EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Mr O Tokosi		University of West London

Heard at: London Central Employment Tribunal

On: 21-23 September 2021

Before: Employment Judge Adkin

Representations

For the Claimant: In person
For the Respondent: Ms R Swords-Kieley, of Counsel

JUDGMENT

1. The claim of automatic unfair dismissal pursuant to section 103A of the Employment Rights Act 1996 is not well founded and is dismissed.

WRITTEN REASONS

2. The Claimant requested written reasons at the conclusion of the hearing, at which a judgment was given orally.

Procedure

3. This was a hybrid hearing.

4. It started off as a hearing online using the CVP technology. In my judgment on the first morning of the hearing a remote hearing not doing justice to Mr Tokosi in particular. There were some difficulties in communication and volume levels. I could not clearly see Mr Tokosi, nor clearly hear him. Bearing in mind that he

is a litigant in person and asking him his opinion and given that the parties are based in Central London I invited them in. Mr Tokosi agreed with that decision.

5. The remainder of the hearing has been on a hybrid basis, i.e. the Claimant, Respondent's Counsel and some of the Respondents witnesses were in this hearing centre in Victory House and there have been some observers and one witness giving evidence remotely which has worked well from my perspective.

Summary

6. The Claimant brought claims of automatic unfair dismissal pursuant to s.103a and s.43B(1)(a) and (b) of the Employment Rights Act 1996.

7. I canvassed with the parties whether there should also be a detriment claim bearing in mind the guidance of Cox v Adecco UKEAT/0339/19/AT. Initially it was identified that the Claimant being shut out of the IT system on 1 July 2020 might be regarded as a detriment. Pragmatically the Respondent did not object to that amendment to the claim but on the afternoon of the first day Mr Tokosi, having spent some time thinking about it, wanted to focus his claim on the dismissal itself rather than a detriment claim, so the claim has proceeded on that basis.

Evidence

8. I have received a witness statement from the Claimant of some 14 pages, 50 paragraphs and a witness statement bundle from the Respondent.

9. The Respondent's witnesses were:

   9.1. Amelia Au-Yeung, Deputy Dean in the Claude Littner Business School;

   9.2. Hannah Chapman, HR Business Partner;

   9.3. Fiona Doherty, Senior HR Coordinator (written witness statement only, no oral evidence);

   9.4. Erfan Ovee Nomaan, Lecturer in Business and Finance at the Claude Littner Business School;

   9.5. Dr Suresh Gamlath, Dean of the Claude Littner Business School

   9.6. Dr Dinusha Weerawardane, Senior Lecturer – Accounting and Finance in the Claude Littner Business School.

10. I have also had the benefit of a bundle of documents which contains 905 pages to which a number of additions were made at the back and inserts that were made on an agreed basis during the course of the hearing and to which some reference may be made in these reasons.

Findings of fact

11. The Claimant is a Qualified Accountant, with Forensic Auditing experience gained at one of the largest accounting firms in the UK.

12. The Claimant started work at the Respondent University within the Claude Littner Business School ("the Business School") on 17 September 2018 as an hourly paid lecturer which is referred to as HPL in these reasons. Initially he was teaching modules which are set out on page 716 of the bundle and specifically those modules were an introduction to financial accounting, financial reporting and researching business data all of which began on 17 September 2018 and all of which ended on 15 February 2019.

13. The Claimant's work was governed by terms and conditions that appear at pages 63-68 these are entitled "statement of main terms and conditions of employment (HOURLY PAID LECTURER)". There is a point of dispute between the parties, the Claimant says that this is an overarching contract that applies between engagements, the Respondent conversely says that it only applies during the currency of those engagements. The Claimant has highlighted clause 12 and clause 15 of that document:

> 12. Pension
>
> 12.1 Subject to b), you will be automatically enrolled into the Teachers' Pension Scheme (TPS) from the commencement of your employment. The TPS is contracted out from the State Second Pension Scheme. You have the right to opt out of the TPS. The attached letter provides further information about the benefits of the TPS and how to opt out, should you wish to do so.
>
> 12.2 If UWL is notified by you or the TPS that you are already a full-time teacher with another employer and you are a member of the TPS through that employer, you will be enrolled into the Local Government Pension Scheme (LGPS) for the purposes of your employment with UWL. In the event that you have such employment and membership of the TPS you shall inform UWL of the fact. Also, if you reduce your hours of work at such employer where you are a member of the TPS you shall inform UWL as this may affect the management of your pension.
>
> 15. Notice
>
> 15.1 Your appointment shall be terminable except in the case of probational dismissal for gross misconduct by your given the institution two months it should say notice in writing or the institution giving you three months' notice in writing".

Further teaching modules

14. After the end of the first batch of modules on 15 February 2019 the Claimant then began teaching some other modules. There was a period during the

summer of 2019 where he was not working and a period later on in 2019 where he ceased working on 31 August 2019 but then commenced on 9 September 2019 which is the academic year to which this claim relates.

Academic year 2019/2020

15. On 5 July 2019 claimant wrote to Dr Amelia Au-Yeung and Dr Dinusha Weerawardane by email acknowledging that it might be somewhat premature but he was trying understand whether he would be being given any more HPL responsibilities/opportunities for academic year 2019/2020. He mentioned that there were other demands and he would like to know by mid August 2019. In fact he was offered some teaching.

16. In 2019/20 the Claimant took on a variety of teaching responsibilities which ran concurrently and each of which was supposed to be governed by a separate pro forma agreement.

17. The Claimant began teaching and also working a module leader on a module called International Trade Finance and Investment for 130 hours with an end date of 15 February 2020.

18. On 16 September 2019 he began teaching on a financial accounting module, 84 hours which ran also until 15 February 2020.

19. On 5 November 2019 the Claimant commenced working on what is described as the "business research project" module which was supervision of under graduates carrying out research. There is a dispute between the parties as to when this came to an end. The Respondent argues that the end date was 6 June 2020 and they based that on a couple of documents but in particular page 506 which is a contract request for existing HPL which gives the start date as 5 November 2019 and the end date of 6 June 2020. This is described as being a total of 33 hours, a rate of pay of £45.51 and total pay of £1,501.83. It is also clear from documentation on page 507 that the budget holder Dr Gamlath who is the Dean of the business school received a request on 1 November which he approved; the finance function approved on 2 November and HR finally signed this off and indicated the whole process was completed on 12 November 2019.

20. Unfortunately the Claimant not provided with a standard pro forma details of contract as has been seen for other cases and can be seen for example in the bundle at page 508 amongst others.

21. The Claimant relies on his argument that the end date of the module was 30 June 2020 on the document that appears at page 668 of the bundle this is a letter dated 8 July and apparently signed by the Deputy Director of Human Resources on 20 July 2020 and shows that the start date for the business research project was 1 November 2019 to 30 June 2020 and giving the same hours and rate of pay as I have already quoted. Fiona Doherty's witness statement states that she produced this document in response to a subject access request and in broad terms she had understood the dates of the

engagement to be November to June and so filled them as 1 November 2019 to 30 June 2020 without checking the details.

22. I deal with this dispute between the parties in my findings below.

New courses in 2020

23. On 1 January 2020 the Claimant entered into an agreement to teach 91 hours taxation module and financial modelling module and also advanced taxation module both of which with an end date of 15 June 2020 (page 508). This is the proforma engagement letter, it is a short one page letter confusingly this is dated 8 January 2021, I have not heard any evidence on this, but I suspect that it is a possibility that that is the date on which this has been printed. In any event it is not in dispute between the parties that both of these modules, the financial module and the advance taxation module ran from 27 January 2020 to 15 June 2020.

24. The Claimant also entered into a contract to teach a taxation module to run from 15 January 2020 to 15 June 2020 the hourly rate is the same, that was for 10 hours in total and again somewhat confusingly the date that this was printed and purported signature date is 8 January 2021.

25. There is also a similar document to page 508 which appears at 510. This again refers to financial modelling and advanced taxation running from 27 January 2020 to 15 June 2020. This one is signed 14 February 2020 and with a letter dated 15 February 2020 which ties in somewhat closer to the actual dates that these modules were taught, although I note that it slightly post dates the commencement of them.

26. The Claimant agreed to work for seven hours on a taxation module from 28 February 2020 to 6 March 2020.

End of the business research project module

27. The hand in date for the dissertation of the business research project was 12 May 2020.

28. 22 May 2020 was the last date of the business research project module from the point of view of the students.

29. The Respondent's Human Resources system shows that the end date for the business research project module as 6 June 2020 [506].

Termination date

30. 15 June 2020 is the date that the Respondent says was the date of termination and that is based on the fact that they say that all live engagements lapsed on that date with no renewal and hence that is the date of termination. The Claimant disputes this. I have dealt with this in the discussion below.

Claimant's concerns leading to protected disclosures

31. The following day in an email dated 16 June 2020 at pages 538-539 the Claimant raised a concern with his colleagues Erfan Nooman, Dinusha Weerawardane and Asare Amaning, prefigured his later alleged protection disclosures. What he said was that there were inconsistencies suggesting likely exam malpractices on the part of certain students. He attached some extracts from their workings which are all electronic. He raised that he believed that this demonstrated that there were inconsistencies which he believed amounted to exam malpractice.

32. Later the same day he then forwarded this concern to Dr Au-Yeung who was the Deputy Dean of the business school. There was then an exchange between Dr Au-Yeung and the Claimant as to how academic irregularities or academic offences should be dealt with and Dr Au-Yeung pointed the Claimant in the direction of a Form O which was the mechanism for reporting such a concern.

33. The Claimant clarified in that exchange that in his belief the irregularity amounted to collusion. The collusion seems to have been the principal concern he had as to what the irregularity was in his mind.

34. By 17 June 2020 at 13:56 (page 895) a colleague of the Claimant Mr Nomaan received an automated reply from him which said

> "thank you for your valued correspondence I will not be available for an extended period of time during which I will not be assessing this mailbox or responding to correspondence. Any further enquiries should be directed to the level 6 course leader, Erfan Ovee please".

35. Also on the same day the Claimant sent an email at 14:59 to M Nomaan and copied Dr Weerawardane saying in respect of a subject that I cannot see on the page (that was a concern raised by the Claimant), it says

> "thanks for this Erfan as notified to you I have been put of[f] contract since the 16 June 2020, I will conclude the A2 FMDL assessment process as part of my obligations as I extended time for students at my own discretion (to allow them sufficient time to submit) which I will attend accordingly. Contractual matters need to be attended by reference to the audience subject."

36. On 22 June 2020 the Claimant wrote to Asare Amaning, enclosing a second marking form (SMF) in which he had some general criticisms of the performance of students with regard to a financial modelling examination and further highlighted that he had identified 10 students as in breach of the academic offences regulations [544]. He requested a response by 24 June.

37. On 26 June 2020 Mr Amaning wrote directly to Erfan Nomaan, who was a lecturer and BA Accounting and Finance Level 6 Course Leader with a version of the SMF. Although it does not appear from the email that he copied in the

Claimant, the Claimant forwarded this message on 27 June 2020, in the first of his two alleged protected disclosure.

Alleged protected disclosures

38. On 27 June 2020 the Claimant made two disclosures that he says are protected and are the basis for his protected disclosure claim.

39. ***First PD*** - the first alleged protected disclosure was an email which appears at page 635 sent at 18:30 to Dr Gamlath who is the Dean of the Business School under the heading "complaint financial modelling assessment interference"

> "I wish to complain that a SMF [Second Marking Form] has been issued in my name, without my knowledge. Erfan/Ovee has effectively adopted the role of the Module Leader and issued invalid documents containing false statements in my name that I am not ware of.
>
> The document titled 'FIN_MOD_Second marking_2019_20_A2P2.docx' was not issued by me and it is not the valid document relating to Financial Modelling.
>
> The guideline you provided to all Module Leaders clearly rests responsibility for finalizing the assessment process and Erfan/Ovee is not the Module Leader or Financial Modelling. I had earlier communicated my position - to conclude the process accordingly, which i did in time and promptly notified Ana.
>
> Please intervene to address this improper conduct, as there is a case for potential forgery against Erfan/Ovee in this matter.

40. The Claimant attached a two marking pro forma documents first of which appears at page 684 and the second which appears at page 692 which he says had been filled in or been issued and filled in without his authorisation. These are standard proforma documents with some content that is prefilled in but that the Claimant says that there are things that have been filled in purportedly signed which were not authorised by him and that is the basis for his first alleged protected disclosure.

41. The Claimant was the first marker for the Financial Modelling course and his colleague Mr Asare Amaning was the second marker. The Claimant's complaint is that comments have been attributed to him as first marker which he did not make. By implication that must've been done by Mr Amaning.

42. In the first pro forma document at page 689, in section 5, a box for comments from the first marker, the Claimant has added comments in red identifying a persistent inconsistency which had to be referred for violation of the academic offences regulations and plagiarism. These are serious concerns being raised by him.

43. The Claimant's complaint as I understand it is that his colleague Mr Amaning did not submit this marking form with his serious comments, but instead submitted a different version with box 5 [697] "Very good performance by the whole cohort". This is consistent with the second markers comment on the following page "Excellent performance by the cohort is evident." In short it suggests that there were no problems by complete contrast to what the Claimant had been trying to highlight. The Claimant, who was the first marker says that he did not write this.

44. I find that the Claimant did not write the comments on page 697, the reason being that he was evidently trying to raise allegations of a serious nature about the students, as is evident from the content of page 689, but also from the email sent by him on 27 June 2020 19:32, in which he was using the official Form O to make these serious allegations about 10 students.

45. Dr Gamlath explained in his evidence to the Tribunal this was not filed in the correct place but attached merely attached to an email. He says would be the natural process of two markers cooperating on completion of the document. He says that there was nothing particular sinister in being attached to a document in this way. The Claimant does not agree.

46. ***Second PD*** - the second alleged protected disclosure was also sent on 27 June 2020 this time at 19:32 i.e. two minutes later and that appears at page 548 of the agreed bundle. That is a very short email with multiple attachments that was sent by the Claimant to Dr Weerawardane but copied to an address offences@uwl.ac.uk and a variety of other colleagues including Dr Gamlath and also Dr Au-Yeung. The email simply states that there are Ten Form Os for your "review and action".

47. What the attachments to this documents comprise are completed Form O documents that had been supplied to the Claimant. He sets out in each details of what he considers to be irregularities on the part of various students that he had been involved in marking.

48. The first Form O appears at page 574 in can be seen in the box at the bottom of that page, the Claimant set out where this falls under the academic regulations and that is in his view to a breach of the academic regulations. Specifically he says that there were potential breaches:

49. 12.1.2m communication with another candidate while under exam conditions;

50. 12.1.2n copying or attempting to copy the work of another candidate;

51. 12.1.2s collusion in the preparation on production of submitted work unless such joint work is explicitly permitted; and

52. 12.1.2v all other forms of cheating.

53. The Claimant contained within these forms examples of work which he found or believed were irregular, there were in particular, examples appear at pages 576-579 inconsistencies that are identified by him. I understand what he

means by inconsistency is that there are figures entered in an excel spreadsheet which do not correspond to the reference cells. As the Claimant explained to me, he inferred that a figure has been inserted which is not derived from the cells around it. What this suggests is that a correct numerical answer has simply been inserted but not calculated properly by the student.

54. There is also another example of an irregularity that he has identified and appears in another Form O at page 598. At the top of that page there is another excel spreadsheet headed Appendix A Summary Data Analysis Schedule, what the Claimant says is that there are references that can be seen in cell B5 and cell B18 which refer to spreadsheets that have been created by different students. The inference that the Claimant drew from this is that students are inappropriately cooperating or cross referring to one another's spreadsheet which is not something that they should have done as part of this exercise.

55. The Form O and the various attachments continue in the bundle to page 632.

56. The Claimant sent this material directly to the Offences Team in a similar email to days later on 29 June 2020 [549].

Investigation

57. There was a brief investigation that was carried out by Dr Weerawardane and completed by the 30 June 2020 i.e. three days later.

58. She wrote her own comments essentially determining in respect of these various Form O that there was no case for further action. She set an email to this effect at page 572 which was sent at 14:09 on 30 June 2020.

59. She came to the conclusion and gave evidence to this Tribunal that there was nothing sinister in the correct results that had been inserted since these results had been provided by the University as part of the assessment process. Her analysis was that this inconsistency suggested that students had simply taken the correct result provided by the Respondent as part of the material provided in the assessment and inserted it into a spreadsheet. In her view she did not consider this amounted to evidence of cheating or inappropriate collaboration.

60. As to the other concern that I have articulated that the Claimant raised, Dr Weerawardane said that the circumstances of the Covid 19 pandemic, bearing in mind this was the summer of 2020, meant that students were sharing laptops and she did not find it surprising that there was a reference from one students spreadsheet to another. Although this is not a point I need to determine I would comment that I found this explanation unconvincing. I did not hear a convincing explanation why students working independently on an Excel spreadsheet for their course should be cross-referencing another student's spreadsheet. This strikes me as a very clear *prima facie* case of plagiarism requiring proper investigation.

Termination

61. The Claimant has suggested that 30 June 2020 is the date of termination based on the letter at page 668 relating to the business research project.

62. On 1 July 2020 (page 643) Dr Au-Yeung the Deputy Dean gave instructions to Hannah Chapman in HR to say

> "as discussed with you the following two members of HPL staff have finished their contracts therefore we require them to complete and therefore please remove them from UWL system (including IT/system access with immediate effect)."

63. The first name is the Claimant's name. The second name was originally redacted. The Respondent provided the other name. No point has been taken by the Claimant on the basis that this is another whistle blower or anyone materially connected his claim. It seems that this is someone who is another HPL member of staff who was not expected to return the following semester.

64. Dr Au-Yeung was asked by Respondents Counsel in supplementary questions at the beginning of her evidence whether she was aware at the time she wrote this email about the IT systems, of the content of page 635 i.e. is the first of the two protected disclosures relating to the marks sheet. Her answer to that was "I don't think so". It seems to me however, that Dr Au-Yeung must have been aware of the other protected disclosure which is the document that appears on page 548 on the basis that she was copied into it and I find on the balance of probabilities must therefore have been aware of it.

Application under whistleblowing policy

65. On 2 July 2020 the Claimant's made an application to the Vice Chancellor (academic) requesting redress under the Respondents' whistleblowing policy, complaining that his email account at the Respondent had ceased without notice to him, while he is still a marker on the Business Research Project that had not concluded. He suggested that this act might constitute the basis for a claim for unfair dismissal. He set out in a highly structured and clear form the matters that are the substance of his claim before this Tribunal i.e. the alleged protected disclosures, why these are said to be protected disclosures and further steps that he might take with external bodies including the QAA, office for students, Information Commissioner's Office, Metropolitan Police, and the Association of Chartered Certified Accountants.

66. The Claimant followed this up with an email dated 23 July 2020.

Payments made to the Claimant

67. On 6 July 2020 Kevin West the Deputy Director of Human Resources provided Dr Gamlath details of the payments that had been made to the Claimant reference to the courses that he had been teaching. This appears at page 713 and page 713a which is a completed version of the email with the full email header.

68. This document, shows that the end dates for the Taxation, Advanced Taxation and Financial Modelling modules were all 15 June 2020. The end date for the Business Research Project module was 6 June 2020.

69. Mr West wrote in this email:

> "He was paid to the end of June but there are not any payments set up for July.
>
> For the Business Research Project he was paid £187.96 a month for 8 months

Subject access request

70. The Claimant submitted a subject access request on 6 July 2020, seeking documents held by the Respondent containing his personal data.

71. On 21 June 2020 Janet Lo, HR services, wrote to the Claimant explaining that he *should have* received a contract for course 1017903 (Business Research Project). She wrote

> "The information was on the HPL system and a letter should have been merged from the HR system once the contract was processed but for a while we did not have access to the system and as such missed sending you your contract which we apologise for."

72. The Claimant highlighted in his response to her that this document had been raised on 8 July 2020. She clarified in a further response sent on 22 July that this was what he "should have received", using a template. This is the contract at 668, a document dated 8 July 2020 and purportedly signed by the Respondent on 20 July 2020, although not signed by the Claimant which shows that this module started on 1 November 2019 and ran to 30 June 2020. This document was created by Ms Fiona Doherty who explained in her written witness statements that she inserted these dates in error.

73. Ms Lo signed off her email of 22 July: [711]

> "you will see that although the physical contract was not issued to you, we have paid you for the 33 hours worked £187.96 each month for 8 months from November to June".

Claim

74. The Claimant notified ACAS of a dispute on 21 September 2020 before presenting a claim on 22 November 2020.

Academic year 2020/2021

75. With regard to subsequent events so far as it is relevant in early October 2020 I do not have a precise date the semester for the following academic year started which was one month later than usual because of the Covid 19 pandemic.

76. Dr Gamlath and Dr Au-Yeung explained the process of identifying academics to teach this semester which was to allocate permanent staff first and then to identify gaps and then identify HPLs to fill those gaps. I accept that there was some disruption because of Covid-19 which is the reason why this term started a month later than it would otherwise have done but neither of these witnesses was able to be very precise when in practice the HPLs were signed up.

77. I accepted their evidence however that this was not a linear process that there is some toing and froing between the timetabling and the availability of lecturers which takes some time to complete.

Policy documents

78. At the material time the Respondent had a Public Interest Disclosure Policy (Whistleblowing) last reviewed September 2018. This contains the following:

> 2.2 This policy is intended to cover concerns which are in the public interest which
>
> might include:
>
> □ financial malpractice or impropriety or fraud;
>
> □ failure or likely failure to comply with a legal obligation or with the Instrument and Articles of Association of the University:
>
> □ dangers or likely dangers to health and safety or the environment;
>
> □ criminal activity or likely criminal activity
>
> □ modern slavery allegations
>
> □ academic or professional malpractice
>
> □ improper conduct or unethical behaviour
>
> □ attempts or likely attempts to conceal any of the above.
>
> If in the course of the investigation a concern raised appears to relate more appropriately to other procedures, these will be invoked. Where it is unclear which Procedure applies, the decision of the designated person will be final.
>
> 7 Making a disclosure
>
> 7.1 The employee should make the disclosure to the designated person.
>
> 7.2 The designated person is the University Secretary. If the disclosure is about the University Secretary, then the disclosure should be made to the Vice-Chancellor. If the disclosure is about the Vice-Chancellor, then the disclosure should be made to the Chair of Council of the University.

9 Conduct of the investigation

9.1 Where an investigation is deemed necessary, the designated person will consider the information made available to him/her and decide on the form of investigation to be undertaken. This may be:

 to investigate the matter internally or arrange for the issues to be investigated independently of the University;

 to refer the matter to the police;

 to refer the matter to an interested external body (e.g. Funding Council or Research Council).

In appropriate circumstances, the designated person may decide that more than one of these actions is necessary.

79. Also, the Academic Regulations at page 182, clause 12 contain academic offences:

"e) plagiarism;

g) forgery;

n) copying, or attempting to copy, the work of another candidate;

s) collusion in the preparation or production of submitted work, unless such joint or group work is explicitly permitted;

v) all other forms of cheating.

80. There is also a document entitled assessment guidance at page 451 and at page 452 the Respondent relies on a passage that says all feedback to be supplied within 15 days of submission. That is in relation to documents that have been submitted by students

LAW

81. The Employment Rights Act 1996 contains the following provisions:

43B Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject
>
> 103A Protected disclosure.
>
> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure

82. In Kilraine v London Borough of Wandsworth [2018] ICR 1850 the Court of Appeal held that a distinction between "allegations" and "disclosures" which appeared to have been identified in earlier authorities was a false dichotomy, given than an allegation might also contain information tending to show, in the reasonable belief of the maker, a relevant failure. At [35], Sales LJ said:

> "In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

83. When an employee lacks the requisite continuous service to claim ordinary unfair dismissal i.e. two years he or she will require the legal burden of proving on the balance of probabilities that the reason for dismissal was an automatically unfair reason this was established by the Court of Appeal in Smith v Hale Town Council [1978] IRLR 413, [1978] ICR 996.

Issues

84. There is a draft list of issues which was amended by the parties on the first day of the hearing to include a second protected disclosure.

First PD - "forgery"

85. Dealing with the first alleged protective disclosure, complaining of the alleged forged marking form.

86. I should make clear that I have not heard evidence from Mr Amaning and the Tribunal does not make a finding in this forum whether he did or did not deliberately try to dishonestly pass off comments as coming from the Claimant. The nature of a claim of this type is that the Tribunal needs only consider the reasonable belief of the Claimant that this occurred. There is a subjective element, namely the Claimant's belief. There is an objective element, namely whether it was objectively reasonable to hold that belief. It is possible to reasonably believe something and yet be wrong about it.

87. The Claimant's contention is that this was a criminal offence. This is the first protected disclosure the Claimant relies on the Forgery and Counterfeiting Act 1981 and in fact sets out s.1 in his witness statement:

> s.1 A person is guilty of forgery if he makes a false instrument with the intention that he or another shall use it to induce somebody to accept it as genuine and by reason of so accepting it so to do or not to do some act to his own or other persons prejudice.

88. Turning first of all to whether the Claimant had a belief that this amounted to criminal activity I have seen the contents of the emails, I have seen the seriousness with which the Claimant has taken this at the time and subsequently pursuing this within the University and also his evidence in the Employment Tribunal and I find that he did believe that a forgery had occurred, that someone had filled in a form purporting to be him. He had raised a concern about students cheating in the marking form. He was also raising this using Form O by the official procedure. Someone, by implication most likely his colleague Mr Amaning, was trying to obscure that message and in fact trying to suggest that the cohort of students had performed well. I find that the Claimant clearly did believe that someone had forged his comments on the form (e.g. at the bottom of page 697).

89. Regarding the objective element, was it reasonable to believe this was a criminal offence? I can see that there was, based on the Claimant's belief in a false instrument and that there was an intention to induce someone (i.e. Dr Gamlath) to accept this as genuine. As to whether this would prejudice someone I have struggled with this somewhat to understand what the prejudice would be. By implication "another person" prejudiced someone relying on the integrity of the Respondent's examination process. For example a prospective employer of a student who had cheated and had nevertheless received a degree in Accounting and Finance.

90. I found that this is a somewhat borderline case as to whether it is objectively reasonable to believe that this disclosure might be or tend to show criminal activity. I have borne in mind however that a reasonable belief may be wrong and yet still a reasonable belief and I have considered that the scheme of the Employment Rights Act is to offer protection to responsible whistle blowers. I do not consider there is any reason not to consider the Claimant was other than a responsible whistle blower. I find on balance that the Claimant's belief in the disclosure tending to show criminal activity was reasonable.

91. As to whether there is a public interest element I bear in mind the fairly low threshold that has been set in the case of Chesterton Global Ltd & Anor v Nurmohamed & Anor [2017] EWCA Civ 979. I do not consider that the Claimant was raising this in his own interest I accept that there was a wider interest in the integrity of the academic assessment process.

92. It follows that I find that this a qualifying protected disclosure.

Second PD – student assessment misconduct

93. The second protective disclosure was alleged breach of legal obligation or tending to show breach of legal obligation in respect of what might be loosely be described as cheating at examinations.

94. The Claimant's complaint suggested it was his view that students had been cheating and he says that is a likely failure to maintain academic standards leading to mark falsification. The Claimant says that the Respondent University is regulated by the Office of Students and there are legal obligations in this respect.

95. The Respondent, appropriately and realistically, concedes that this disclosure contained information and that it was raised in the public interest. I accept that he was raising this because of genuine concern about academic standards, which is plainly in my assessment a matter of public interest.

96. I am satisfied my given the circumstances and the discussion above the Claimant did believe that this was such a disclosure.

97. As to whether this was objectively reasonable, I find that questions related to standards in Universities which are public exams are serious, there is a legal obligation on Universities to uphold standards.

98. For all those reasons I find that this was also a qualifying protected disclosure.

Dismissal & date of dismissal

99. Section 95 of the Employment Rights Act 1996 provides:

> 95 Circumstances in which an employee is dismissed.
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . . , only if)—
>
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
>
> (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or …

100. The Claimant relies on clause 12 of the statement of terms and conditions of employment and potentially also clause 15. He says that the pension in particular showed that there was an ongoing contract between the parties. I do not accept that argument, I accept the submission put forward on behalf of the Respondent that these terms applied during the currency of individual modules, I do not find that automatic enrolment into the teachers pension scheme had the effect of keeping the contractual relationship going beyond an expiry of the individual fixed term contracts that the Claimant was working under. Taken to its logical conclusion that argument would mean that anyone who remained part of the pension scheme would be employed indefinitely.

101. The Claimant had entered into a series of different contracts to teach series of courses that were running concurrently. I will deal with each of them in turn.

102. The Taxation module commenced on 15 January 2020 and ended on 15 June 2020 [509].

103. The Financial Modelling and Advanced Taxation modules both started on 27 January 2020 and both ended on 15 June 2020 [508].

104. In respect of the Business Research Project module, the dissertations submission deadline had passed on 12 May 2020. Both the human resources system [506] and the payment system showed the course as completing on 6 June 2020 [713A]. The Claimant had already received his last payment for this module in June. There were eight instalments of his payment for this module, which I infer must have been November, December 2019, January, February, March, April, May, June 2020.

105. The Claimant stated by his email of 17 June first that he was "off contract" which I take to be his recognition that the contract had ended). In circumstances where he voluntarily completed the assessment process after the expiry, he was not being paid any additional amount and so in those circumstances I find that this did not have the effect of extending the contract beyond the date of expiry.

106. All of the matters above point towards a conclusion that the Claimant had no live contract as at 15 June 2020, i.e. all contracts had terminated and not been renewed, and he knew this.

107. I have considered the document at 668 i.e the purported contract created on 8 July 2020 in response to the Claimant's SAR. On balance I accept the evidence of Ms Fiona Doherty that this was created by her in the context of the subject access request evidenced in part by the email exchange of page 711 – 712, and that she in simple terms took the date that the beginning of the month of November and run this to the end of 30 June. She says that she should have taken the precise dates from the system and did not.

108. This case highlights the potential problems caused when a employer creates a document in response to a SAR, rather than simply producing the documents that are held. Page 668 was not produced contemporaneously to the commencement of the module in response to a SAR. The emails sent by Janet Lo on 21 and 22 July do make it clear however that the contract was not sent to the Claimant and he was being provided with it on the basis that it should have been sent to him. It is clear from her email of 22 July that the document was actually created on 8 July as a "merge" document (I understand from this that data is used from the Respondent's system to populate a generic template). It follows that this document, created after the conclusion of the module does not provide evidence of the date of termination which rebuts the other information above. The Claimant should not be in doubt that it has not been put forward as contemporaneous evidence of the terms agreed at the outset of teaching this module.

109. I do not that the failure to provide the Claimant with a written contract at the outset of his teaching the Business Research module in November 2019 means that it would run indefinitely. The Claimant was contracting as an hourly

paid lecturer for fixed term contracts. In all cases these ran within the academic year, not onto the next year. Had the Claimant being asked when the course came to an end sometime in early 2020 I cannot see that he would have had any basis to say that it would come to an end on any other date than that shown on the HR system, even if that was not a date in his mind. The parties must have agreed by implication that the Claimant would teach to the Respondent's course dates.

110. I have considered whether it could be argued on the Claimant's behalf that by voluntarily extending the submission deadlines beyond the end of the module he has in some way kept alive the contract beyond the expiry date. I think if there had been a discussion between the parties and an agreement that that should continue to a different date and particularly if there had been any additional pay then that might be the result. That is not what happened however.

111. My finding is that the Claimant was dismissed falling under s.95(1)(b) i.e. a limited term contract which had terminated by virtue of the limiting event and it is for that reason that he described himself as off contract on 17 June and saying that he had been off contract since 16 June. This ties in with the final date of the courses ending on 15 June. It was not in his mind at this stage that the contract governing the Business Research module was still ongoing. I find that the Claimant understood that all of his contracts had come to an end by that stage. I find that that was the expiry of the fixed term and I find that **15 June 2020** was therefore the date of dismissal.

Reason for dismissal

112. Did the Claimant show the reason or if more than one the principal reason for his dismissal was that he made either or both the alleged protective disclosures?

113. It follows from my finding that the effective date of termination was 15 June 2020 that those protected disclosures made 12 days later on 27 June 2020 as a matter of logic cannot be the reason.

114. The claim of automatic unfair dismissal cannot succeed and is dismissed.

Was revoking IT access a dismissal?

115. It is unnecessary for me to continue to deal with these matters, given that the claim is dismissed for the reasons given above but for the sake of completeness, I will deal with these points.

116. As to s.95(1)(a) the Claimant contends that the Respondent dismissed him by shutting him out of the IT system of 1 July 2020. Based on my finding that he had already been dismissed by operation of s.95(1)(b) i.e. non-renewal of a fixed term contract, the event of 1 July 2020 was not a dismissal.

117. Had the Claimant not already been dismissed, depending on the circumstances, revocation of IT access might have amounted to a dismissal.

In the circumstances of this case I find that by terminating his IT system access on 1 July that would have been a dismissal. It does not appear that the Claimant's IT access was terminated on any previous occasion when there was a gap between his teaching commitments. In my assessment that was final in essence it was telling the Claimant that he would not continue working beyond that point. Had the Claimant not already been dismissed I would have found that the action of 1 July 2020 amounted to a dismissal.

Was IT access terminated because of protected disclosures?

118. Again it is unnecessary for me to deal with this, but again I have gone on to deal with this in the alterative in case I am wrong about the date of dismissal, on the basis that I have heard evidence and it may assist.

119. My first observation is that Dr Ay Yeung's communications on 16 June when the Claimant first raised his concerns in general terms were professional and appropriate and she steered him in the right direction regarding the process. I do acknowledge that once he had made his disclosures on 27 June 2020 the Claimant may feel that he was treated differently by the Respondent and there may be an element of truth in that.

120. The test I would have to apply is whether one or both of the protected disclosures were the principal reason for the dismissal.

121. What is said in her witness statement, Dr Ay Yeung at paragaraph seven is that the Claimant did not inform the school that he was available for HPL work. I am not convinced that that is a determinative point for this reason, it seems to me that if the Respondent wanted the Claimant to work they would have just asked him so my finding is that the fact that he had not notified them I don't find to be a conclusive point.

122. There is however the content of the witness statement of Dr Gamlath which appears half way through paragraphs 44, 45 and 46. There were a series of permanent employees who were due to return to their teaching he mentions in particular Professor Chin-Bun Tse, Joseph Burke and the fact that the advance taxation module was not due to be delivered in the academic years 2020/2021.

123. Mr Tokosi says I do not know about that which is a realistic position for him to take because he was not present so it would be difficult for him to comment on it. The effect of that is that the only evidence we have on that point is the evidence of Dr Gamlath who says that there were permanently members of staff returning to pick up those engagements. I do not have a basis not to accept that evidence. There were permanent members of staff returning to take up roles and that the Claimant was not needed.

124. It follows that if I had found that the date of termination was 1 July 2020, I would not have found that the principal reason for the dismissal was a protected disclosure.

CONCLUSIONS

125. The claim will be dismissed.

T. C. Adkin

Employment Judge Adkin

Date 15.11.21

WRITTEN REASONS SENT TO THE PARTIES ON

15/11/2021

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.

APPENDIX

LIST OF ISSUES

1 Summary

1.1 The Claimant brings claims of automatic unfair dismissal (whistleblowing pursuant to sections 103A and 43B(1)(a) Employment Rights Act 1996 ("ERA"), and whistleblowing detriment pursuant to s.47B ERA.

2 Alleged protected disclosure

2.1 The Claimant asserts that the following amount to a protected qualifying disclosure:

2.1.1 Email to the Dean of School, Dr Suresh Gamlath, on 27 June 2020 at 19.30 complaining that a second marking form had been issued in his name without his knowledge, alleging potential forgery (page 635 of the bundle) **("Alleged PD1").**

2.1.2 Email to Dinusha Weerawardane, on 27 June 2020 at 19:32 attaching ten Form O (Academic Offences) (page 548 of the bundle) **("Alleged PD2").**

2.2 Do either (or both) of the above amount to a qualifying protected disclosure?

2.2.1 Did the Claimant make a disclosure which included information?

2.2.2 Did the Claimant reasonably believe that the disclosure was in the public interest?

2.2.3 Did the Claimant reasonably believe the disclosure tended to show:

(i) That a criminal offence had been committed, was being committed, or was likely to be committed (in respect of Alleged PD1)?

(ii) That the disclosure tended to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (in respect of Alleged PD2)?

3 Automatic Unfair Dismissal pursuant to Section 103A ERA

3.1 Was the Claimant dismissed within the meaning of s.95 ERA?

3.2 Does the Claimant show that the reason (or, if more than one, the principal reason) for his dismissal was that he had made either or both of the above alleged protected disclosures?

4 Jurisdiction: Time Limits

4.1 What is the effective date of termination ("EDT") of employment of the Claimant?

The Respondent says the EDT was 15 June 2020. The Claimant says the EDT was 30 June 2020.

4.2 Subject to the extension of time limits under Acas early conciliation, did the Claimant bring his claim for automatic unfair dismissal within three months of the EDT (section 111(2) ERA?

4.3 If not, was it not reasonably practicable for the claim to have been presented by the Claimant in time and was the claim presented within such further time as the Tribunal considers reasonable (sections 48(3)(b) and 111(2)(b) ERA?

5 Whistleblowing Detriment pursuant to Section 47B ERA

5.1 Did the Respondent subject the Claimant to the following detriment:

5.1.1 Terminating the Claimant's access to the Respondent's IT systems on 1 July 2020?

5.2 If so, does this amount to a detriment and did the Respondent subject the Claimant to that detriment on the ground that he made either (or both) of the alleged Protected Disclosures at §2.1 above?

6 Remedy (if liability proven)

6.1 What financial loss, if any has the Claimant suffered as a result of any unfair dismissal or detriment that is found?

6.2 Should any adjustment be made to the Claimant's compensation, for example, in respect of failure to mitigate, due to Polkey, unreasonable failure to follow the Acas Code of Practice or due to lack of good faith?

6.3 Has the Claimant suffered any injury to feelings in respect of any detriment that is found?