breaches of the Equality Act 2010. It is accepted the SLT is made up of European females. Ms Kelly acknowledged this and said it was something the Governors were

attempting to tackle. She explained that there was a historic lack of diverse applications and as a result the Governors were trying to develop BAME staff at the school. The allegation was that the claimant had made reference to a comment referring to the 'black one'. His interpretation was that Ms Stone was discussing a locum member of staff and then made such a reference.

35. Not only is this denied by Ms Stone, it is also denied the claimant made any such reference on the 20/7/2017.

36. In the ET1 and witness statement the claimant does not say that he made an allegation about R1's staffing or recruitment practices. What he does say is that he challenged racist statements and the explanation in response was that Ms Johnson explained, on his case, that R1 was hiring black staff to meet quotas.

37. The evidence, which is accepted, was that R1 did not have a quota for hiring staff. Ms Johnson said no such allegation was made by the claimant.

38. Again, there was no direct evidence from the claimant that he made such an allegation to Ms Johnson, that Ms Stone was operating discriminatory staffing or recruitment practices.

39. The finding is that the claimant did not make such an allegation to Ms Johnson.

40. It is admitted that the claimant did raise during the meeting a reference to the 'Congo' and to St Marino/San Marie (or similar). The Tribunal finds that a random reference to an African country (even if it was accompanied by a 'sniff' or 'snort' (and the claimant has never explained why this was discriminatory)) cannot be evidence of racism.

41. Equally, the claimant cannot have been offended by or made an allegation of racism by the reference to St Marino/San Marie. It was his own evidence that Ms Pinnock'Moore explained to him afterwards and away from the office that it was a reference to a fictious Caribbean island[2]. If the claimant was not aware of the reference, he cannot have made any connection between it and a racist or offensive comment. Furthermore, it is unclear how a reference to a Caribbean island (if indeed that was the reference, rather than, for example a reference to San Marino in Italy) can be an allegation of racism.

42. The claimant produced a witness statement from Ms Pinnock'Moore dated 31/1/2021. Ms Pinnock'Moore did not attend the hearing and so her

[2] From the television programme *Death in Paradise*.

evidence can only be given very little, if any weight. All Ms Pinnock'Moore said was that she attended a meeting with the claimant on 20/7/2017 in Ms Johnson's office and that he made 'a disclosure regarding malpractices at the school'. She does not go onto say what those disclosures were. Ms Pinnock'Moore went onto say that as she still works at the school, she did not feel comfortable delving any deeper. That evidence therefore does not assist the claimant.

43. The Tribunal finds that all of the SLT were in post prior to the claimant's recruitment. He was recruited into a temporary role and subsequently made permanent. There were no issues until the claimant listened to the audio recording. The respondents say it was clear the audio recording was cut and doctored. Even on the claimant's own case, the recording had been edited as it had a (sinister) music overlay. The Tribunal does not accept the claimant made the disclosures he now says he did.

44. The claimant had previously admitted buying the SIM card in the fact find interview, at the disciplinary hearing and in his ET1. During the hearing, the claimant attempted to invent an alternative scenario. Not only had his explanation never been put before R1 during the disciplinary process, it was not clear what it was the claimant was trying to advance. He seemed to be saying, that he only admitted to buying the SIM card as he was informed the police had told R1 the CCTV image of his buying *a* SIM card, was *the* SIM card which was used to send the text message on 5/9/2017. He then said there was no proof of that.

45. If he only admitted to buying *a* SIM card, not *the* SIM card which was used for sending the text message, then he has not advanced any explanation for the purchase of a SIM card. The card was purchased at a shop near to the school, once the Inset day had concluded, by the claimant. The claimant then seemed to say that if a text had been sent to him from the SIM card[3] which ended 747 or from him to the SIM card ended 747, that would bring him to the attention of the police. He was then asked to explain when or how there has been an intervening text sent between him and the SIM card ended 747 and he said that was not what he was saying.

46. This was a very unlikely and belated alternative scenario from the claimant and it did not feature in his witness statement dated 1/2/2021, nor did he raise it when he was asked of there was anything further to add when he began his evidence. Indeed, in his witness statement and in his evidence-in-chief to the Tribunal, the claimant said: 'These texts were alleged to have been sent from a SIM card which I purchased on the same day' and 'Due to me purchasing the aforementioned SIM card'. This alternative scenario damaged the claimant's credibility. He knew what he purchased on 5/9/2017 and what he purchased it for. He said he did not object to the

[3] The number was 07950 470747.

content of the text message which was sent to the parents. He then tried to claim that although he purchased a SIM card, which the police traced from the text message, that his purchase had nothing whatsoever to do with the text message which was sent to the parents. The Tribunal rejects this scenario and finds the SIM card the claimant purchased was the one which was used to send the text to the parents. Furthermore, the claimant knew his friend was going to send the text, knew the content of the text, knew the parents' mobile telephone numbers had been obtained in beach of the policy and was complicit in the wrong doing.

47. In considering the fairness of the dismissal, the Tribunal finds that the respondent had a genuine belief in the claimant's misconduct. The harassment of the SLT was reported to the police and they investigated the purchase of the SIM card, by reference to the telephone number from which the text messages were sent. The police traced the purchase of the SIM card and obtained CCTV footage of the purchase of it.

48. On 6/10/2017 the police showed the CCTV picture to Ms Stone and Ms Glasheen and the claimant was identified as the purchaser of the SIM card. The claimant was arrested on 9/10/2017 (remanded on bail until 24/10/2017) and suspended on 10/10/2017.

49. At that point, R1 did have reasonable grounds for its genuine belief the claimant was guilty of misconduct. On the 24/10/2017 the claimant pleaded not guilty to the offence of harassment without violence and was remanded on bail until 19/12/2017. On 2/11/2017 however, the CPS decided not to pursue the prosecution of the claimant.

50. On the 13/11/2017 the respondent invited the claimant to a fact-finding meeting on 21/11/2017. The claimant did not attend and the meeting was rescheduled to 12/12/2017. The claimant was then unfit to attend the meeting.

51. On 8/2/2018 Julia Baldwin (R1's Business Manager) invited the claimant to a meeting on 14/3/2018. The meeting took place however, the claimant objected to Ms Baldwin as the investigation officer and so she was replaced. A HR adviser from R2 wrote to the claimant on 3/4/2018 and rescheduled the fact-finding meeting for 27/4/2018 with Ms Moon as the investigating officer.

52. On 3/5/2018 Ms Moon decided there was as case to answer from a disciplinary point of view. On 4/7/2018 R2's HR Advisor invited the claimant to a disciplinary meeting on 13/7/2018. The claimant was not well enough to attend the meeting and he was referred to Occupational Health on 27/9/2018. On 4/1/2019 the disciplinary hearing was rescheduled to 17/1/2019. There was a delay in arranging the disciplinary

hearing, however, this was in part due to the claimant's health issues, school holidays and availability.

53. On 4/1/2019 the claimant was informed the disciplinary hearing would be conducted by two school Governors, not three as per the policy. The claimant was represented by his Trade Union at the time and he did not object either before the meeting took place, or, at the meeting itself. He did subsequently raise this as part of his appeal.

54. The claimant was informed of the panel's decision to dismiss him on 21/1/2019.

55. In terms of the reasonableness of the investigation carried out by Ms Moon, it was admittedly limited. She looked at the investigation the police carried out. The police informed R1 that the number from which the text messages were sent, had been traced to the SIM card the claimant was seen purchasing on 5/9/2017. The claimant agreed in that meeting (despite what he now says) that he purchased the SIM card. He then gave it to a friend at the school who 'did what they did' and that due to the content, he did not object.

56. The claimant now says he thought his friend was going to use the SIM card to approach the 'correct people'. Not only is it not clear how the SIM card was needed for this purpose, at the time, the claimant said he did not object to the content of the message to be sent. The text message refers to 'that mysterious letter from the school'. If it had been intended that the text would go to the 'correct people'[4] they would not necessarily understand the reference to the letter (presumably the letter sent by the Governors to parents on 28/7/2017 (page 172)). The Tribunal finds that on balance, the claimant did know the text message was going to be sent to the parents of pupils at the school, even if he did not send it himself and it was his friend who actually did so.

57. Ms Moon did some further investigating following the fact find meeting and in the circumstances and in light of the claimant's admissions he made at the time, the investigation was reasonable in the circumstances. The claimant did not name his 'friend' and therefore, Ms Moon was unable to include that person in the investigation.

Law

58. Section 94(1) of the Employment Rights Act 1996 (ERA) provides that 'an employee has the right not to be unfairly dismissed by his employer'. Dismissal is defined by Section 95(1) ERA. Once a dismissal has been established it is for the employer to show the reason or principal reason for

[4] Rather than the parents.

the dismissal and that it is either a reason falling within subsection (2), or some other substantial reason of a kind such as to justify the dismissal of the employee holding the position which the employee held.

59. Section 98(2) sets out five potentially fair reasons, one of which is conduct (section 98(2)(b)). Once the reason for the dismissal has been shown by the employer the Tribunal applies Section 98(4) to the facts it has found in order to determine the fairness or unfairness of the dismissal. The burden of proof is neutral. Section 98(4) provides:

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

60. In considering Section 98(4), the Tribunal asks itself whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer. It is not for the Tribunal to substitute its own view for that of the decision makers in the case. The case of Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT, established that the correct approach for a Tribunal to adopt in answering the questions posed by Section 98(4) is as follows:

> The starting point should always be the words of section 98(4);
>
> in applying the section, a tribunal must consider the reasonableness of the employer's conduct, not whether the tribunal considers the dismissal to be fair;
>
> in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what the right course to adopt should have been;
>
> in many (although not all) cases, there is a band of reasonable responses in which one employer might reasonably take one view, whilst another might reasonably take another; and
>
> the function of the tribunal is to determine whether in the particular circumstances of the case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band of reasonable responses, the dismissal is fair. If it falls outside the band it is unfair.

61. In the case of Sainsbury's Supermarket Ltd v Hitt [2003] IRLR 23 CA, the court of appeal held that the objective standards of a reasonable employer

must be applied to all aspects of the question whether an employer was fairly and reasonably dismissed, including the investigation.

62. In Polkey v AE Dayton Services Ltd [1988] ICR 142 the House of Lords made it clear that procedural fairness is an integral part of the reasonableness test. The House of Lords decided that the failure to follow the correct procedures was likely to make a dismissal unfair, unless in exceptional circumstances, the employer could reasonably have concluded that doing so would have been futile. The question: 'would it have made any difference to the outcome if the appropriate procedural steps had been taken?' is relevant only to the assessment of the compensatory award and not to the question of reasonableness under section 98(4).

63. It is the employer who must show that misconduct was the reason for dismissal. According to the EAT in British Home Stores Ltd v Burchell 1980 ICR 303, EAT, a three-fold test applies. The employer must show that:

> it believed the employee guilty of misconduct;
>
> it had in mind reasonable grounds upon which to sustain that belief; and
>
> at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

This means that the employer need not have conclusive direct proof of the employee's misconduct; only a genuine and reasonable belief, reasonably tested.

64. If the Tribunal is satisfied that the R1 conducted matters in accordance with the Burchell guidance it has to decide whether the dismissal was a reasonable response to the misconduct and must not adopt a 'substitution mindset'.

65. In respect of the investigation where an employee admits an act of gross misconduct and the facts are not in dispute, it may not be necessary to carry out a full-blown investigation. In Boys and Girls Welfare Society v MacDonald 1997 ICR 693 EAT the claimant admitted the misconduct and was dismissed. The EAT said that it was not always necessary to apply the test in Burchell where there was no real conflict on the facts.

66. The claimant has to show he made a protected disclosure(s) and was then subjected to the detriment of dismissal. The burden then shifts to the employer to show that the disclosure(s) was not the reason or the principal reason for the dismissal (the detriment). In Fecitt and ors v NHS Manchester (Public Concern at Work intervening) ICR 371 CA the Court of

Appeal said that causation is satisfied where the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the whistle-blower.

Conclusions

67. For the reasons set out about, the claimant did not make any protected disclosures to Ms Johnson during the meeting on 20/7/2017 and as such, he was not subjected to the detriment of dismissal on 17/1/2019. He did not put the case to Ms Gibbons that she was materially influence by any alleged protected disclosures when the panel took the decision to dismiss.

68. The Tribunal has found R1 had a genuine belief that the claimant was guilty of misconduct and that belief was reasonably held. The claimant had admitted the purchase of the SIM card and said he did not object to the content of the text message. The Tribunal has found that the claimant knew the text message was to be sent to parents and that it was in breach of the ICT e-safety and acceptable use policy which was signed by the claimant on 5/9/2017 prior to the text message being sent, and also contrary to the data protection policy. The Tribunal concludes that the claimant knew the text message was going to be sent to the parents and he therefore knew that was a breach of the data protection policy and of the ICT e-safety and acceptable use policy.

69. The investigation was limited, however in accordance with Boys and Girls Welfare Society, when misconduct has been admitted, the investigation does not have to be as extensive as when it is not admitted.

70. The claimant offered no explanation for the purchase of the SIM card and it was therefore reasonable for R1 to conclude, he purchased it for the purpose of sending a text message, which could in the circumstances be found to have been harassment of the parents and brought R1 into disrepute. This is clearly gross misconduct and is in beach of the policies, one of which the claimant signed in acceptance on the same day the texts were sent.

71. In respect of the data breach, R1 does not have to prove it was the claimant who accessed the data (the parents' mobile telephone numbers), it just has to have had a genuine and reasonable belief that he was culpable. Someone accessed the parents' numbers and used them to send the text message. The claimant stated in the disciplinary meeting that he was happy 'to be the point of contact if it happened to go the way it has', he also commented that he 'had a lot less to lose career-wise'[5]. R1 was entitled to take these statements into account when deciding if the

[5] Than his friend who was a teacher at the school it is presumed.

claimant had been involved in a data breach and it was reasonable for R1 to conclude he was liable for the breach.

72. The decision to dismiss therefore fell within the range of reasonable responses and was therefore fair.

Employment Judge Wright
08 March 2021